



GAHC010260952017

Page No.# 1/20



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2499/2017

SRI PARAN JYOTI SAIKIA
S/O- SRI DHARMA SAIKIA, R/O- HOUSE NO. 7, LUTUMA, P.O-
BINOVANAGAR, P.S- FATASIL AMBARI, GUWAHATI-781018, DIST-
KAMRUPM, ASSAM

VERSUS

THE ASSAM POWER DISTRIBUTION COMPANY LTD. and 4 ORS
REPRESENTED BY THE MANAGING DIRECTOR, ASSAM POWER
DISTRIBUTION COMPANY LTD., BIJULEE BHAWANANNEX BUILDING,
PALTAN BAZAR, DIST- KAMRUP, PIN- 781001

2:THE MANAGING DIRECTOR
APDCL
BIJULEE BHAWANANNEX BUILDING
PALTAN BAZAR
DIST- KAMRUP
PIN- 781001

3:THE CHIEF GENERAL MANAGER
APDCL
BIJULEE BHAWANANNEX BUILDING
PALTAN BAZAR
DIST- KAMRUP
PIN- 781001

4:THE ALLAHABAD BANK
REPRESENTED BY ITS DEPUTY GENERAL MANAGER
ZONAL OFFICE
G S ROAD
OPP BORA SERVICE STATION
ULUBARI



GUWAHATI
PIN- 781007

5:THE DEPUTY GENERAL MANAGER
ZONAL OFFICE
ALLAHABAD BANK
GS ROAD
OPP BORA SERVICE STATION
ULUBARI
GUWAHATI
PIN- 78100

Advocate for the Petitioners : Mr. I. Choudhury, Sr. Advocate
Mr. A. Sarma, Advocate

Advocate for the Respondents : Mr. N. Deka, Advocate
Mr. M. Gogoi, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 05.08.2023

Date of Judgment : 05.08.2023

JUDGMENT AND ORDER (ORAL)

The extra ordinary jurisdiction under Article 226 of the Constitution had been invoked by the petitioner challenging the letter dated 24.04.2017 issued under Office Memo No.APDCL/CGM(RE)/DDUGJY/Gen-Corres/CAD/2015-16/187 by the Chief General Manager (RE), APDCL as regards forfeiture of Bank Guarantee of the petitioner; for setting aside and quashing the impugned letter dated 25.04.2017 issued under Office Memo No.APDCL/CGM(RE)/DDUGJY/DDU/II/Hills/2016-17/79 by the Chief General Manager (RE), APDCL to the Allahabad Bank for invocation of Bank Guarantee No.0177416IPG000074 dated 04.08.2016 (for short, 'the Bank Guarantee in

question') of the petitioner as well as for a direction upon the APDCL Authorities to forebear from invoking the said Bank Guarantee in question.

2. The facts involved in the instant case as can be discerned from the pleadings and the materials on records is that an Invitation for Bids was issued by the Chief General Manager (RE), of the Respondent No.1 for execution of projects, i.e. electrification works (BEI) of unelectrified villages of 20 districts in Assam under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY), Phase-II on behalf of the Government of Assam. From a perusal of the said Invitation for Bids, it transpires that there were five packages.

3. The instant writ petition, however, relates to Package No.4, i.e. DDU/II/Hills for electrification work of unelectrified villages of Dima Hasao, Karbi Anglong districts of Assam (Spec. No.:APDCL/DDUGJY/II/XII/Hills). To the said Invitation for Bids, there was an Instruction to Bidders (ITB) which stipulates the various terms for the purpose of eligibility, bid security, bid validity etc. The petitioner being interested participated in the said tender process.

4. At this stage, it is relevant to take note of that as per Clause 9.1 of the Invitation for Bids dated 11.07.2016, the bids were to be submitted in single sealed envelope at or before 12:00 hours (IST) on 06.08.2016. It was mentioned that the Techno Commercial Part shall be opened on the same day i.e. on 06.08.2016. This Court further finds it relevant to take note of that on the very day, i.e. on 06.08.2016, the petitioner entered into a Pre-Contract Integrity Pact with the Chief General Manager (RE) of the Respondent No.1 Company.

