



forfeiture of the 'earnest money' the provisions of the Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. [Paras 31 and 33]

[79-C, E-F]

*Chairman of the Bankura Municipality, Bankura v. Lalji Raja and Sons (1953) SC 248 at 250; Maula Bux v. Union of India, [1969] 2 SCC 554; Saurabh Prakash v. DLF Universal Ltd., 2006 (12) SCALE 531, referred to.*

2. The acceptance of the bid herein was subject to order of this Court which by reason of the order of the Special Court or otherwise did not result in a concluded contract. The deposit was to be made within sixty days from the date of grant of sanction which would mean final acceptance of the bid, which was to depend upon the ultimate order which was to be passed by this Court. [Para 28] [78-H, 79-A]

3. When a sale would be held to be completed would, thus, depend upon the fact of each case. Indisputably, it will primarily depend upon the terms and conditions of the contract. But herein there was another supervening circumstance i.e. the interim orders passed by this Court. Having regard to the interim orders passed by this Court, the Judge, Special Court could not confirm the sale. It is true that the Judge, Special Court, in its order dated 22.01.2004 directed the highest bidder to comply with the conditions, but what escaped the notice of the Judge was that sanction could not have been granted on a provisional basis. If there could be only one order of sanction, the same would mean the final one and not the provisional one. That is how the parties including the Custodian understood the same. [Para 23]

[76-F-H, 77-A]

4. As per the terms and conditions of sale, the auction was to be held at two stages : (i) submission of the bid; and (ii) grant of sanction to the sale by the Special Court. When the bid was accepted, it was for the Special Court to confirm the sale. It was only when the sale is confirmed, which was to be done by way of grant of sanction thereto, the purchaser was to pay the balance of the purchase price. Only on payment of such purchase price, the auction purchaser would have been entitled to take delivery of possession. [Paras 15, 16 & 18] [74-B-E]

5. It may be true that whereas in a case where the sanctioning

**A** authority is the court itself and confirmation of sale would not be subject to approval from some other authority; acceptance of the sale itself would amount to sanction thereof. But situation became completely different in view of the orders passed by this Court. [Para 19] [74-F-G]

**B** *Bishan Paul v. Mothu Ram*, AIR (1965) SC 1994; *State of Uttar Pradesh v. Kishori Lal Minocha*, [1980] 3 SCC 8 and *Union of India and Ors. v. Messrs. Bhim Sen Walaiti Ram*, [1969] 3 SCC 146, referred to.

**C** 6. The question whether time was the essence of contract, is required to be considered having regard to the fact situation obtaining in each case. If the deposit was to be made from the date of final sanction of the offer, question of applicability of the said proposition of law could not arise. [Para 34] [79-G]

**D** *State of Maharashtra and Ors. v. A.P. Paper Mills Ltd.*, [2006] 4 SCC 209, distinguished.

*Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors.* (2006) 6 SCALE 220, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4512 of 2006.

**E** From the Final Judgment and Orders dated 22.6.2006 and 31.7.2006 of the Special Court (Trial of Offences Relating to Transactions in Securities) at Bombay in I.A. No. 131/2006 in Misc. Petition No. 4/2001.

Indu Malhotra, Gopal and Vikas Mehta for the Appellant.

**F** Arvind Kumar Nigam, Kamini Jaiswal, Shomila Bakshi, Sunita Dwivedi and Arvind Kumar Tewari for the Respondents.

The Judgment of the Court was delivered by

**G** **S.B. SINHA, J** : Introduction :

**H** 1. Application of terms and conditions of sale of properties in terms of the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short, 'the Act') is in question in these appeals which arise out of the judgments and orders dated 22.06.2006, 31.07.2006 and 23.06.2006 passed by the Special Court (Trial of Offences

Relating to Transactions in Securities) at Bombay in Intervention Application No.131 of 2006 filed in Misc. Petition No. 4 of 2001, Report No. 12 of 2006 in Misc. Application No.131 of 2006; and Misc. Petition No. 41 of 1999 respectively.

