

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

**SUBJECT : CODE OF CIVIL PROCEDURE**

W.P.(C) NO.7354/2008 and CM Nos. 14248/2008 (stay), 16324/2008

Reserved on : 11th November,2008

Date of Decision : 5th December, 2008

TITAGARH WAGONS LTD. ....

Through : Petitioner  
Mr. A.S. Chandioke,  
Sr. Advocate, with  
Ms. Maneesha Dhir,  
Ms. Tripti and Ms. Purti  
Marwaha, Advocates.

Versus

CONTAINER CORP. OF INDIA LTD. ....

Through : Respondent  
Mr.B. Datta, ASG with  
Mr. R.K. Joshi and  
Mr. Jyotindra Kumar,  
Advocates.

CORAM:  
HON'BLE MR. JUSTICE MUKUL MUDGAL  
HON'BLE MR. JUSTICE MANMOHAN

MUKUL MUDGAL, J.

1. The principal question which arises in the present writ petition relates to the issue raised by the petitioner as to whether the bids submitted by the petitioner M/s. Titagarh Wagons Ltd. were not responsive as concluded by the respondent M/s. Container Corporation of India Limited and as to whether the petitioner's conduct is such so as to disentitle it to seek equitable relief under Article 226 of the Constitution.

2. The petitioner's case is that when the petitioner submitted the bid, due to a clerical mistake, the bank guarantee for a sum of Rs.20 lakhs accompanying the bid was valid upto 24th January, 2009 i.e. the validity of the bid period, instead of 30 days beyond the validity period of the bid, as required by the tender conditions. The requirement in question was stipulated by clause 13 which reads as under: - Bid Security 13.1 Pursuant to Clause 8, the Bidder shall furnish, as part of its bid, bid security of Rs.20,00,000.00

(Rupees Twenty Lakhs only) 13.2 The bid security is required to protect the Purchaser against risk of Bidders conduct, which would warrant the security's forfeiture, pursuant to Clause 13.7. (emphasis supplied) 13.3 The bid security shall be in the currency of quotation and shall be in one of the following forms: a) An unconditional bank guarantee issued by State Bank of India or any Nationalized Bank/Scheduled Commercial Bank valid for 30 days beyond the validity of the bid in the performa given at Section-VIII of the Bid Documents. b) A demand draft in favor of Container Corporation of India Ltd. payable at New Delhi. 13.4 Any bid not secured in accordance with Sub-Clauses 13.1 and 13.3 will be rejected by the Purchaser as non-responsive and such bids will not be opened. 13.5 Unsuccessful Bidders bid security will be discharged/returned not later than 30 days after the expiration of the period of bid validity prescribed by the Purchaser, pursuant to Clause-14. 13.6 The successful Bidder's bid security will be discharged upon the Bidder's executing the Contract, pursuant to Clause-33, and furnishing the performance security, pursuant to Clause 34. 13.7 The bid security may be forfeited: (a) If a Bidder withdraws or modifies his bid during the period of bid validity specified by the Bidder on the Bid Form; or (b) In case of a successful Bidder, if the Bidder fails: (i) To sign the Contract in accordance with Clause-33; or (ii) To furnish performance security in accordance with Clause-34. (emphasis supplied)

3. The petitioner then contended that on 26th July, 2008, upon realizing his mistake on 22nd July, 2008 that the validity of the bank guarantee was upto 24th January, 2009 instead of 23rd February, 2009 as required by the tender conditions, it directed the Syndicate Bank to extend the bank guarantee upto 24th March, 2009 and the said Bank, at the request of the petitioner, by a letter dated 26th July, 2008 addressed to the Respondent, extended the validity of the bank guarantee upto 24th March, 2009. He further contended that the petitioner has fulfilled the essential eligibility criteria of the bid and his tender could not be rejected on the basis of a mistake which was capable of being cured and was not a material term of the tender.

