

(2011) 03 DEL CK 0003

In the Delhi High Court

Case No : Writ Petition (C) No. 8418 of 2010

Madhucon Projects Ltd.

APPELLANT

Vs

National Highways Authority of India and Others

RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 74
Evidence Act, 1872 — Section 68, 85
Notaries Act, 1952 — Section 8
Reserve Bank of India Act, 1934 — Section 2
Transfer of Property Act, 1882 — Section 3

Citation : (2011) 03 DEL CK 0003

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : P.V. Kapur and Rakesh Munjal, Amit Sibal, Gopal Jain, Amitabh Chaturvedi, Nikhil Srivastav, Jeevesh Srivastav, Parag Maini and Akash D. Pratap, for the Appellant; Sudhir Nandrajog Padma Priya, Saahila Lamba and Meenakshi Sood for Respondent Nos. 1 and 3/NHAI, Ravinder Agarwal, for Respondent No. 2/UOI and Sunil Gupta and Priya Kumar, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The National Highways Authority of India (for short "NHAI")/Respondent No. 1, floated a tender for the development and operation/maintenance of the four-laning of Ranchi-Rargaon-Jamshedpur section from KM 114.00 to 277.500 of NH-33 in the State of Jharkhand on Design, Build, Finance, Operate and Transfer (DBFOT) Annuity Basis under NHDP Phase-III Project. The estimated project cost was Rs. 1,479.00 crore. The tender process was divided into two stages. The first stage was the qualification/Request for Qualification (RFQ), which involved the pre-qualification of interested parties/bidders so as to shortlist the bidders who would participate in the second stage. The second stage was the bid stage/Request for Proposal (RFP) when the shortlisted bidders were to submit their bids/financial offers in accordance with their bidding documents

whereafter the bids were to be scrutinized on the basis of lowest semi-annual annuity.

2. The Petitioner and other prospective parties submitted their applications at the first stage in April, 2010 and Respondent No. 1 announced the list of 18 pre-qualified bidders including the Petitioner vide letter dated 13.5.2010 in accordance with the RFQ documents. Pursuant thereto Respondent No. 1 issued a letter to the Petitioner of eligibility for participation in the second stage of bidding process on 2.7.2010 so that the Petitioner could collect the RFP documents after payment of applicable charges. The RFP documents were collected by the Petitioner in August, 2010 on payment of a sum of Rs. 3.00 lakh and were thereafter duly submitted in terms of the requirement of Clause 2.1.7 read with Clause 2.1.8 of the RFP documents. Respondent No. 5/ICICI Bank Limited issued a bank guarantee at the behest of the Petitioner in favour of Respondent No. 1 for the bid security amount of Rs. 14.79 crore, which was a requirement as per Clause 2.1.7 of the RFP.

3. Clause 2.1.9 of the RFP documents required the bidder to submit a Power of Attorney as per format on Appendix III authorizing the signatory of the bid to commit the bidder. The Petitioner accordingly submitted a Power of Attorney. It may be noticed that the bid due date as per the RFP was 16.8.2010 but was subsequently repeatedly extended and eventually the last date fixed was of 16.11.2010. The bid documents were opened on the said date when Respondent No. 1 raised a question about the Power of Attorney submitted by the Petitioner on the ground that the date printed on the Power of Attorney was of 12.8.2010 which was different from the date on which it was actually signed of 19.8.2010. The Petitioner on 16.11.2010 itself, thus, obtained a certificate of the Notary to the effect that the Power of Attorney was executed by the Executant on 19.8.2010 and attested by the Notary on the same date. The Petitioner also addressed a letter dated 23.11.2010 giving an explanation and enclosing the certificate of the Notary. The Petitioner at his behest was granted a personal hearing by the Chairman of Respondent No. 1 on 30.11.2010 as the financial bids were to be opened on 7.12.2010. The Petitioner appeared for personal hearing and again represented that the Power of Attorney was not invalid and that the bid of the Petitioner should be considered. However, the financial bids of only 9 out of the shortlisted bidders were opened by Respondent No. 1 on 7.12.2010 and the bid of the Petitioner was not opened. As per the bids opened Respondent No. 4, M/s. NCC Infrastructure Holdings Ltd., was found to be the L-1. The Petitioner claimed that his bid was lower than that of Respondent No. 4 and made a representation on 8.12.2010 to the Chairman of Respondent No. 1 followed by some further representations and communications. The Petitioner was, however, informed through a representative that a decision had already been taken to reject the representation of the Petitioner and that the Letter of Award of the contract is likely to be issued to Respondent No. 4 shortly. Not only that, it is the claim of the Petitioner that Respondent No. 1 further threatened to invoke the bank guarantee submitted by the Petitioner as bid security to the