2. Before advertng to the questions as also the fact involved in each of these matters, we may at the outset notice that one Harshad Mehta was a person notified under the Act. The private respondents herein being his relatives were also notified (hereinafter referred to as 'the notified parties'). Apart from late Harshad S. Mehta, the Custodian had notified 29 entities in terms of Section 3 of the said Act, *inter alia*, comprising three of his younger brothers, his wife, wives of two of his younger brothers.

3. In the proceedings initiated before the Special Court various applications were filed. Properties belonging to the said late Harshad S. Mehta or other notified entities were put on auction. The auctioned properties comprised of commercial as also the residential ones. The residential properties, *inter alia*, were situate at Madhuli.

*Order of this Court :*

4. Notified parties questioned the validity and/or legality of the said auction sales. They ultimately came to this Court. Whereas auction sales in respect of the commercial properties were allowed to be completed by orders passed by this Court from time to time, the auction sale in respect of the residential properties was the subject-matter of the judgment of this Court in *Ashwin S. Mehta and Another v. Custodian and Others*, [(2006) 2 SCC 385] wherein, *inter alia*, it was directed :

“(viii) The learned Judge, Special Court shall allow the parties to make brief oral submissions which pointed reference to their written submissions. Such hearing in the peculiar facts and circumstances of this case should continue from day to day.

(ix) The learned Judge, Special Court while hearing the matter in terms of this order shall also consider as to whether the auction sale should be confirmed or not. It will also be open to the learned Judge, Special Court to pass an interim order or orders, as it may think fit and proper, in the event any occasion arises therefor.

A (x) We would, however, request the learned Special Judge,  
 Special Court to complete the hearings of the matter, keeping in  
 view of the fact that auction sale in respect of the residential  
 premises is being considered, as expeditiously as possible and not  
 later than twelve weeks from the date of the receipt of the copy of  
 B this order. Save and except for sufficient or cogent reasons, the  
 learned Judge shall not grant any adjournment to either of the  
 parties.

C (xi) The learned Judge, Special Court shall take up the matter  
 relating to confirmation of the auction sale in respect of the  
 commercial properties immediately and pass an appropriate order  
 thereupon within four weeks from the date of receipt of copy of this  
 order. If in the meanwhile, the orders of assessment are passed by  
 the Income Tax Authorities, the Custodian shall be at liberty to  
 bring the same to the notice of the learned Special Court which  
 shall also be taken into consideration by the learned Judge, Special  
 D Court.”

*Order of the Special Court :*

E 5. Pursuant to or in furtherance of the said directions, the question as  
 to whether the auction sale should be confirmed or not came up for  
 consideration before the learned Judge, Special Court. By reason of the  
 impugned order dated 22.06.2006 passed in Intervention Application No. 131  
 of 2006 in Misc. Petition No. 4 of 2001, it was held that the as the auction  
 purchaser had not deposited the balance amount within the period stipulated  
 under the terms and conditions of the auction, the earnest money deposited  
 F by the bidder was to be forfeited. By reason of the impugned order dated  
 23.06.2006 passed in Misc. Petition No. 41 of 1999, with the consent of the  
 Custodian and the notified parties, a fresh auction sale was directed to be  
 held.

G *Terms and Conditions of Sales :*

6. In the aforementioned backdrop of events, we may notice the  
 relevant terms and conditions of sale :

H “3. The offers should be submitted in a sealed envelope  
 superscribed with the words “Bid for sale in respect of

Residential Flats/Office Premises (mention the name of the property)". There shall be only one consolidated bid in respect of each of the following properties a) Maduli; b) Khar; c) Guru Krupa. In respect of other properties, single bid for a particular flat / property or combined bid for more than one flat / property is permitted; however, in such cases, the earnest money for consolidated bid would be 2% of the bid amount otherwise, the earnest money to be deposited for each property shall be as mentioned against respective property in the schedule. Separate tender form and Agreement will have to be submitted for each bid property.

