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STATE OF HARYANA & ORS.

v.

M/S MALIK TRADERS
(Civil Appeal No. 7033 of 2011)

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AUGUST 17, 2011

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Contract:

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Tender – Inviting of bids for collection of toll – Terms of bid requiring to keep the offer/bid open for acceptance upto 90 days after the last date of receipt of bid – Letter of acceptance issued to bidder within the bid validity period – Bidder failed to deposit security amount and the first instalment within the stipulated period – Letter of acceptance issued to bidder cancelled and bid security forfeited – HELD:

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A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him – In the instant case, the bidder had agreed to keep the bid open for 90 days after the last date of receipt of the bid and that he would be bound by the communication of acceptance of the bid within the said period of 90 days –

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Therefore, the bidder could not have withdrawn the bid within the said 90 days – Besides, since the bidder withdrew his offer during the period of bid validity in violation of the agreement, the full value of Bid Security was liable to be forfeited – The purpose of bid security is to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence – Such conditions are included to ensure that only genuine parties make the bids – The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in

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violation of the agreement – High Court was not justified in quashing the letters accepting the bid of the respondent and the letter cancelling the acceptance of the bid and forfeiting the Bid Security – Order of High Court set aside – Contract Act, 1872 – s.5.

The respondent was the second highest bidder for the bid of collection of toll. In terms of the written offer/bid, the respondent agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. As the highest bidder failed to deposit the security amount and the first instalment within the stipulated period, the letter of acceptance issued to that bidder was cancelled and a letter of acceptance dated 26.11.2008 was issued to the respondent within the stipulated period of 90 days. Since the respondent also failed to deposit the security amount and the first instalment within the stipulated period, the letter of acceptance issued to the respondent was cancelled by Memo dated 17.12.2008, and the Bid Security of Rs. 20 lakhs was forfeited. Bids were re-invited for collection of toll and this time the respondent being the highest bidder, its bid was accepted and it deposited the security amount and the first instalment in terms of the letter of acceptance. Thereafter the respondent filed a writ petition before the High Court for refund of the forfeited amount of the Bid Security of Rs. 20 lakhs in respect of the earlier bid contending that before the receipt of the letter of acceptance, it, by letter dated 15.11.2008, had informed the authority concerned that it was not interested in the work and the amount of Bid Security be refunded to it. The writ petition was allowed by the High Court holding that since the offer was withdrawn before it was accepted, there could be no acceptance of the offer and, as such, there could not be any consequence of the writ petitioner not honouring the commitment. Aggrieved, the State Government filed the appeal.

A Allowing the appeal, the Court

B HELD: 1. It is true that as per s. 5 of the Contract Act, 1872, a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. It is also true that before receipt of the letter of acceptance dated 26.11.2008, the respondent had sent a letter dated 15.11.2008 withdrawing its offer. However, admittedly, in paragraph 8 of the written offer/bid, the respondent had agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. The respondent had also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the said period of 90 days. Therefore, respondent could not have withdrawn the bid before the expiry of the period of 90 days. It is not disputed that the acceptance of the respondent's bid was communicated to the respondent within the said period of 90 days. Therefore, the respondent was bound by the said acceptance of the bid, despite its withdrawal by the respondent in the meanwhile. [para 10] [379-D-H]

E 1.2 In paragraph 10 of the offer/bid, the respondent had also agreed that the full value of the Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the respondent withdraw or modify its offer/bid during the period of bid validity (90 days) or extended validity period. Since the respondent withdrew its offer during the period of bid validity in violation of the agreement in paragraph 8 of the offer/bid, the full value of Bid Security was liable to be forfeited in terms of the agreement contained in paragraph 10 of the offer/bid. Under the cover of the provisions contained in s. 5 of the Act, the respondent cannot escape from the obligations and liabilities under the agreements contained in its offer/bid. The right to

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withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. [para 10] [379-G-H; 380-A-F]

1.3 A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him. Forfeiture of such Bid Security amount does not, in any way, affect any statutory right u/s 5 of the Act. The Bid Security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement. [para 10] [380-E-H; 381-A]

National Highways Authority of India v. Ganga Enterprises & Anr. 2003 (3) Suppl. SCR 114 = (2003) 7 SCC 410 – relied on.