5. It further reveals from the records that on 19.09.2016, the Tender Purchase Committee of the respondent No.1 took a decision and made recommendations for grant of the contract in respect to the five packages.



6. From the said Resolution dated 19.09.2016 in respect to Package No.4, it transpires that out of the three bidders, the bids of M/S Windpower Infra Pvt. Ltd. and M/S N. K. Power & Infrastructure Pvt. Ltd. were found non-responsive. Accordingly, the bid of the petitioner, being the lowest bidder, the Tender Purchase Committee recommended awarding of the work to the petitioner.

7. It further reveals from the record that the Performance Certificate dated 30.06.2016 on the basis of which the petitioner claimed to be eligible for submission of the bid was sent for verification to the Office of the Executive Engineer (E), Daporijo Electrical Division, Department of Power, Arunachal Pradesh. The record further shows that on 23.09.2016, the Executive Engineer (E), Daporijo Electrical Division, Department of Power had issued a communication to the Chief General Manager (RE) of the Respondent No.1 stating inter-alia that the Performance Report in favour of M/S Paran Jyoti Saikia dated 30.06.2016 for an amount of Rs.22,14,71,979.00 was not issued from their Office.

8. Upon receipt of the said communication dated 23.09.2016, the Board of Directors of the respondent No.1 in its meeting dated 23.09.2016 observed that the petitioner had manipulated the documents and forged the signature of the Executive Engineer, and as such, the Board instructed the Chief General Manager (RE) to initiate legal action against the petitioner and his JV partner M/S D&G Construction for providing false information and misleading the Board. It was further observed in the said Resolution dated 23.09.2016 that an FIR be lodged in that respect and the Board opined for re-tendering of the said Package No.4 as the other two bidders who participated were found to be non-responsive.

9. It further reveals from the record that after more than six months

thereafter, the Board of Directors of the respondent No.1 in its meeting held on 29.03.2017 had taken a Resolution. Taking into account its importance for the purpose of adjudication of the dispute, the relevant portion of the Resolution is quoted herein below:-

“09. FORFEITURE OF COST OF BID SECURITY FOR SUBMISSION OF FRAUDULENT DOCUMENTS OF PERFORMANCE CERTIFICATE BY M/S PARAN JYOTI SAIKIA IN TENDER SPECIFICATION: APDCL/DDUGJY/II/XII/CA,APDCL/DDUGJY/II/XII/HILLS,APDCL/DDUGJY/II/XII/BARAK:- The Board after threadbare discussion on the agenda note resolved to forfeit the Bank Guarantee amounting to Rs. 0.75 crore submitted by M/S Paranjyoti Saikia JV with M/S D & G Construction for providing fraudulent documents against package No. APDCL/DDUGJY/II/XII/Hills wherein Sri P. J Saikia was declared lowest bidder.”

10. Pursuant to the said Board meeting of the respondent No.1 dated 29.03.2017, the Chief General Manager (RE) of the respondent 1 issued a communication dated 24.04.2017 to the petitioner stating inter-alia that the Board has decided to forfeit the Bank Guarantee amounting to Rs.75,00,000/- submitted by M/S Paran Jyoti Saikia, JV with M/S D&G Construction against Tender Specification No.APDCL/DDUGJY/II/XII/Hills and Package No.DDU/II/Hills for providing fraudulent documents of Performance Certificate. Subsequent thereto, the Chief General Manager (RE) of the Respondent No.1 Company issued a communication dated 25.04.2017 to the Senior Manager of the Allahabad Bank invoking the Bank Guarantee in question. It is under such circumstances, the petitioner has approached this Court by filing the instant writ petition challenging the communications dated 24.04.2017 as well as 25.04.2017 and sought for a direction upon the respondents to forebear from invoking the Bank Guarantee in question.