extent of 5 per cent of the value on the ground that the bid of the Petitioner was non-responsive on account of the defective Power of Attorney.

4. The Petitioner, thus, filed the present writ petition under Article 226 of the Constitution of India for quashing the decision of Respondent No. 1 to declare the bid of Respondent No. 1 as non-responsive as a sequitur to restrain Respondent No. 1 from issuing Letter of Award of contract to Respondent No. 4 and for restraining Respondent No. 1 from taking any steps to invoke the bank guarantee submitted towards bid security of Rs. 14.79 crore.

5. The writ petition along with application for interlocutory relief were taken up by this Court on 20.12.2010 and on hearing learned Counsels for the parties, for the reasons recorded therein, a prima facie view was found in favour of the Petitioner and an interim order was passed directing Respondent No. 1 to open the price bid of the Petitioner, which was stated to be lying in a sealed cover with Respondent No. 1 and to process the bid of the Petitioner without the contract being awarded to any party. This order was assailed before the Supreme Court by both Respondent No. 1 & Respondent No. 4. The SLP filed by Respondent No. 4, being SLP (C) No. 1569/2011 was dismissed on 18.1.2011 but the SLP filed by Respondent No. 1, being SLP (C) No. 1939/2011, was entertained and the interim orders passed by this Court on 20.12.2010 was modified vide order dated 20.1.2011 by the same Bench to the extent that the financial bid of the Petitioner herein should not be opened but be kept in a sealed cover, which would, however, be produced before this Court at the time of hearing of the petition and the opening of the financial bid would, thus, depend on the outcome of the decision of the High Court. The direction that the contract would not be awarded to any party was to continue.

6. In the aforesaid factual matrix two questions arise for consideration:

- i. Whether the Power of Attorney submitted by the Petitioner 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?

7. 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 Rs. 14.79 Crores (Rupees Fourteen Crores and Seventy Nine Lakhs 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 Scheduled 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.

8. 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. Clause 2.11 deals with "sealing and marking of bids" while Clause 2.15 deals with "modifications/substitution/ withdrawal of bids". The relevant Clause 2.15.3 reads as under:

2.15 Modifications/Substitution/Withdrawal of Bids

....

2.15.3 Any alteration/modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Authority, shall be disregarded.

9. Respondent No. 1, 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

(d) 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.

10. Insofar as the question of forfeiting of the bid security amount is concerned, part D of Chapter 2 deals with "Bid Security". The relevant clauses 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 Rs. 1,000 crore (Rs. 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 u/s 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)

11. 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

3.2.1 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;

....

3.2.2 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.

12. 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.

13. We have already noticed above that Appendix III gives the format of the Power of Attorney for signing of a bid with reference to Clause 2.1.9. The format is followed by certain notes which were referred to during the course of the argument and thus we reproduce the same as under:

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 executants(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 of 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.

14. 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. We declare that:

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

(c)

(d)

(e)

8. 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.

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

The validity of Power of Attorney:

16. The Power of Attorney submitted with the bid of the Petitioner has been placed on record. There is no dispute that it is in the proper format. However, at the end of the Power of Attorney in the prescribed format the following is stated:

In witness whereof we, Madhucon projects limited the abovenamed principal have executed this power of attorney on this 12th day of August, 2010.