4. The offers should reach at the office of the Custodian at 10th floor, Nariman Bhawan, 227 Vinay K. Shah Marg, Nariman Point, Mumbai-400 021 by 2.00 p.m. on the dates specified for each property described in the schedule written hereunder along with Demand Draft / Banker's cheque / Pay Order of a Public Sector Bank in favour of the Custodian, the Special Court payable at Mumbai towards earnest money for participating in the said auction for purchase of Residential Flats / Office Premises as indicated in the schedule written hereunder. This amount of earnest money will not carry any interest whatsoever.
7. If any dispute arises as to the last or highest bidding, the said property shall be again put up for sale at the last undisputed bidding and be resold at the discretion of the Custodian subject to the confirmation by the Special Court.
8. The sale is subject to sanction of the Hon'ble Special Court at Mumbai in the above case. The Court reserves the right to accept or reject any or all offers without assigning any reasons. The Court shall not be responsible in any way for not accepting any or all the offers received by the Custodian.
9. Within 60 days from the Hon'ble Special Court granting sanction to the sale, the Purchaser shall pay the balance of the purchase price and he/she will have to take possession/delivery of the said property from the Custodian at his/her own costs and risks.

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- A 12. If the purchaser does not pay the balance amount of the purchase price in the manner and within the time provided herein or the time specified by the Custodian or in any other respect fails to perform these conditions or any of these, the Custodian shall be at liberty to forfeit initial deposit made as per para 4 above and shall then proceed to resell the said property by public auction at such time subject to such conditions and in such manner as the Custodian shall deem fit and proper without previously giving any notice to the purchaser and the deficiency in price if any, occasioned by such resale together with all costs charges and expenses pertaining to the resale shall be made good by the defaulting purchaser and be recovered by the Custodian with interest on the amount of deficiency at the rate of 18% per annum from the expiration of the date of the aforesaid sanction of sale till payment and in the event of non payment of the whole or any part or any part thereof such sum, the same shall be recoverable by the Custodian from the defaulting Purchaser as and by way of liquidated damages while any excess on such resale shall not be available to such defaulting Purchaser as and by way of liquidated damages while any excess on such resale shall not be available to such defaulting purchaser. This condition shall be without prejudice to Custodian's right and remedies, which the Custodian shall otherwise have in law and/or under these conditions.
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- F 13. The Purchaser shall not be liable to pay outgoings if any, in respect of the said property for the period prior to the date of confirmation of sale and all such outgoings shall be paid by the Custodian till such confirmation.
- G 16. Upon payment of the purchase price in full and all costs, charges and expenses mentioned above, Custodian's authorized representative shall sign such papers and documents as may be necessary for transfer of the said property in the name of the Purchaser. Such documents of transfer shall be prepared and executed by and at the cost, charges and expenses of the Purchaser.
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20. In case of sale of the said property is not sanctioned by the Special Court in favour of the highest bidder or is set aside, the initial deposit made in terms of para 4 above shall be refunded to such bidder without interest, other costs, charges and expenses expended by him/her for the property. Except as herein above provided, the said initial deposit made in terms of para 4 above shall in no event be refunded. A
25. The time hereunder fixed for the observance and performance by the Purchaser of any of the obligations to be observed and performed by him/her under these conditions is and shall be deemed to be of the essence of the contract and any forbearance by the Custodian of strict observance and performance on the part of the Purchaser thereof shall not be construed as a waiver or relinquishment on the part of the Custodian who shall have the right at his option thereof to exercise his right and remedies as are available to him under these conditions and under law or in equity as arising from non-observance and non-performance thereof including the right to forfeit.” B
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*FACT:*