11. From the records it is apparent that on 28.04.2017, this Court issued

notice and further directed that until the next date, operation of the letter dated 25.04.2017 shall remain suspended subject to the condition that within one week from the date of the order, the petitioner would communicate to the respondent Nos.1, 2 & 3 intimating that the validity of the Bank Guarantee has been extended beyond the next date so fixed. It further reveals from the records that the interim order has been extended from time to time.

12. This Court further finds it relevant to take note of a communication issued by the Branch Head of Punjab National Bank dated 27.09.2018 wherein it has been provided that the lien has been marked against the fixed deposit of Rs.75,00,000/- of the petitioner against the contingent future liability towards APDCL subject to this Court's verdict in the instant case. It was further certified that the Bank Guarantee towards APDCL for the amount of Rs.75,00,000/- would continue to remain subsisting and in existence till further orders of this Court.

13. It further reveals from the record that the respondent Nos.1, 2 & 3 had initially filed a preliminary affidavit for the purpose of opposing the interim prayer. In the said affidavit, the Performance Certificate dated 30.06.2016, the certificate issued by the Executive Engineer (E), Daporijo Electrical Division, Department of Power to the Chief General Manager (RE) dated 23.09.2016 wherein it has been mentioned that the Performance Certificate dated 30.06.2016 was not issued from the said Office; the Minutes of the Meeting of the Respondent Board held on 23.09.2016 as well as the Pre-contract Integrity Pact entered into on 06.08.2016 by and between the petitioner as well as the Chief General Manager (RE) of the respondent No.1 were enclosed. In the said Preliminary Affidavit, it was mentioned at Paragraph No.11 that the Respondent No.1 incurred loss as it had to re-tender the Package No.4 due to the fault of

the petitioner.

14. To the said preliminary affidavit, an affidavit-in-reply was filed by the petitioner. Relevant herein to mention that in paragraph No.8 of the said affidavit-in-reply, the communication dated 23.09.2016 issued by the Executive Engineer (E), Daporijo Electrical Division, Department of Power was disputed and it was further stated to be an outcome of some miscommunication or some mischief played by someone to prejudice the petitioner.

15. It further reveals from the records that on 14.08.2019, a detailed Affidavit-in-Opposition was filed by the Respondent Nos.1, 2 & 3. From a perusal of the said Affidavit-in-Opposition, it is seen that the respondent Nos.1, 2 & 3 had laid emphasis on the Pre-contract Integrity Pact entered into on 06.08.2016 which was required as per Clause 9.3 (I) of the Instructions to Bidders (ITB). It was stated that entering into the Pre-contract Integrity Pact is one of the necessary conditions for the purpose of being eligible to participate in the said tender process. It was stated that in the said Pre-Contract Integrity Pack which was duly signed by the petitioner, it was agreed that any breach of the provisions by the bidders or anyone employed by it or acting on its behalf shall entitle the buyer, i.e. the respondent No.1 to take all or any of the actions as stipulated in Clause 6.1 of the Pre-Contract Integrity Pact. It was further mentioned that Clause 3.0 of the Pre-contract Integrity Pact categorically mandated that the Bidder, i.e. the petitioner herein had committed to take all measures necessary to prevent corrupt practices, unfair means and illegal activities during any stage of the bid or during any pre-contract or post-contract stage in order to secure the contract. It was the specific case as stated in the affidavit-in-opposition that the petitioner herein had submitted a fake Performance Certificate for the purpose of securing the contract which comes

within the mischief of Clause 3 of the Pre-contract Integrity Pack, and as such, on the basis of Clause 6.1 (ii), the respondent authorities had in its meeting held on 29.03.2017 resolved to forfeit the entire Bank Guarantee of the amount of Rs.75,00,000/- for providing fraudulent documents by the petitioner and the communications dated 24.04.2017 and 25.04.2017 were consequential to the said decision.