17. Thus, the typed date as given is of 12.8.2010. This is followed up by the signatures of the Managing Director of the Petitioner company - above the address of the company at Hyderabad. On the left side of the document there is an acceptance by Mr. S.V. Patwardhan, Chief Executive Director of the Petitioner, who has been authorized as per the Power of Attorney to submit the bid followed by the signatures and addresses of the two witnesses. Mr. S.V. Patwardhan after appending the signatures has put down the date as 19.8.2010. There is a seal of the Notary putting down the number at which it is authorized, the signatures of the Notary followed by the date stamped of 19.8.2010.

18. Learned Counsel for the Petitioner while referring to the pleadings in the petition drew our attention to the first communication in this behalf addressed by the Petitioner on 23.11.2010. The letter sets out that in the past there was never any grievance raised in respect of similar discrepancies submitted by various bidders. This is stated to be apparent from the fact that Respondent No. 1 issued a check list for scrutinizing of documents in respect of various projects on 22.11.2010. Such a check list was issued in respect of Krishnagar-Baharpore RFP. In the past no such check list was issued including in the present case. Thus, seeking to make this check list applicable retrospectively without circulation is pleaded to be unfair. Not only that, financial bids of other projects up to 16.11.2010 are stated to have been accepted with deficiencies. These norms were never brought to the notice of any of the bidders, which was being

done in respect of the bids starting retrospectively with closing date as early as August, 2009. An important aspect emphasized was that though the document was prepared on 12.8.2010, the same was signed on 19.8.2010 and was presented for notarization on the same date. In support of this plea a certificate dated 16.11.2010 of the notary has been annexed to the letter dated 23.11.2010. The certificate reads as under:

TO WHOM IT MAY CONCERN

This is to certify that the document named "Power of Attorney for signing of Bid" for the NHA project "Four laning of Ranchi-Rargaon-Jamshedpur section from Km114.00 to Km 277.500 of NH-33 in the State of Jharkhand on Design, Build, Finance, Operate and Transfer (DBFOT) Annuity basis under NHDP Phase-III" prepared by Madhucon Projects Limited was presented before by the executants Mr. N. Seethaiah in person on 19th August, 2010 which I attested on the same day.

19. The Petitioner has also relied on the register of the Notary which has number seriatim and the serial number of the Power of Attorney is at 291 in the register which is duly signed in the register. The further material sought to be relied upon by the Petitioner are the air tickets of Mr. N. Seethaiah to show that he came to Delhi and was in Delhi on the relevant dates as also the mobile bill to show user from Delhi. This is stated to be additional material placed before this Court to substantiate the plea that there could be no doubt about the execution and notarization of the Power of Attorney on 19.8.2010.

20. The other aspect as set out in the petition flows from the provisions of Section 85 of the Indian Evidence Act, 1872 (hereinafter referred to as the "Evidence Act"), which reads as under:

85. Presumption as to powers of attorney - The Court shall presume that every document purporting to be a Power of Attorney, and to have been executed before, authenticated by, notary public, or any Court, Judge, Magistrate, Indian Consul, or Vice Consul, or representative of the Central Government, was so executed and authenticated.

21. The plea, thus, is that a presumption has to be drawn about the execution and authenticity of the Power of Attorney which has been executed inter alia before a Notary Public.

22. It was emphasized by learned Counsel for the Petitioner that there was no particular manner of authorization prescribed. In different States the Notaries carry out notarization in different manner and the manner in which the Power of Attorney has been notarized is the practice followed in Delhi. In this behalf learned Counsel referred to the check list circulated vide letter dated 22.11.2010 in respect of another project where notarization of Power of Attorney was specifically referred to and the mode & manner of attestation prescribed. The mode & manner reads as under:

Mere attestation of POA cannot lead to an inference that it was executed before the Notary Public. Execution of POA before the Notary Public and authentication by it is essential condition for valid notarization under the Notary Act and Evidence Act. The condition of notarization as envisaged in the RFP document can only be fulfilled if it was executed before the Notary Public, meaning thereby that execution and notarization of the POA are on the same date and notarization bears the words "signed/executed before me". The Stamp of Notary indicating the registration number need to be affixed by the Notary.