*Re Civil Appeal No. 4512 of 2006*

7. The bids were invited on 19.11.2004. The last date for receipt of the bids was 06.01.2004. Appeals were filed by the notified parties against the order dated 17.10.2003 whereby and whereunder the Custodian was directed to take all steps to sell the properties mentioned therein, which is the subject-matter of the present appeals. This Court directed that the bids may be received; but the same may not be opened till 05.01.2004. On 05.01.2004, the bids were directed to be opened, but the results were to be placed before this Court. Pursuant thereto, the bids were opened and the appellant was found to be the highest bidder in respect of Flat Nos. 61A and 61B, Gulmohar, S.V. Road, Khar, Mumbai. The valuation of the flat had been fixed at Rs. 60,00,000 (Rupees sixty lakhs), but his bid was of Rs.85,00,000 (Rupees eighty five lakhs). By an order dated 22.01.2004, the learned Judge, Special Court while accepting the bid, *inter alia*, directed : E

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A “...Accordingly, the bid submitted by Mr. Madhu Suri and Shiv Kumar Suri of Rs. 16,00,000 (Rupees sixteen lakhs) is *provisionally accepted*, subject to final order to be passed by the Hon’ble Supreme Court. The highest bidder whose bid has been accepted shall comply with the terms and conditions on which the bid is submitted. The Highest bidder shall be at liberty to appear before the Hon’ble Supreme Court on the appointed date.

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The initial deposit made by all the unsuccessful bidders shall be refunded to the bidders.”

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[Emphasis supplied]

8. This Court thereafter by an order dated 30.01.2004 directed :

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“The learned counsel for the Custodian brings on record the result of the bids and the order of the Special Court dated 17.12.2003 and 20.1.2004. The learned counsel for the Appellants proposes to offer his comments on the bids and the two orders of the Special Court. Let it be done within two weeks.

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The process of finalizing the bids according to law may be proceeded ahead by the Special Court. However, the finalization shall be subject to the result of these appeals.”

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9. It is, however, stated that the learned Judge, Special Court did not take any further step to finalize the bids pursuant thereto or in furtherance thereof. As indicated hereinbefore, there being no serious dispute in regard to auction sale of the commercial properties, this Court by an order dated 05.05.2004 directed that the interim order dated 31.01.2004 would not apply to the sale of commercial properties. Pursuant to the directions and/or observations made by the learned Judge, Special Court, an application was filed for impleadment by the appellant. An application was also filed for deposit of the amount in an interest bearing account of a Nationalized Bank.

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The said applications were allowed. The appeals were finally disposed of in the manner, as indicated hereinbefore, by an order dated 03.01.2006. According to the appellant, although he had filed an application for intervention and addressed several letters to the Custodian, as to when payments in terms of the auction sales were required to be made, it did not

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receive any response thereto.

10. By reason of the impugned judgment the learned Judge, Special Court, however, directed the Custodian to consider as to whether the earnest money deposited by the appellant was to be forfeited, stating :

“.....But in my opinion, this basic premise itself does not exist. The right in relation to residential properties of the Harshad Mehta group would have been created in favour of the Applicant, had the applicant complied with the Order passed by this Court accepting his bid. Essential condition of that Order was that the Applicant complies with all the terms and conditions of the bid. One of the most essential condition of the bid was that within 60 days of the acceptance of the bid, he deposits the balance amount of consideration. Failure of the Applicant to deposit the balance amount of consideration resulted in rejection of his bid and therefore, the Applicant lost all his rights in relation to the property which could have been created in his favour by the Order passed by this Court. The submission of the learned Counsel appearing for the Applicant that because the Supreme Court had prevented the custodian from handing over of possession, the Applicant was not obliged to deposit the balance amount of consideration, in my opinion, has no substance. For getting possession, the Applicant will have to create an entitlement in him to get possession. For creating that entitlement, he has to deposit full amount of consideration. The learned Counsel for the Applicant then submitted that the Supreme Court has observed that the question of confirmation of the bid should be considered by the Court after deciding the main application. In my opinion, that question will arise only in relation to those bidders who have complied with the Order accepting their bids and not in case like the Applicant, who has lost the rights that may have been created in his favour because of his default in complying with the terms of the bid. The Applicant, therefore, has no right in relation to the property which is the subject matter of the main application filed by the custodian. Therefore, the Applicant has no right to intervene. As I find that the Applicant was liable to deposit the balance amount of consideration as per the terms of the bid, the custodian is directed to consider whether the amount of earnest money deposited by the Applicant is to be forfeited or not and submit a report to the Court seeking appropriate orders. Application disposed of.”