16. In the backdrop of the above, let this Court, therefore, take note of the respective submission of the parties.

17. Mr. I. Choudhury, the learned senior counsel for the petitioner submitted that from a perusal of the document, namely, the Invitation for Bids and more particularly Clause 9.1, it would show that the bids were to be submitted at or before 12:00 hours (IST) on 06.08.2016. The learned senior counsel for the petitioner further submitted that from a perusal of the said Clause itself, it would further show that the Techno Commercial Part shall be opened on the same date, i.e. on 06.08.2016. The learned senior counsel further referred to Clause 13 of the Instruction to Bidders which relates to Bid Security. Referring to Clause 13.2, the learned senior counsel for the petitioner submitted that it has been categorically stipulated in what form the bid security was required to be submitted as well as for what period the bid security had to be valid. Referring to the said Clause, the learned senior counsel submitted that the bid security as per Clause 13.2 stipulates that it shall remain valid for a period of 30 days beyond the original bid validity period and beyond any extension subsequently requested under the ITB Clause 14.2. The learned senior counsel further drew the attention to Clause 14 of the Instruction to Bidders, i.e. the Period of Validity of Bid and referring to Clause 14.1, the learned senior counsel submitted that the bid shall be valid for six months after the date of opening of Techno

Commercial Part, i.e. the Bid Envelope, prescribed by the Employer, pursuant to the ITB Clause 20.1. The learned senior counsel for the petitioner further submitted that Clause 14.2 would have no application in the instant facts. It is, therefore, the submission of the learned senior counsel that as per Clause 9.1 of the Invitation for Bids, the Techno Commercial Bid would be opened on 06.08.2016 and as per Clauses 13.2 and 14.1 of the Instruction to Bidders, the bid security would remain valid for the purpose of forfeiture only for a period of 30 days after the expiry of the bid validity, and therefore, submitted that the respondent Nos.1, 2 & 3 could not have exercised the jurisdiction for the purpose of invocation of the Bank Guarantee beyond 05.03.2017.

18. The learned Senior Counsel submitted that though the Bank Guarantee for the bid security was valid upto 04.05.2017, but taking into account the terms and conditions of the Instruction to the Bidders, the Bank Guarantee cannot be invoked beyond 05.03.2017.

19. The learned Senior Counsel referring to the Bank Guarantee in question enclosed as Annexure-3 to the writ petition submitted that the Bank Guarantee in question could have been invoked only as the terms and conditions mentioned in the Bank Guarantee. The learned Senior Counsel, therefore, submitted that the invocation of the Bank Guarantee vide the communication dated 25.04.2018 not only was contrary to the provisions of ITB, i.e. Instruction to Bidders but is also contrary to the Bank Guarantee in as much as conditions on the basis of which Bank Guarantee in question was issued were not fulfilled.

20. The learned Senior Counsel for the petitioner further in the alternative also submitted that even assuming for argument's sake that the respondent Nos.1, 2, & 3 could have invoke the Bank Guarantee in question then also as per Clause 6.1 (ii) of the Integrity Pact, the buyer was conferred with a discretion to

forfeit either fully or partially the earnest money deposit. The learned senior counsel, therefore submitted that though as per Clause 6.1 (ii), there is no requirement to assign any reason for forfeiting the earnest money deposit but taking into account that the respondents were conferred with a discretion to partially or fully forfeit the Bank Guarantee, the Respondent Authorities could have forfeited the earnest money deposit only to the extent the same would commensurate with the loss so suffered. The learned Senior Counsel, therefore, submitted that when a discretion has been conferred upon an authority which is a State within the meaning of Article 12 of the Constitution, the said discretion cannot be exercised in an unreasonable, arbitrary and irrational manner which however was done in the instant case, and as such, the communications dated 24.04.2017 and 25.04.2017 are required to be set aside and the respondents be restrained from invoking the bank guarantee.