23. This document was not circulated vis-?-vis the tender in question in the present case and thus in the absence of any prescribed manner of notarization, it was notarized the way it had been done in the past and accepted. To advance this plea further it was submitted that the format of the Power of Attorney in respect of consortium is not even required to be notarized.

24. Learned Counsel also referred to the judgment of the Supreme Court in Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others, , which dealt with a case of the proof of execution of a Will. In that context a discussion took place about the proof of execution of a document required by law to be attested as specified u/s 68 of the Evidence Act. As to what is meant by the word "attestation" is defined u/s 3 of the Transfer of Property Act, 1882 (hereinafter referred to as the "TP Act"), which reads as under:

3. Interpretation-clause.-In this Act, unless there is something repugnant in the subject or context,-

("attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary)

25. It was, thus, emphasized by reference to the aforesaid definition that no particular form of attestation is necessary.

26. Learned Counsel for Respondent No. 1, on the other hand, has referred to the pleadings in the writ petition, more specifically para 15, to submit that the explanation in respect of the discrepancy in the Power of Attorney has been explained as under:

15. The Power of Attorney submitted by the Petitioner was printed on 12th August 2010. The officer who printed the same put the date on which the same was printed i.e. 12th August 2010, believing that the said would be executed on the same day. However, the Power of Attorney was not executed on the same

day i.e. 12th August, 2010, on which it was printed. The Power of Attorney was executed on 19th August, 2010 before a notary. The attorney also appended his signatures and while executing the same, in acceptance, and put the date of 19th August, 2010 by hand under his signatures and that too on both pages of the said Power of Attorney. The Notary also put the date of his signature as 19th August, 2010. Thus, clearly, in terms of Section 85 of the Evidence Act, there was a mandatory requirement of presuming that the Power of Attorney had been so executed....

27. In the aforesaid context while referring to the certificate issued on 16.11.2010 by the Notary it is submitted that the same does not state that the executant executed the Power of Attorney in the presence of the Notary. On the register also only initials were placed and that too in a manner which were casting some doubts on the same.

28. Thus, it was submitted that the explanation was clearly an afterthought and the Power of Attorney was executed by Mr. N. Seethaiah on 12.8.2010 as the printed date shows though no date was put below the signatures appended by Mr. N. Seethaiah. The date of acceptance by Mr. S.V. Patwardhan is 19.8.2010 and it was attested on 19.8.2010. Thus, the document was executed on 12.8.2010, accepted on 19.8.2010 and notarized on 19.8.2010. We may note that there is no dispute that the stamp paper is of Delhi. The address given of Mr. N. Seethaiah below his signatures was of Hyderabad and the Power of Attorney did not state that it was executed at Delhi. (Incidentally, the format does not require it to state so.) Thus, there was no proper authentication. Learned Counsel submitted that the pre-requisite for the presumption to be drawn u/s 85 of the Evidence Act is that it has to be executed before and authenticated by a Notary Public which criteria has not been satisfied in the present case and thus no presumption could be drawn in the present case. In this behalf learned Counsel referred to the Division Bench judgment of this Court in *Electric Construction and Equipment Company Ltd. Vs. Jagjit Electric Works*, . It was emphasized that the presumption u/s 85 of the Evidence Act could be raised only if the twin conditions of execution before the Notary and authenticated by the notary were satisfied.