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A 11. Pursuant to the said order, the Custodian submitted its report on 21.07.2006, recommending forfeiture of earnest money deposited by the appellant, whereupon the learned Judge, Special Court by reason of the impugned order dated 31.07.2006 directed :

B “3. Both submissions made on behalf of the bidder Yogesh Mehta have no substance. So far as bidders in relation to commercial properties are concerned, though they did not deposit the amount immediately because there was stay order from the Supreme Court operating, they deposited the amount immediately after the Supreme Court vacated the stay on sale of commercial properties. Therefore, it was open to the bidder C Mr. Yogesh Mehta to deposit the amount at least immediately after the Supreme Court decided the appeals by its judgment dated 03.01.2006. That there was a stay of all sale of the residential properties of Harshad Mehta, does not appear to be correct, because the Supreme Court in clear term has said D in its judgment dated 03.01.2006 that the Supreme Court is concerned with those appeals only which relate to sale of eight residential flats in a building known as Madhuli. The flat in relation to which the said Yogesh Mehta had submitted the bid admittedly is not in the building called Madhuli.

E 4. In these circumstances, therefore, in my opinion, the earnest money deposited by the bidder has to be forfeited. In this view of the matter, the report is disposed of with a direction F to the Custodian to forfeit the earnest money deposited by Mr. Yogesh Mehta Report disposed of.

The Custodian is, directed to issue a fresh advertisement for sale of the properties in accordance withlaw.”

G *Re Civil Appeal No. 4513 of 2006 :*

H Appellants herein are tenants of various flats in the building known as ‘Gurukrupa’. They were also put on public auction. The said properties also stood attached in terms of Section 3(3) of the Act. In response to the bids invited for sale of the said flats, an offer was made by the appellants. By an order dated 28.01.2004, the learned Judge, Special Court considered it

appropriate to tentatively accept the highest bid, subject to the final order passed by this Court, stating :

“.....Therefore, both the bidders increased their bids. The highest bid is of Rs.170,00,000 (Rupees One crore seventy lakhs) from the occupants of the building. The learned counsel for occupants is present and she states that occupants are not in a position to increase the bid. The other bidder namely West Cost Exim Pvt. Ltd. is absent.

I have perused the valuation report dated 24.1.2004. As per the valuation report, value of the property is about Rs. 1,60,00,000. Considering that the bid offered by the highest bidder is above the valuation given in the valuation report, as also considering that the bidders are the occupants of that building itself, in my opinion, it would be appropriate to accept the highest bid. *The highest bid of the occupants as per the report is therefore tentatively accepted.*

Learned Counsel for the highest bidder states that the bid was given on behalf of the occupants, and therefore, Conveyance should be executed in favour of the Nominees nominated by the joint occupants/highest bidders. The custodian is accordingly so directed.

In the Order dated 5.1.2004 passed in Civil Application No. D. No. 255575/03, D. No. 25620/03, D. No. 25644/03 and D. No. 25815/03, the Supreme Court has directed this Court to open the bid and place the result thereof before the Hon'ble Supreme Court. Therefore, the highest bid given by the highest bidder is tentatively accepted subject to final order to be passed by the Hon'ble Supreme Court in the above said proceedings.”