21. Mr. N. Deka, the learned counsel appearing on behalf of the respondent Nos.1, 2 & 3 submitted that in terms with Clause 9.3 (I) of the Instruction to Bidders, the Integrity Pact is a part of Techno Commercial bid submitted by each bidder. The learned counsel for the respondents, therefore, submitted that the petitioner in order to be eligible for the purpose of the said bid had entered into a Pre-Contract Integrity Pact dated 06.08.2016. Referring to Clause 3 of the Pre-Contract Integrity Pact he submits that if a bidder indulges in any unfair means for the purpose of securing the contract, the earnest money deposit (the bid deposit) which is required to be submitted while submitting the commercial bid amounting to Rs.75,00,000/- can be forfeited in terms with Clause 6.1 (ii). The learned counsel for the respondent Nos.1, 2 & 3, therefore, referring to the Performance Certificate dated 30.06.2016 as well as the communication dated 23.09.2016 issued by the Executive Engineer (E), Daporijo Electrical Division,



Department of Power confirming that the said Performance Certificate was not issued by the said Office submitted that the petitioner in order to secure the contract in question had indulged in unfair means, and as such, the respondent authorities were within the jurisdiction to forfeit the earnest money deposit in terms with Clause 6.1 (ii). He further submitted that though a submission has been made that the Integrity Pact was not holding the field at the time when the decision was taken on 29.03.2017 for the purpose of invocation of Bank Guarantee, but a perusal of Clause 12 of the Pre-Contract Integrity Pact would show that validity of the Pre-Contract Integrity Pact in respect of unsuccessful bidders shall expire after six months from the date of signing of the contract by the successful bidders, and as such, the Pre-Contract Integrity Pact was holding the field at the time when the decision was taken on 29.03.2017. The learned counsel for the respondents further countering the submission of the petitioner to the effect that the decision to invoke the entire Bank Guarantee was arbitrary and unreasonable submitted that the respondent Nos.1, 2 & 3 suffered losses on account of going for re-tender of the work, and as such, the decision so taken for forfeiture of the entire earned money was in accordance with the provisions of law. In that regard, the learned counsel appearing on behalf of the respondents referred to paragraph No.11 of the preliminary affidavit filed by the respondent Nos.1, 2 & 3 on 01.06.2017.

22. This Court had duly perused the materials on record and also taken note of the respective submission made by the learned counsels for the parties. From the submissions so made by the learned counsels for the parties, it appears broadly that two issues need to be considered. The first is as to whether the respondent Nos.1, 2 & 3 in terms with the Pre-Contract Integrity Pact could forfeit the earnest money deposit and/or the security deposit/performance bond

in terms with Clause 6.1 (ii) in the fact of the instant case by invoking the Bank Guarantee in question. The second aspect is as to whether the action of the respondent Nos.1, 2 & 3 to invoke the Bank Guarantee of Rs.75,00,000/- thereby to forfeit the entire earnest money deposit was justified.

23. This Court has perused the Pre-Contract Integrity Pact. From a perusal of Clause 3.0 of the Pre-Contract Integrity Pact, it is the mandate that the bidder, i.e. the petitioner herein had committed to take all measures necessary not to indulge in corrupt practices, unfair means and illegal activities during any stage of the bid or during any pre-contract or post-contract stage in order to secure the contract or in furtherance to secure it. The bidder, i.e. the petitioner herein by entering into the Pre-Contract Integrity Pact had duly committed that it had not used any unfair means for the purpose of securing the contract in question. However, from the Performance Certificate dated 30.06.2016, which is the document on the basis of which the petitioner claims to be eligible and on the basis of which the petitioner has submitted the bid was disowned by the Issuing Authority vide communication dated 23.09.2016 to be a certificate not issued by the said Authority.

24. The learned Senior Counsel appearing on behalf of the petitioner though submitted that there has been a communication error and the said communication dated 23.09.2016 is disputed, but the fact remains that as on today, the Performance Certificate dated 30.06.2016 has been disowned by the authority who has issued it. Now coming to Clause 6 of the Pre-Contract Integrity Pact, it stipulates that if any breach is committed by the bidder or anyone employed by it or acting on its behalf, it would be within the jurisdiction of the buyers, i.e. the respondent No.1 to take any of the actions as stipulated in Sub-Clause (i) to Sub-Clause (x) of Clause 6.1 as well as Clause 6.2.