4. The main plea of the petitioner was that on 28th July, 2008, when the bids were opened at 11.30 a.m., a clarification was sought by the respondent from the petitioner as to why the bank guarantee by him was valid only upto 24th January, 2009 and upon this query, the petitioner clarified that the amendment letter was not annexed with the original bank guarantee owing to some mistake and they were under the impression that the bank guarantee issued by the Syndicate Bank on 26th July, 2008 was directly sent to the respondent. It is contended that the said bank guarantee by the Syndicate Bank extending the period of validity was faxed to the respondent on 28th July, 2008 and the respondent then proceeded to open the technical bid of the petitioner, which according to the petitioner amounted to an acceptance by the respondent that the petitioner's bank guarantee was in order. The petitioner has also relied upon the communication on 12th September, 2008 issued by the respondent in accordance with the two clarifications given by the RITES to submit that this communication showed that the extended bank guarantee given by the petitioner stood accepted and no infirmity was found in it. The writ petition was filed on 13th October, 2008 when the price bid of the petitioner was disregarded as non-responsive by the respondent.

5. The learned Senior Counsel for the petitioner, Mr. A.S.Chandioke, contended that the period of validity of the bank guarantee was, at best, a curable irregularity, which was capable of being cured and was not a material term of the tender. Reliance has been placed on the judgment in the case of Poddar Steel Corporation vs. Ganesh Engineering Works and Ors. (1991) 3 SCC 273 where in paragraph 6 and 8, the court held as follows:

6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka (1990) 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However, it remains to be seen as to which of the two clauses, the present case belongs.

7. XXX XXX XXX XXX XXX XXX XX

8. In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of respondent 1 filed before the High Court. The appeal is accordingly allowed with costs throughout. (emphasis supplied) 6. Reliance was also placed on the judgment of this Court in the case of Kapsch Metro JV vs. Union of India and Anr. 140 (2007) DLT 378 (DB) where the court held as follows:- 3.(a) xxx xxx xxx (b) xxx xxx xxx (c) xxx xxx xxx (d) The petitioners upon

realizing the fact that the Bank Guarantee was in effect required to be from the rescheduled date of the opening of the bid, i.e., 22nd January, 2007, and not from 5th January, 2007, acted promptly by rectifying the same and thereby furnishing the amended Bank Guarantee dated 1st February, 2007 for a period of 180 days from the revised date of bid opening and valid upto 21st July, 2007. The amended bank guarantee was sent to the NHAI by the petitioner vide letter dated 4th February, 2007. (e) The petitioner apprehending rejection of the bid on the ground that the Bank guarantee was made in conformity only after the opening of the bid despite the fact that the original Bank guarantee was valid for a period of 180 days with effect from the non-rescheduled date of opening of bid that is 5th January, 2007, made a representation on 12th February, 2007 to the respondent No.2 indicating the bonafide mistake and informing them about the rectification of the same. 4. xxx xxx xxx 5. The petitioners have been conscientious enough by updating the EMD on their own after coming to know of the technical non-compliance. We fail to see how the Respondent No. 2 can claim that public interest would not be subserved by the participation of the petitioner. Wider competition in such circumstances is always in public interest and therefore, we do not find that there is sufficient reason for Respondent No. 2 to exclude the petitioners' bid for such a minor discrepancy and that too one which was cured on a timely basis suo moto by the petitioner. In our view, since public interest requires a wider participation of bidders to ensure healthy competition, the dictum laid down by the Hon'ble Supreme court in M/s Poddar Steel Corpn.'s case (supra) would be clearly applicable and the enforcement of the validity period of the EMD Clause by the respondent No. 2 by insisting on the literal compliance of the 180 day validity period would not be justified. At the highest, the deficiency was of the 17 days period in the EMD of a 180 validity period and this too was subsequently altered in order to conform to the prescribed requirement. We are of the view that in this case, the time lag of 17 days is a technical irregularity of little significance and is worthy of being waived as per the dictum laid down by the Hon'ble Supreme Court in M/s Poddar Steel's case (supra). Furthermore, the same has been set right and is now fully compliant with the requirements of the tender. In our view, this is an eminently fit case where strict literal compliance would not subserve public interest or indeed the interest of justice. In so far the judgments relied upon by the respondent No. 2 is concerned, we are of the view that they are not applicable in the instant case because Respondent No. 2 is being unreasonable by not even allowing the petitioners bid a fair consideration especially considering that there has been no accrual of unfair advantage to any of the parties. (emphasis supplied)

9. The learned Senior Counsel for the petitioner further contended that the bid of the petitioner could have been rejected at the initial stage only. Once the bid has been processed then the respondent has no right to reject the bid of the petitioner. In support of his contention, the learned senior counsel for the petitioner relied upon clause 13.4 and 14.1 of the bid security. Laying emphasis on Section 28 of the Indian Contract Act, 1872, the learned Senior Counsel also contended that any agreement in restraint of legal proceedings which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights is void. He contended that no

pleadings had averred that the extended bank guarantee as furnished by the petitioner was conditional.