[Emphasis supplied]

13. Appellants herein in that case also filed applications for intervention before the Court.

14. The impugned order was passed ex parte. Appellants were not given any notice. The fact that the building had already been put on sale

A by way of auction and the bids had tentatively been accepted by the learned Judge, Special Court by an order dated 28.01.2004 was not brought to its notice.

*Question :*

B 15. The short question which, therefore, arises for consideration is as to what would be the interpretation of the said terms and conditions of sale.

*Findings :*

C 16. The auction was to be held at two stages : (i) submission of the bid; and (ii) grant of sanction to the sale by the Special Court.

17. The word 'sanction' has been used in clause 9 as also in clause 20.

D 18. Evidently, the terms and conditions set out hereinbefore did not contemplate a situation of this nature. When the bid was accepted, it was for the Special Court to confirm the sale. It was only when the sale is confirmed, which was to be done by way of grant of sanction thereto, the purchaser was to pay the balance of the purchase price. Only on payment  
E of such purchase price, the auction purchaser would have been entitled to take delivery of possession.

19. Whether confirmation of sale and sanction of auction connote two different things was not in issue. Parties also construed the terms of the  
F auction in the same manner. As noticed hereinbefore, acceptance of auction by the Special Court was a provisional one. It was subject to the order of this Court. It may be true that whereas in a case where the sanctioning authority is the court itself and confirmation of sale would not be subject to approval from some other authority; acceptance of the sale itself would amount to sanction thereof. But situation became completely different in  
G view of the orders passed by this Court. We would deal with the matter a little later, but we may at this juncture notice some decisions operating in the field at this juncture.

20. In *Bishan Paul v. Mothu Ram*, AIR (1965) SC 1994, this Court laid  
H down the law in the following terms :

“8. The rules which we have earlier reproduced show that the auction is held on a date fixed and is subject to a reserve price which is confidential. The officer conducting the sale declares at the fall of hammer who is the highest bidder. The highest bid is subject to the approval of the Settlement Commissioner or an officer appointed by him. A period of seven days must elapse before the bid is approved and there is also a limitation of seven days from the acceptance of the bid for making an application to set aside the sale. If the bid is approved and if no application meanwhile for setting aside the sale is made, the highest bidder is recognised as the auction purchaser and he is required to produce a treasury challan in respect of the balance of the purchase money within a period of fifteen days (which period may be extended without limit of time) before the Settlement Commissioner or the officer appointed by him. When the full purchase price is paid a certificate issues in Form No. XXII and is sent to the Sub-Registrar for registration. If the balance of the price is not paid, the amount of advance in deposit is forfeited and the auction purchaser has no claim to the property.

9. The passing of title thus presupposes the payment of price in full and the question is at what stage this takes place. Obviously, there are several distinct stages in the sale of property. These are: (a) the fall of the hammer and the declaration of the highest bid; (b) the approval of the highest bid by the Settlement Commissioner or officer appointed by him; (c) payment of the full price after approval of the highest bid; (d) grant of certificate; and (e) registration of the certificate.”

21. Yet again in *State of Uttar Pradesh v. Kishori Lal Minocha*, [1980] 3 SCC 8, this Court held :

“The question that remains to be answered is, even if there was no statutory provisions, whether there was a concluded contract between the appellant and the respondent under which the respondent was liable to pay 20,100 which represents the difference between the highest bid at the first sale and the price fetched at the resale. The sale proclamation containing the conditions of sale has not been produced. Assuming that the different clauses of

A Rule 357 barring the last part of the fifth clause embody the conditions of sale, it is clear from the second clause that in the absence of the final sanction of the Excise Commissioner, the bid cannot be said to have been finally accepted. It is not claimed by the appellant that the bid offered by the respondent was sanctioned by the Excise Commissioner. There was thus no concluded contract between the parties to make the respondent liable for the alleged loss....”