25. From the above discussion, it is clear that as on today till it is proved otherwise, the Performance Certificate dated 30.06.2016 has to be taken as a fake certificate and accordingly by virtue of Clause 3 read with Clause 6 of the Pre-contract Integrity Pact, the Respondent Authorities, i.e. the Respondent Nos.1, 2 & 3 were within its jurisdiction to take such action in terms with Clause 6 of the Pre-contract Integrity Pact to the extent permissible under law.

26. Now the next question arises as to whether the invocation of the Bank Guarantee was permissible. During the course of arguments, it was submitted by the learned counsel appearing on behalf of the respondent Nos.1, 2 & 3 that the said respondents had taken recourse to Clause 6.1 (ii). Taking into account its importance, this Court, therefore, reproduces Clause 6.1 (ii) herein under:-

6.1 (ii) The Earnest Money Deposit (in pre-contract stage) and/or Security Deposit/Performance Bond (after the contract is signed) shall stand forfeited either fully or partially, as decided by the BUYER and the BUYER shall not be required to assign any reason therefore.

27. From a perusal of the above quoted Clause, it would be seen that the earnest money deposit (in pre-contract stage) and/or security deposit/performance bond after the contract is signed shall stand forfeited either fully or partially as decided by the buyer and the buyer shall not be required to assign any reason. A reading of Clause 6.1 (ii), and more particularly, the earnest money deposit (in pre-contract stage) has to be understood as the bid security submitted in terms with Clause 13.0 of the Instruction to Bidders.

28. In the backdrop of the said, let this Court take note of the Bank Guarantee in question enclosed as Annexure-3 to the writ petition. The said Bank Guarantee in question was the bid security submitted by the petitioner.

From the perusal of the said Bank Guarantee, it shows that the Allahabad Bank at Guwahati, Lakhtokia Branch had issued the said Bank Guarantee and undertook to pay to the employer, i.e. the respondent No.1 upon receipt of its first written demand owing to the occurrence of any of the conditions or their combination stated therein and specifying the occurred condition or conditions. The conditions have been enumerated in the said Bank Guarantee as Clauses 1 to 6. Taking into account its importance, the said conditions are reproduced herein under:-

THE CONDITIONS of this obligation are:

- (1) If the Bidder withdraws its bid during the period of bid validity specified by the Bidder in the Bid Form; or*
- 2) In case the Bidder does not withdraw the deviations proposed by him, if any, at the cost of withdrawal stated by him in the bid and/or accept the withdrawals/rectifications pursuant to the declaration/confirmation made by him in Attachment-Declaration of the Bid; or*
- (3) If the Bidder does not accept the corrections to arithmetical errors identified during preliminary evaluation of his bid pursuant to ITB Clause 27.2; or*
- (4) If, as per the requirement of Qualification Requirements the Bidder is required to submit a Deed of Joint Undertaking and he fails to submit the same, duly attested by Notary Public of the place(s) of the respective executant(s) or registered with the Indian Embassy/High Commission in that Country, within ten days from the date of intimation of post - bid discussion; or*
- (5) In the case of a successful Bidder, if the Bidder fails within the specified time limit*
 - (i) to sign the Contract Agreement, in accordance with ITB Clause 33, or*
 - (ii) to furnish the required performance security, in accordance with ITB Clause 34 or*
- (6) In any other case specifically provided for in ITB.*

29. A perusal of the said conditions quoted herein above would show that the Bank Guarantee in question was conditional. The said conditions were pari-materia to the conditions mentioned in Clause 13.6 of the Instruction to Bidders (ITB) wherein the conditions were enumerated as Sub-Clauses (a) to (c). However Condition 6 of the Bank Guarantee is an additional condition which states “***in any other case specifically provided for in the ITB***”. It is relevant to take note of that Conditions 1 to 5 are not applicable to the instant case as per the admitted stand of both the parties. As such Condition 6 assumes importance in as much as whether on the basis of Condition No.6, the Bank Guarantee in question could be invoked.