2. The High Court was not justified in quashing the letter dated 26.11.2008 accepting the bid of the respondent and the letter dated 17.12.2008 forfeiting the Bid Security amount of Rs. 20 lakhs. The order of the High Court is set aside. Consequently, the writ petition stands dismissed. [para 12] [383-C]

Case Law Reference:

2003 (3) Suppl. SCR 114 relied on para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7033 of 2011.

A From the Judgment & Order dated 07.07.2009 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 2266 of 2009.

B P.N. Mishra, Manjit Singh, Vivekta Singh, Harkesh, Kamal Mohan Gupta for the Appellants.

A.K. Sanghi, D.K. Garg, Dipak Kumar Jena, Minakshi Ghosh Jena, Abhishek Garg, Dhananjay Garg for the Respondent.

C The Judgment of the Court was delivered by

CYRIAC JOSEPH, J. 1. Leave granted.

D 2. This appeal is filed against the judgment dated 7.7.2009 rendered by a Division Bench of the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009, allowing the said writ petition. The appellants were the respondents in the writ petition and the sole respondent herein was the petitioner therein.

3. Facts in brief are stated hereunder:

E On 18.9.2008, the appellant State of Haryana invited tenders from interested persons for appointment as Entrepreneur/Agent for collection of toll at Toll Bridge over river Yamuna on Karnal-Meerut Road, near U.P. Border. The respondent M/s. Malik Traders was one of the 13 bidders who submitted tenders. As required by the terms and conditions of the Bid, all the bidders, including the respondent, deposited the Bid Security of Rs. 20 lakhs in the form of bank guarantee or FDR in favour of the Executive Engineer. M/s. Gaurav Traders who quoted Rs. 8,83,30,000/- was the highest bidder and the respondent M/s. Malik Traders who quoted Rs. 7,97,66,180/- was the second highest bidder.

H 4. As required under the terms and conditions of the bid, the respondent in paragraph 8 of its written offer/bid agreed to keep the bid open for acceptance upto 90 days after the last

date of receipt of bid. The respondent also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. In paragraph 10 of the offer/bid, the respondent also agreed that the full value of Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the respondent withdraw or modify its bid/offer after the last date and time for the receipt of bids, during the period of bid validity (90 days) or extended validity period.

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5. Since M/s. Gaurav Traders was found to be the highest bidder, a letter of acceptance was issued to it on 25.9.2008. However, it failed to deposit the security amount and the first instalment as per the letter of acceptance. Therefore, as per condition No. 9.3(B) of the Detailed Notice Inviting Tender (DNIT) and condition No. 6 of the acceptance letter, the Bid Security of Rs. 20 lakhs deposited by M/s. Gaurav Traders was forfeited and the letter of acceptance was cancelled and withdrawn vide letter dated 16.10.2008 of the competent authority. Thereafter, a letter of acceptance dated 26.11.2008 was issued to the respondent M/s. Malik Traders who was the second highest bidder. As per condition No. 6 of the said letter of acceptance, the respondent was required to deposit the security amount and the first instalment within 21 days from the receipt of the letter of acceptance. However, the respondent failed to deposit the security amount and the first instalment as required by the letter of acceptance. Hence, vide Memo No. 5029 dated 17.12.2008 issued by the Executive Engineer, Provincial Division No. III, PWD, B&R Branch, Karnal, the letter of acceptance was cancelled and withdrawn and the Bid Security of Rs. 20 lakhs was forfeited.

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6. It has to be mentioned that before receipt of the letter of acceptance, the respondent had sent a letter dated 15.11.2008 informing the Executive Engineer that the respondent was not interested in the work and, therefore, the

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A amount of Bid Security deposited on 19.9.2008 may be
 refunded. However, the appellants did not consider or act upon
 the said letter dated 15.11.2008 of the respondent, as the
 respondent had agreed to keep its bid open for acceptance
 upto 90 days after the last date of receipt of bid and the said
 B period of 90 days had not expired. In this connection, it has
 also to be mentioned that the letter of acceptance dated
 26.11.2008 was issued to the respondent before the expiry of
 the above-mentioned period of 90 days.