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22. Mr. Arvind Kumar Nigam, the learned counsel appearing on behalf of the notified parties has, however, placed strong reliance upon a decision of this Court in *Union of India and Others v. Messrs. Bhim Sen Walaiti Ram*, [1969] 3 SCC 146 wherein a distinction had been made between a situation where auction sale is conducted by an officer lower than the authority competent to approve the same and the acceptance of a bid by the officer presiding at the auction and holding that in the event the transaction is complete, failure on the part of the auction purchaser to deposit the prescribed amount, the Collector would be entitled to resell the licence, stating :

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“.....It is not disputed that the Chief Commissioner has disapproved the bid offered by the respondent. If the Chief commissioner had granted sanction under Clause 33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable for any shortfall on the re-sale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the respondent for payment of the deficiency in the price.”

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23. When a sale would be held to be completed would, thus, depend upon the fact of each case. Indisputably, it will primarily depend upon the terms and conditions of the contract. But herein there was another supervening circumstance i.e. the interim orders passed by this Court. The core question in this case would, thus, be whether having regard to the interim orders passed by this Court, the learned Judge, Special Court could confirm the sale. The answer thereto must be rendered in the negative. It is true that the learned Judge, Special Court, in its order dated 22.01.2004 directed the highest bidder to comply with the conditions, but what escaped the notice of the learned Judge was that sanction could not have been

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granted on a provisional basis. If there could be only one order of sanction, the same would mean the final one and not the provisional one. That is how the parties including the Custodian understood the same. In his report the Custodian stated :

“The Supreme Court has further directed at page 50 that “the learned Special Court shall proceed to pass appropriate orders as regard confirmation of the auction sales in respect of commercial properties”. The Custodian states that commercial properties are reflected at *Serial Nos. 1 to 13 of Exhibit 'A'*. In respect of these properties, where sale had been sanctioned by this Hon'ble Court subject to the orders of the Hon'ble Supreme Court, full payments have been received and possession of the properties has also been handed over to the purchasers.

The Custodian therefore prays that this Hon'ble Court may be pleased to confirm the sale of commercial properties as listed at Sl. Nos.1 to 13 in the table annexed hereto as Exhibit 'A'.

The Custodian also states that this Hon'ble Court had also confirmed sale of the properties at Serial Nos. 14 to 17 which were not described as commercial properties, subject to orders of the Hon'ble Supreme Court. However, in these cases only earnest money was received from the successful purchasers and possession could not be handed over in view of orders of the Hon'ble Supreme Court. No bids were, however, received in respect of properties at Serial Nos. 18 to 25 (various flats at Madhuli), Separate proceedings in respect of properties at S. No. 26 are being adopted.”

24. Before us a chart has been submitted, from a perusal whereof it appears that even the purchasers of commercial properties made final payments within the period 14.07.2004 and 05.01.2005. No payment, therefore, was said to have been made within a period of sixty days from the date of auction i.e. 05.04.2005.

25. If there had been a stay in regard to acceptance of the bid, it could not have been sanctioned. It could be sanctioned subject to the final order of this Court. Moreover, when this Court issued direction in regard to confirmation of sale, the matter ought to have been considered afresh.

A 26. In the peculiar facts and circumstances of this case, it is difficult to accept the submission of the learned counsel for the respondents that the bid was accepted finally, but only possession was to be taken by the purchasers at their own risk.

B 27. Strong reliance has been placed by Mr. Nigam upon a decision of this Court in *State of Maharashtra and Others v. A.P. Paper Mills Ltd.*, [2006] 4 SCC 209, wherein this Court in a case where the bidder had withdrawn its offer before the expiry of the period itself during which the bid was to remain operative, held :