30. The learned counsel for the respondent Nos.1, 2 & 3 submitted that the Integrity Pact is a part of the ITB, and as such, the conditions mentioned in the Integrity Pact has to be brought within the fold of the ITB. The said submission, though at the first blush looks attractive, but from a perusal of Condition 6, the same is misconceived. The word “***specifically***” used in Condition 6 cannot be rendered otiose. The said word “***specifically***” has to be given a meaning. The word “***specifically***” means of relating to or invoking a particular named thing. In the opinion of this Court, therefore, Condition 6 of the Bank Guarantee in question would apply if there is a specific condition in the ITB which would entitle the Respondent No.1 to invoke the Bank Guarantee in question. The learned counsel for the respondent Nos.1, 2 & 3, however, could not show as specific condition other than enumerated in Clause 13.6 of the ITB which authorizes the invocation of the Bank Guarantee in question. This Court at this stage, finds it relevant to take note of two judgments of the Supreme Court in the case of ***Hindustan Construction Co. Ltd. vs. State of Bihar & Others***, reported in ***(1999) 8 SCC 436*** as well as ***SBI & Another vs. Mula Sahakari Sarkar***

Karkhana Ltd., reported in **(2006) 6 SCC 293**. Paragraph No.9 of the said judgment in Hindustan Construction Co. Ltd. (supra) is quoted herein below:-

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

31. Paragraph Nos.33 & 34 of the judgment in SBI (supra) is quoted herein below:-

“33. *It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.*

34. *If a construction, as was suggested by Mr Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law."*

32. Under such circumstances, this Court answers the first issue holding that the respondent Nos.1, 2 & 3 was within its right to take action under Clause 6 of the Pre-Contract Integrity Pact but could not have invoked the Bank Guarantee as the conditions for invocation of the Bank Guarantee were not fulfilled. Under such circumstances, the communication dated 25.04.2017 was illegal and accordingly interfered with.

33. The answer to the first issue though resolve the issue as regards the invocation of the Bank Guarantee but taking into account the submission so

made by the learned counsels for the parties as to whether the respondent Nos.1, 2 & 3 could have forfeited the entire earnest money/bid security in terms with Clause 6.1 (ii) of the Pre-Contract Integrity Pact, this Court is of the opinion that the second issue so framed is also required to be dealt with by this Court. This issue is also required to be adjudicated upon for the order this Court proposes to pass.

34. Clause 6.1 (ii) of the Pre-Contract Integrity Pact had already been quoted in the previous segments of the instant judgment. This Court had also explained the contours of the said provision. No doubt the respondent No.1 has a power to forfeit the earnest money deposit/bid security for infraction of the commitments in Clause 3 of the Integrity Pact. However, one very important aspect in Clause 6.1(ii) of the Integrity Pact is that discretion had been conferred upon the respondent No.1 to fully or partially forfeit the earnest money/bid security. This Court cannot be unmindful of the fact that the respondent Nos.1, 2 & 3 are a 'State' within the meaning of Article 12 of the Constitution. Therefore, when a discretion is conferred upon a 'State' to partially or fully forfeit the bid security/earned money, the said discretion has to be exercised in a reasonable, fair and rational manner. In the words of Lord Esher MR in the case of '***The Queen on the Prosecution of Richard Westbrook vs. The Vestry of St. Pancras***', reported in **(1890) 24 QBD 371**, it was observed that if people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of Law, they have not exercised their discretion.

35. As it would appear that the Respondent Nos.1, 2 & 3 had the discretion to partially or fully forfeit the earned money deposit, the said discretion had to be exercised in a fair, reasonable and rational manner. Therefore, to be fair,

reasonable and rational, the discretion so exercised are required to have a rational nexus with the object behind the forfeiture. In the opinion of this Court, the object seems to be recoup the losses suffered on the ground of breach to the commitment so made as per Clause 3 of the Integrity Pact.