29. Learned Counsel referred to Clause 3.3 of the RFP which deals with Test of Responsiveness and requires the Power of Attorney to be executed as per Clause 2.1.9. In terms of Clause 3.2.2, Respondent No. 1 had the right to reject any bid which was non-responsive and no request for alteration, modification, substitution or withdrawal was to be entertained in respect of such bid. We may notice that the plea raised on the basis of this clause is sought to be repelled by the Petitioner by relying on sub Clause (b) of Clause 6.2 of the RFP, which gives the discretion to Respondent No. 1 to consult with any bidder in order to receive clarification or further information. It was, thus, submitted that if at all there was some doubt in the mind of Respondent No. 1 a clarification or information could have been sought in that behalf from the Petitioner.

30. Respondent No. 4, who as a consequence of the Petitioner's bid being declared non-responsive has become L-1, has naturally canvassed strongly in support of the decision taken by Respondent No. 1 to declare the bid of the Petitioner as non-responsive. We may notice that a detailed and elaborate synopsis was filed but a number of aspects raised in the same, in our considered view, are not germane to the matter in issue.

31. The first aspect is about the scope and judicial review in tender matters, i.e. the conditions of tender should be strictly enforced. The objective standard should not be diluted by exercise of subjective discretion, the court should not compel the authority to waive or relax or alter any standard and the court does not sit in appeal in substituting its decision with that of the authority, an authority in a given case may choose to waive in its wisdom and discretion a non-essential condition but even in such an eventuality a writ should not be issued to compel the authority to do so, the lowest bid should not necessarily be the deciding factor.

32. We may note that a number of these pleas flow from the consequences which may arise on account of consideration of the bid of the Petitioner. This is so as the Petitioner at the outset, as noticed in our order dated 20.12.2010, had stated that their offer was for Rs. 133.20 crore while the bid of Respondent No. 4 was for Rs. 135.7 crore. The differential was, thus, Rs. 2.5 crore. This is the differential amount over a period of six (6) months and for the total period of fifteen (15) years the financial impact, thus, would be Rs. 75.00 crore, i.e. if the bid of the Petitioner was to be accepted, the cash flow impact on Respondent No. 1 as compared to the bid of Respondent No. 4 was Rs. 75.00 crore. This is an undisputed position which has emerged. We may observe that in view of the leave granted by the Supreme Court vide its order dated 20.1.2011 the tender documents of the Petitioner were produced in a sealed cover, were opened to verify the bid amount and were thereafter sealed. These are produced by Respondent No. 1 and the figures aforesaid stand verified. We may, however, hasten to add that the fact that the bid of the Petitioner was financially more competitive would not, of course, entitle the Petitioner to convert a non-responsive bid into a responsive one.

33. Learned senior counsel for Respondent No. 4 sought to submit that no presumption could be drawn in respect of the validity of the Power of Attorney in view of Section 85 of the Evidence Act which is the bedrock of the claim of the Petitioner. The purpose of the Power of Attorney is to commit the bid and the manner in which such commitment takes place as provided as per the clauses. No modification/substitution or withdrawal can take place and thus the Petitioner cannot place added material before Respondent No. 1 to justify the validity of the Power of Attorney.

34. Learned Counsel also emphasized that there is a fundamental difference between authentication and attestation. For the purposes of authentication the person should have appeared before the Notary, identified himself and executed

the documents whereafter the Notary would attest the documents. The mere use of the word "attested" by the Notary in the present case is not actually an authentication.

35. Learned Counsel referred to the Advanced Law Lexicon of P. Ramanatha Aiyar, where the word "Notarize" is defined as under:

Notarize. To take acknowledgements, affidavits or depositions, authenticate documents, as a notary public; to swear or affirm to, before a notary.

To attest to the authenticity of (a signature, mark, etc.)

36. Learned Counsel also referred to the functions of the Notaries as specified in Section 8 of the Notaries Act, 1952 where Clause (a) reads as under:

8. Functions of notaries.- (1) A notary may do all or any of the following acts by virtue of his office, namely:

(a) verify, authenticate, certify or attest the execution of any instrument;

37. It was, thus, submitted that the distinction between "authentication" and "execution" which are two different phrases must be kept in mind.