C 7. After cancellation of the letter of acceptance issued to
 the respondent and after expiry of the above-mentioned period
 of 90 days on 17.12.2008, the Executive Engineer vide Bid
 Notice No. 5160 dated 31.12.2008 re-invited bids for the
 collection of toll at toll point on the Bridge over river Yamuna
 on Karnal-Meerut Road. The respondent again participated in
 D the bid, offering an amount of Rs. 4,94,91,810/-. It may be noted
 that the amount offered by the respondent in the subsequent
 bid was less than its offer in the first bid with a difference of
 Rs. 3.03 crores. Since the respondent's bid was the highest
 bid among the bids submitted pursuant to the Bid Notice dated
 E 31.12.2008, a letter of acceptance was issued to the
 respondent on 6.2.2009. The respondent deposited the security
 amount and the first instalment in terms of the said letter of
 acceptance.

F 8. After the second letter of acceptance dated 6.2.2009
 was issued to the respondent, the respondent on 7.2.2009 filed
 C.W.P. No. 2266 of 2009 in the Punjab & Haryana High Court
 praying for quashing the first letter of acceptance dated
 26.11.2008 of the Executive Engineer and the Memo No. 5029
 dated 17.12.2008 cancelling the said letter of acceptance and
 G forfeiting the Bid Security of Rs. 20 lakhs. Even though the
 appellants opposed the grant of prayers in the writ petition, a
 Division Bench of the High Court vide order dated 7.7.2009
 allowed the writ petition quashing the letter of acceptance dated
 26.11.2008 and the Memo dated 17.12.2008 and also directed
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the Executive Engineer (appellant No. 5) to refund the Bid Security amount of Rs. 20 lakhs to the respondent within two months from the date of receipt of a copy of the order. Aggrieved by the said order dated 7.7.2009 passed by the High Court in C.W.P. No. 2266 of 2009, the respondents in the writ petition have filed this appeal.

9. We have considered the pleadings in the case, the submissions made by the learned senior counsel for the parties and the materials placed on record.

10. For allowing the writ petition, the only reason stated by the High Court is that, since the writ petitioner (respondent herein) had withdrawn its offer before it was accepted, there could be no acceptance of the offer and there could not be any consequence of the petitioner not honouring the commitment. However, we cannot agree with the view taken by the High court. It is true that as per Section 5 of the Indian Contract Act, 1872 (hereinafter referred to as "the Act"), a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. It is also true that before receipt of the letter of acceptance dated 26.11.2008, the respondent had sent a letter dated 15.11.2008 withdrawing its offer. However, admittedly, in paragraph 8 of the written offer/bid, the respondent had agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. The respondent had also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. Hence, the respondent could not have withdrawn the bid before the expiry of the period of 90 days. It is not disputed that the acceptance of the respondent's bid was communicated to the respondent within the said period of 90 days. Therefore, the respondent was bound by the said acceptance of the bid, despite its withdrawal by the respondent in the meanwhile. In paragraph 10 of the offer/bid, the respondent had also agreed that the full value of the Bid Security would be forfeited without prejudice to any

A other right or remedy available to the Executive Engineer or his
successor in office or his representative, should the respondent
withdraw or modify its offer/bid during the period of bid validity
(90 days) or extended validity period. Since the respondent
B withdrew its offer during the period of bid validity in violation of
the above-mentioned agreement in paragraph 8 of the offer/
bid, the full value of Bid Security was liable to be forfeited in
terms of the agreement contained in paragraph 10 of the offer/
bid. Thus, even though under Section 5 of the Act a proposal
C may be revoked at any time before the communication of its
acceptance is complete as against the proposer, the
respondent was bound by the agreement contained in its offer/
bid to keep the bid open for acceptance upto 90 days after the
last date of receipt of bid and if the respondent withdrew its
D bid before the expiry of the said period of 90 days the
respondent was liable to suffer the consequence (i.e. forfeiture
of the full value of Bid Security) as agreed to by the respondent
in paragraph 10 of the offer/bid. Under the cover of the
provisions contained in Section 5 of the Act, the respondent
cannot escape from the obligations and liabilities under the
E agreements contained in its offer/bid. The right to withdraw an
offer before its acceptance cannot nullify the agreement to
suffer any penalty for the withdrawal of the offer against the
terms of agreement. A person may have a right to withdraw his
offer, but if he has made his offer on a condition that the Bid
F Security amount can be forfeited in case he withdraws the offer
during the period of bid validity, he has no right to claim that
the Bid Security should not be forfeited and it should be
returned to him. Forfeiture of such Bid Security amount does
not, in anyway, affect any statutory right under Section 5 of the
G Act. The Bid Security was given by the respondent and taken
by the appellants to ensure that the offer is not withdrawn during
the bid validity period of 90 days and a contract comes into
existence. Such conditions are included to ensure that only
genuine parties make the bids. In the absence of such
H conditions, persons who do not have the capacity or have no
intention of entering into the contract will make bids. The very

purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.