36. In the backdrop of the above, let this Court revisits the facts. This Court has perused the minutes of the meeting dated 23.09.2016 as well as the minutes of the meeting dated 29.03.2017. Nothing is mentioned therein as to why the entire earnest money deposit was sought to be forfeited and not partially. Mr. I. Choudhury, the learned senior counsel for the petitioner submitted that taking into account the discretion conferred for the purpose of forfeiting the earned money deposit which is, at the time of the pre-contract stage, and the discretion being conferred upon the authority to either fully or partially forfeit would show that the said forfeiture has to commensurate with the loss suffered by the respondent Nos.1, 2 & 3 on account of the fault of the petitioner. It is the further submission of the learned senior counsel for the petitioner that from the minutes of the meeting dated 23.09.2016 as well as the minutes of the meeting dated 29.03.2017, there is nothing on record to show as to why the entire amount was decided to be forfeited. It was further submitted that there is also no pleadings as to what loss has occasioned to the respondent Nos.1, 2 & 3 for which the entire earnest money deposit was sought to be forfeited by invoking the Bank Guarantee. On the other hand, Mr. N. Deka, the learned counsel appearing on behalf of the respondent Nos.1, 2 & 3 submitted that on account of the petitioner, the entire Package had to be re-tendered which had caused delay and loss to the respondent Nos.1, 2 & 3.

37. This Court is of the opinion that except the vague statement made in paragraph No.11 of the affidavit that the Respondent No.1 suffered loss, there is

nothing mentioned as to why the entire earnest money deposit was sought to be forfeited and not any amount which would commensurate with the actual loss suffered. This Court further finds it relevant to take note of that in respect to the Package No.4 in question there were three tenderers. In the recommendation so made by the Tender Package Committee on 19.09.2016, two of the bidders have been held to be unresponsive and the remaining bidder, i.e. the petitioner was recommended. Even assuming that the Performance Certificate dated 30.03.2016 is a fake certificate, the bid submitted by the petitioner at best would be unresponsive. This decision was taken on 23.09.2016 itself whereby the petitioner's bid was also rejected in view of the fake certificate submitted by the petitioner. There is no material on record to show that at the time of taking the decision to forfeit the entire earnest money deposit, the Board of the respondent No.1 had taken into account any materials as regard the loss so suffered on account of re-tendering, price increase etc.

38. Under such circumstances, this Court is of the opinion that the Resolution so adopted on 29.03.2017 to forfeit the entire earnest money deposit was unfair, arbitrary, unreasonable as well as irrational. Consequently, the consequent steps so taken for issuance of the impugned communications dated 24.04.2018 and 25.04.2017 on the basis of the Board meeting held on 29.03.2017, in the opinion of this Court, is also arbitrary, unreasonable, irrational and unfair and violates the mandates of the Article 14 of the Constitution. The second issue therefore stands answered.

39. Accordingly, the writ petition stands disposed of with the following observations and directions:-

- (i) The impugned letter dated 25.04.2017 to invoke the Bank Guarantee is set aside and quashed in view of the fact that the conditions of the



Bank Guarantee do not permit invocation of the Bank Guarantee on account of any other condition other than enumerated in the Bank Guarantee. The breach of the Pre-Contract Integrity Pact is not a condition for invocation of the Bank Guarantee.

(ii) The forfeiture of the entire earnest money deposit of Rs.75,00,000/- vide the communication dated 24.04.2017 which is on the basis of the minutes of the meeting dated 29.03.2017 is interfered with as the same is unreasonable, arbitrary, unfair and irrational.

(iii) This Court observes that the respondent Nos.1, 2 & 3 on the basis of the Pre-contract Integrity Pact would be entitled to take such actions in terms with Clauses 6.1 & 6.2 against the petitioner. Taking into account that in view of the pendency of the instant writ petition and the issue as to whether the invocation of the Bank Guarantee No.0177416IPG000074 dated 04.08.2016 was proper or not was pending before this Court, the said period shall be excluded in computing the period of limitation.

JUDGE

Comparing Assistant