C “.....Stand of the learned Counsel for the respondent that another request was made after the expiry of the 45 days period does not change the situation. Clause 5(v) clearly spells that once a tender is tendered the offer shall be considered valid for a period of 45 days from the date of tender sale in case of tenders which are under consideration. If this clause is read with Clause 5(iv) the position is clear that once a tender is tendered no changes can be made and no tender can be withdrawn. We are not concerned with a case of consequences after acceptance of the tender by the successful bidder. In such a situation loss sustained in the re-sale and the amount realized less, shall be recovered from the bidder while adjusting the amount paid by him towards earnest money deposit. In this case the acceptance of the tender was after the validity of the period. Therefore, this is not a case which could authorize the Government to recover the loss from the respondent. But it is a case of withdrawal of tender and the effect of it is to be considered. Since the tender is valid for a period of 45 days and withdrawal is before expiry of the period the earnest money is to be forfeited. The stand of the respondent that because of delay in declaration of the final sale results there was no bar on withdrawal of the tender is clearly untenable. Once the tender is withdrawn the result is that the tenderer who withdraws the tender cannot take the stand that since the final sale result has not been declared there is no bar on the withdrawal.”

H 28. The said decision cannot be said to have any application whatsoever to the fact of the present case. The acceptance of the bid herein was subject to order of this Court which, in our opinion, thus, by reason of the order

of the Special Court or otherwise did not result in a concluded contract. The deposit was to be made within sixty days from the date of grant of sanction which would mean final acceptance of the bid, which was to depend upon the ultimate order which was to be passed by this Court.

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29. We, therefore, are of the opinion that the impugned order cannot be sustained.

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30. In Misc. Petition No. 41 of 1999, evidently a consent order had been passed behind the back of the appellants. The said order, therefore, cannot also be sustained.

31. There is another aspect of the matter which also cannot be lost sight of. Forfeiture of the earnest money, in our opinion, in the aforementioned situation, could not have been directed.

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32. In *Chairman of the Bankura Municipality, Bankura v. Lalji Raja & Sons*, [1953] SC 248 at 250, this Court noticed the definition of the word 'forfeiture' in the following terms :

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"The word 'forfeiture' is defined in Murray's Oxford Dictionary The fact of losing or becoming liable to deprivation of goods in consequence of a crime, offence, or breach of engagement".."the penalty of the transgression" or a "punishment for an offence".

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33. While directing forfeiture of the 'earnest money' the provisions of the Indian Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. [See *Maula Bux v. Union of India*, AIR (1970) SC 1955 : [1969] 2 SCC 554 & *Saurabh Prakash v. DLF Universal Ltd.*, [2006] 12 SCALE 531].

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34. The learned counsel appearing for the Custodian submitted that the time was of the essence of contract. It may or may not be so. This question is required to be considered having regard to the fact situation obtaining in each case. If the deposit was to be made from the date of final sanction of the offer, question of applicability of the said proposition of law could not arise.

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35. We may, however, notice that in *Mcdermott International Inc. v. Burn Standard Co. Ltd. & Ors.*, [2006] 6 SCALE 220, this Court observed

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A that in a case of this nature, time was not of the essence and, therefore, Section 55 of the Contract Act was not attracted, noticing :

“This Court in *Hind Construction v. State of Maharashtra*, [1979] 2 SCC 70 stated:

B “7. The question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. [See Halsbury’s Laws of England, 4th ed., Vol.4, para 1179].”

C “8. Even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental. [See *Lamprell v. Billericay Union*, (1949) 3 Exch 283, 308; *Webb v. Hughes*, [1870] LR 10 Eq 281; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 KB 616].”

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*Conclusion :*

E 36. For the reasons aforementioned, the impugned judgments cannot be sustained. They are set aside accordingly and the matter is remitted to the learned Judge, Special Court for consideration of the matter afresh in the light of the observations made hereinbefore. The appeals are allowed. We may, however, hasten to add that it will be open to the learned Judge, Special Court, to pass an appropriate order in accordance with law. We F must also observe that we have not gone into the question in regard to the validity or otherwise of the auction sale. In the facts and circumstances of the case, there shall be no order as to costs.

K.K.T.

Appeals allowed.