10. Mr. B. Dutta, the learned Additional Solicitor General has relied upon the fact that the original bank guarantee was valid upto 24th January, 2009 and submitted that while the bank guarantee may have been unconditional but the extension as accepted by the respondent on 29th July, 2008 was not unconditional and it was conditional upon filing of a suit or action to enforce a claim and demand under the guarantee. The condition of providing an unconditional bank guarantee valid for 30 days beyond the validity of the bid was absolutely mandatory as per Clause 13.1 and 13.3. of the bid security. Section VIII which provides the format of the Bid Security form also refers to clause 13 of the Section II of the Instructions to Bidders which lays down the conditions of the obligation to the Bidders for providing bank guarantee and clearly lays down that the guarantee should remain in force upto and including 30 days after the period of the bid validity and any demand in respect thereof should reach the bank not later than the above date. The said bid security form of the Container Corporation of India Ltd. under Section 8 reads as follows: CONTAINER CORPORATION OF INDIA LTD. SECTION VIII (See Clause 13 of Section II Instruction to the Bidders) BID SECURITY FORM Whereas (hereinafter called the Bidder ) has submitted its bid dated .. for the supply of bogie container flat wagons (hereinafter called the Bid ). KNOW ALL MEN by these presents that WE .. of having our registered office at (hereinafter called the Bank ) are bound upto Container Corporation of India Ltd., having its registered office at C-3, Mathura Road, Opp. Apollo Hospital, New Delhi-110076 (INDIA) (hereinafter called the Purchaser ) in the sum of .. for which payment well and truly to be made to the said Purchaser, the Bank binds itself, its successors and assigns by these presents. Sealed with the Common Seal of the said Bank this . day of 2006. The CONDITIONS of this obligation are: 1. If the Bidder withdraws or modifies its Bid during the period of bid validity specified by the Bidder on the Bid Form; or 2. If the Bidder, having been notified of the acceptance of its bid by the Purchaser during the period of bid validity: (a) fails or refuses to execute the Contract Form if required; or (b) fails or refuses to furnish the Performance Security, in accordance with the Instruction to Bidders; we undertake to pay the Purchaser up to the above amount upon receipt of its first written demand, without the Purchaser having to substantiate its demand, provided that in its demand the Purchaser will note that the amount claimed by it is due it owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions. This guarantee will remain in force up to and including thirty days after the period of the bid validity, and any demand in respect thereof should reach the Bank not later than the above date. (Signature of the Bank)

11. He further submitted as follows: - (a) Last date for submitting the bids was 26th July, 2008 and the bids were finally opened on 28th July, 2008. The original bids submitted by the petitioner did not have the unconditional bank guarantee valid upto 30 days beyond the validity of the bid. (b) The petitioner also wrongly claimed that on 28th July, 2008, clarification on opening of the bids was sought by the respondent. (c) The plea of opening of the bid security and the technical bids amounting to waiver of the tender condition has also been denied. It was stated by him that the bids were opened

only in accordance with clauses 17.1 and 20.1 of the Instructions to Bidders . The said clauses read as under:- Cl.17.1 The Bids must be received by the Purchaser at the address specified under Sub-Clause 16.2 not later than 11.00 A.M. on July 28, 2008. The Bid Security and First Stage Technical Bids shall be opened at 11.30 AM on July 28, 2008. In the event of the specified date for the submission of Bids being declared a holiday for the Purchaser, the Bids will be received upto the appointed time on the next working day. Cl.20.1 The Purchaser will open the Bid Security and First Stage Technical Bids that is Cover-O and Cover-1, in the presence of Bidder s representatives who choose to attend, at 11.30 hrs on July 28, 2008 at the following location: Office of Container Corporation of India Ltd. C-3, Mathura Road, Opp. Apollo Hospital New Delhi-110076. The Bidder s representatives who are present shall sign a register evidencing their attendance. In the event of the specified date of Bid opening being declared a holiday for the Purchaser, the Bids shall be opened at the appointed time and location on the next working day. (d) The letter dated 26th July, 2008 was received from the Syndicate Bank, Calcutta by the respondent only on 29th July, 2008 as recorded in the Receipt and Discharge Section of the respondent. It has also been suggested that the date of 26th July, 2008 has been overwritten over the original date of 29th July, 2008.