11. In taking the above view, we are supported by the decision of this Court in *National Highways Authority of India v. Ganga Enterprises & Anr.* [(2003) 7 SCC 410] which was rendered in a similar case. In the said case, the appellant, National Highways Authority of India, by a notice, called for tenders by 31.7.1997 for collection of toll on a portion of a particular highway. The notice provided that toll plazas would be got completed by the appellant and handed over to the selected enterprise. The notice required the bidders to furnish: (i) a bid security in a sum of Rs. 50 lakhs in the form of a bank draft or bank guarantee, and (ii) a performance security in the form of a bank guarantee of Rs. 2 crores. The bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid or failed within the specified period to furnish the performance security and sign the agreement. The bid was to remain valid for a period of 120 days after the last date of bid submission. In terms of the tender document, the respondent firm gave its bid or offer and furnished a bank guarantee in a sum of Rs. 50 lakhs. It was an "on-demand bank guarantee" stating that it could be enforced on demand if the bidder withdrew his bid during the period of bid validity or failed to furnish the performance security or failed to sign the agreement. While the validity period of the bid was to end on 28.11.1997, the respondent withdrew its bid on 20.11.1997 and did not furnish the performance guarantee. Therefore, the appellant although found the respondent to be the highest bidder and accepted its offer on 21.11.1997, encashed the bank guarantee for Rs. 50 lakhs. The respondent then filed a writ petition in the High Court for refund of the amount. The High Court formulated two questions viz.: (a) whether the forfeiture of security deposit was without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition

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A was maintainable in a claim arising out of a breach of contract. Without considering Question (b), the High Court allowed the writ petition on the ground that the offer was withdrawn before it was accepted and thus no completed contract had come into existence. The High Court observed that in law a party could
B always withdraw its offer before acceptance. Therefore, it held that the invocation and encashment of the bank guarantee was illegal and void and was liable to be set aside. The appellant then approached the Supreme Court. Allowing the appeal, this Court held as follows:

C "In our view, the High Court fell in error in so holding. By
invoking the bank guarantee and/or enforcing the bid
D security, there is no statutory right, exercise of which was
being fettered. There is no term in the contract which is
contrary to the provisions of the Indian Contract Act. The
Indian Contract Act merely provides that a person can
E withdraw his offer before its acceptance. But withdrawal
of an offer, before it is accepted, is a completely different
aspect from forfeiture of earnest/security money which has
F been given for a particular purpose. A person may have
a right to withdraw his offer but if he has made his offer
on a condition that some earnest money will be forfeited
for not entering into contract or if some act is not
performed, then even though he may have a right to
G withdraw his offer, he has no right to claim that the earnest/
security be returned to him. Forfeiture of such earnest/
H security, in no way, affects any statutory right under the
Indian Contract Act. Such earnest/security is given and
taken to ensure that a contract comes into existence. It
would be an anomalous situation that a person who, by
his own conduct, precludes the coming into existence of
the contract is then given advantage or benefit of his own
wrong by not allowing forfeiture. It must be remembered
that, particularly in government contracts, such a term is
always included in order to ensure that only a genuine
party makes a bid. If such a term was not there even a

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person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”

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We respectfully agree with the above view of this Court.

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12. Hence, the High Court was not justified in quashing the letter dated 26.11.2008 accepting the bid of the respondent and the letter dated 17.12.2008 forfeiting the Bid Security amount of Rs. 20 lakhs. The appeal is allowed and the order dated 7.7.2009 passed by the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009 is set aside. Consequently, the writ petition stands dismissed. There will be no order as to costs.

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R.P.

Appeal allowed.

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