38. Learned Counsel then turned to the definition of "authentication" under the Advanced Law Lexicon of P. Ramanatha Aiyar, which reads as under:

Authentication.

1. Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved (authentication of the handwriting).

2. Specific., the assent to or adoption of a writing as one's own. (Black, 7th Edn., 1999)

Authentication is the process of validating the identity of someone or something (Information Technology)

The act of authenticating.

A process used to confirm the identity of a person or to prove the integrity of the specific information. (Information Technology)

Statement that something is true, such as an auditor's signature on a company's accounts (Business Term)

39. Learned Counsel referred to the judgment of the Allahabad High Court in Wali Mohammad Chaudhari and Others Vs. Jamal Uddin Chaudhari, , which analyzed Section 85 of the Evidence Act. It was observed that authentication is not merely attestation but something more. Authentication would require a person to have assured himself of the identity of the person who has signed the instrument as well as the fact of execution. It is for this reason that a Power of Attorney

bearing the authentication of a Notary Public or an authority mentioned in Section 85 of the Evidence Act is taken as sufficient evidence of the execution of the instrument by the person who appears to be the executant.

40. A reference was also made to the judgment of the Supreme Court in Jugraj Singh and Another Vs. Jaswant Singh and Others, . It was noticed that there was no prescribed form of authentication but reliance was placed in Wali Mohammad Chaudhari case (supra). In that context it was noticed that a proper Power of Attorney duly authenticated as required by law had to be made before the power could be conferred on another person to execute the document or to present it for registration. In the facts of that case the document bore only the signatures of the witness without anything to show that he was a Notary Public. It was observed that in any event there was no authentication by the Notary Public (if he was one) in the manner in which the law would consider adequate. The authentication had occurred in California and there was nothing to show that the document has been subscribed or sworn before him.

41. We have given our thoughtful consideration to the vital issue about the validity of the Power of attorney. It is not in dispute that the Power of Attorney is in the given format. It is also not in dispute that as per the terms & conditions of the RFP, the Power of Attorney was required to be notarized. No prescribed manner of notarization was specified.

42. The aforesaid aspect become material by reason of the fact that vide letter dated 22.11.2010 a check list was issued which prescribed the manner of notarization and the specific endorsement which was required to be made by a Notary was set out. This was subsequent to the contract in question and thus Respondent No. 1 may have become wiser to provide for a prescribed form of notarization. However, this was not so as observed above in respect of the tender in question.

43. There is no prescribed manner of authentication by a Notary. In the present case the Notary has affixed his seal and signed it and put down the seal of attestation. This is the manner in which such notarization take place in Delhi. The judgment cited on behalf of the Respondents are not of much assistance as they only deal with the general principles set out in Section 85 of the Evidence Act or are in the given facts of the case as in Jugraj Singh and Anr. case (supra) where the very identity of the person who was supposed to be a Notary was in doubt. There was nothing to show that the person was a Notary Public in California. There is, of course, no doubt about the twin principles set out aforesaid for the purposes of drawing a presumption u/s 85 of the Evidence Act. The Advanced Law Lexicon of P. Ramanatha Aiyar referred to in this behalf also provides that authentication is to confirm the identity of the person and further to test the authenticity of a signature. This has, in fact, been done. In our considered view, the real question is whether there is a defect in the Power of Attorney by reason of there being a typed date of 12.8.2010 while the date of acceptance and attestation by the Notary was 19.8.2010. This discrepancy is sought to be

explained by the Petitioner by stating that the document was typed on 12.8.2010 but was presented for attestation by Mr. N. Seethaiah on 19.8.2010. Mr. N. Seethaiah's signature does not bear a date below and the specification of the address of the company at Hyderabad can hardly draw a conclusion that it was executed at Hyderabad. The format does not prescribe the place to be mentioned where it is executed. The acceptance is on 19.8.2010. The question is - has the Petitioner been able to explain this discrepancy and whether it is permissible for the Petitioner to explain away this discrepancy?