12. The respondent has pleaded as follows in its counter affidavit: - .On July 29, 2008, the petitioner had given a letter from the Syndicate Bank, Kolkata purporting to be dated July 26, 2008. The mere perusal of the letter dated July 26, 2008 reveals that the word 6 in the date of the letter July 26, 2008 has been interpolated. The correction may have been carried out after opening of the bids to make it inconformity with the tender stipulations. The said letter was received in the receipt and dispatch section of the respondent on July 29, 2008 under diary no.6583. A copy of the said letter is enclosed hereto as Annexure R-1. The concoction and the interpolation in the said letter is apparent even to a naked eye and the same is also apparent on comparison of the letter dated July 23, 2008 issued by the Bank and the letter dated July 26, 2008 .. .The extended bank guarantee was received on July 29, 2008 i.e. after the scheduled date and time for submission of the bid security and the respondent craves leave of this Hon ble Court to refer to paragraph xv of the Brief Facts hereinbefore. These averments regarding the receipt of the extension of the Bank Guarantee by the respondent on 29th July, 2008 have been met with the following pleas in the rejoinder by the petitioner: - That the respondent has further made bald allegations against the petitioner, which are denied. The respondent has submitted that the number 6 in the letter dated 26.07.2008 has been interpolated. Such an allegation is denied as the letter dated 26.7.2008 is an extended bank guarantee and an official document issued by a reputed nationalized bank. Moreover, the correction in the date of the extended bank guarantee has been duly rectified and initialed by the officer of the Syndicate Bank and thus the allegation of interpolation is baseless. The extended bank guarantee dated 26.7.2008 was issued on 26.7.2008 itself, on the request of the Petitioner made on the same date since the petitioner on realizing the error in respect of the validity of the duration of the bid security, had contacted its bankers, Syndicate Bank on 26.7.2008 and requested to extend the existing Bank Guarantee No. 57/08 till 24.03.2009 and had further also requested the bank to directly fax and courier the copy of the same to the respondent. Copy of the letter dated 26.7.2008 issued by the petitioner to Syndicate Bank is enclosed herewith as ANNEXURE-A1.

13. The main plea of the respondent, therefore, is that the bids were opened by the respondents only in accordance with clauses 17.1 and 20.1 of the Instructions to Bidders and the extended bank guarantee was not submitted by the petitioner within the stipulated time i.e. 11.00 a.m. on 28th July, 2008. The respondent has not waived the tender conditions of providing the bid security of an unconditional bank guarantee as mentioned in the bid documents. The requirement of filing of a written claim or demand was there in the original bank guarantee in paragraph 4, which reads as under:- Unless a demand or suit or actions to enforce a claim under the guarantee is filed against us by 24/01/2009, all your rights under this guarantee shall be forfeited and we shall be relieved and discharged from all liability thereafter. XXXX XXXX XXXX XXXX 6. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 24/01/2009. Indisputably on the date of the opening of the tenders the petitioner's bid was not responsive as the bank guarantee was not valid for a period beyond 30 days of the bid opening date i.e. 28th July, 2008. This defect was sought to be remedied by the petitioner only on 29th July, 2008 by a letter sent to the respondent by the petitioner's bank, i.e. Syndicate Bank.

14. In our view, the period of the validity of the bank guarantee by the petitioner cannot be termed as a curable irregularity. The date of the validity of the bank guarantee was a material term of the tender clause creating a mandatory obligation upon the parties to follow. The purpose of providing an unconditional bank guarantee as bid security is to protect the purchaser against such conduct of the bidder which may require the respondent to invoke the bank guarantee. The whole purpose of providing unconditional bank guarantee as bid security valid for 30 days beyond the validity of the bid, thus, guarantees the bona fide conduct of the bidder, and thus, is a mandatory condition in the tender process. Even assuming that the facts of the petitioner's case are similar to the facts of Kapsch Metro JV (supra) and that the petitioner could rely upon the dicta laid down in the above judgment which relied upon the Hon'ble Supreme Court's judgment in Poddar Steel's case (supra), then also Article 226 being an equitable jurisdiction demands that the petitioner must approach this court with clean hands. The petitioner's case is twofold that the petitioner had realized its mistake of the validity period of the bank guarantee on 26th July, 2008 and its banker Syndicate Bank extended the validity of the Bank Guarantee on 26th July, 2008 itself. The petitioner claims to have been reliant upon the bank which according to the petitioner was presumed to have directly sent the bank guarantee to the respondent. It is even claimed that the Syndicate Bank has faxed on 28th July, 2008 the extension of the validity of the period of bank guarantee to the respondent.