44. 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 M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, . 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.

45. We must keep in mind that the objective of execution of the Power of Attorney is to give authority to the person to bind the bidder. It is not a financial term nor an eligibility term but merely the authority to file the bid. A certain amount (in the present case Rs. 3.00 lakh) has already been charged at the stage when the RFP was issued. The bid is also accompanied by a bank guarantee of Rs. 14.79 crore. Thus, it is not a question of there being a non-serious bid or somebody backing out of the bid. In order for there to be a proper authenticity of the Power of Attorney an extra condition of notarization is provided. Peculiarly, such notarizations are not required for the other set of Power of Attorney in case of a bid made by a consortium. This itself shows the seriousness attached to the issue of notarization!

46. A typographical error of a date in the Power of Attorney when it is duly signed, accepted and notarized can at worst be a technical defect. In fact, it is for such situations that Clause 6.2 has been provided for Respondent No. 1 to consult the bidder for receiving any clarification or information. The Petitioner, thus, gave the clarification under the cover of a letter dated 23.11.2010 and even sent the certificate of the Notary duly certifying to the authentication. This is not a case where there were some modification being sought or in that sense some additional material is sought to be incorporated in the bid. It does appear that the decision to impose a strict requirement in respect of the manner of Power of Attorney was taken simultaneously when the present bid was being scrutinized and that is the reason the check list has been subsequently drawn and circulated vide letter dated 22.11.2010. The bid in the present case was opened on 16.11.2010. The future bidders could be enlightened by a format of attestation specifically required but that was not so in the case of the Petitioner.

47. We are, thus, of the considered view that the bid of the Petitioner ought not to have been treated as a non-responsive bid but the Petitioner could at best have been called to issue a clarification which in any case was available with

Respondent No. 1 under the cover of the letter dated 23.11.2010 as per the certificate issued by the Notary Public. The other documents submitted before this Court are filed to really demonstrate in one sense that there was no falsity in the stand taken by the Petitioner [flight tickets, mobile bill (showing user from Delhi), etc.]. We have already observed aforesaid that if the bid of the Petitioner is found to be in order undisputedly it will result in the saving of Rs. 75.00 crore over a period of fifteen (15) years.

48. The bid of the Petitioner is, thus, required to be treated as responsive, opened and process.

Forfeiture of the Bank Guarantee:

49. The forfeiture of the bank guarantee is a direct consequence of the bid being declared non-responsive. Once the bid is responsive there is no question of forfeiture of the bid amount. We may, however, notice that submissions were advanced by the parties as to why even if the bid of the Petitioner was to be treated as non-responsive on account of the Power of Attorney, the bid security amount was not liable to be forfeited. Interestingly, the Petitioner and Respondent No. 4 were ad idem on this issue possibly because they are both bidders who may face such situation at different stages of time.

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 Rs. 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 co-relation 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 (UOI)*, 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 Rs. 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 Rs. 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.

Conclusion:

57. The RFP submitted by the Petitioner is, thus, held to be a responsive and the decision to declare it as a non-responsive bid on grounds of alleged defect in the Power of Attorney is held to be illegal and invalid. There is, thus, no question of there being any encashment of the bid security amount to the extent of 5 per cent, which in any case could not have been encashed as held aforesaid. The RFP submitted by the Petitioner be processed in accordance with law and the contract should, thus, be awarded as per the result of the scrutiny of all the bids including the bid of the Petitioner.

58. The writ petition is allowed in the aforesaid terms.

59. We had called upon the parties to file their bill of fee & costs. The amount stated by the Petitioner is Rs. 24,82,538.00, by Respondents 1 & 3/NHAI is Rs. 3,58,300.00 and by Respondent No. 4 is Rs. 23,23,750.00. We, however, in the given facts & circumstances of the case grant cost to the Petitioner of Rs. 7,27,538.00 excluding the fee of the second senior counsel to be paid by Respondents 1 & 3/NHAI.