15. Thus, the petitioner sought to rely upon the plea that the date on the letter of the Syndicate Bank has not been altered. All that is filed in support of this plea is a self-serving letter of the petitioner dated 26th July, 2008 addressed to the Syndicate Bank seeking extension from the Syndicate Bank of the validity period of the Bank Guarantee. This letter itself does not show, nor is it averred as to how this letter was sent. Ex facie the letter of the Syndicate Bank granting extension of the validity period bears an overwriting on the date of such letter. No copy of the fax sent by the Bank on 28th July, 2008 has been annexed. In fact, the petitioner could have easily filed some

correspondence or the documentation from the Bank to show that the Bank guarantee was extended on 26th July, 2008. Since, no such proof has been furnished, we are fully satisfied that the petitioner's version of extension of the bank guarantee has been created only for the purpose of this writ petition and consequently the petitioner does not deserve to have the equitable jurisdiction of the writ court exercised in its favour under Article 226 of the Constitution.

16. In our view the respondent's plea that the extension of bank guarantee was received from Syndicate Bank only on 29th July, 2008 is worthy of belief. It defies credibility to persuade us to believe that in a contract of such heavy stakes the petitioners would rely upon merely the bank communicating the validity extension to the respondents.

17. The learned counsel for the petitioner has also contended that once the bid has been processed, then, relying on clause 13.4 and 14.1 of the Instructions to Bidders, it amounts to a waiving of the tender conditions. However, we are unable to agree with the above contention of the petitioner as under Clause 16, 17.1 and 20.1 of the Instructions to Bidders, it was necessary and mandatory for the respondent to process the bids. In our view, it was the mandatory requirement of the above clauses which was complied with by the respondents. Therefore, the conduct of the respondent, thus, cannot be construed to be such as to waive the requirements of the tender conditions.

18. In our view the bids were opened only in accordance with clauses 17.1 and 20.1 of the Instructions to Bidders which clearly provided that the bids must be received by the purchaser not later than 11.00 a.m. on 28th July, 2008. The purpose of providing an unconditional bank guarantee as bid security is to protect the purchaser against such conduct of the bidder which may require the respondent to invoke the bank guarantee. The whole purpose of providing unconditional bank guarantee as bid security valid for 30 days beyond the validity of the bid, thus, guarantees the bona fide conduct of the bidder, and thus, is a mandatory condition in the tender process. Thus, after taking into account the clauses 17.1 and 20.1, we are satisfied that the bids were opened as per the tender conditions and the mere opening of bids did not amount to any waiver of a defect in the bank guarantee.

19. We also do not agree with the contention of the petitioner that Section 28 of the Contract Act applies to the present case as it does not in any way restrain legal proceedings. The petitioner having participated in the bid is stopped from raising this plea. The most important aspect of the present case is that the petitioner has not fulfilled the essential eligibility criteria as laid down in the tender conditions.

20. After the judgment was reserved, an application was filed by the appellant to place on record additional documents. It sought to contain that Syndicate Bank itself had clarified that even its unconditional bank guarantee and further that similar bank guarantees have been furnished and accepted by the respondent. However, in our view, it is not the bank which can determine whether the nature of bank guarantee is unconditional or conditional. The terms of the bank guarantee need to be ascertained to

determine whether the bank guarantee is conditional or unconditional. After a careful examination of the terms of the bank guarantee, we are of the view that the extended bank guarantee as furnished by the appellant was unconditional. Even if it is assumed that similar bank guarantees have been accepted by the respondent earlier, it does not in any way make any difference, as a wrong done cannot justify another wrong and two wrongs never make a right.

21. Consequently, we are of the view that the writ petition deserves dismissal. Accordingly, the writ petition is dismissed along with all pending applications and stands disposed of.

Sd./-  
MUKUL MUDGAL,J

Sd./-  
MANMOHAN,J

5<sup>TH</sup> December, 2008