

A NATIONAL THERMAL POWER CORPORATION LTD.

v.

M/S. ASHOK KUMAR SINGH & ORS.

(Civil Appeal No. 1852 of 2015)

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FEBRUARY 13, 2015

[T.S. THAKUR, R.K. AGRAWAL

AND ADARSH KUMAR GOEL, JJ.]

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Government contracts: Forfeiture of earnest money on withdrawal of bids – Challenged – Held: In terms of condition no.2 of Special condition of contract, revocation of tender was by itself sufficient to call for forfeiture of earnest money – Therefore, respondents cannot contend that the right to withdraw the bid in terms of s.5 of the Contract Act, 1872 would entitle them to withdraw without suffering forfeiture of the earnest money.

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Allowing the appeal, the Court

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HELD: A plain reading of Condition no.2 of Special Conditions of Contract would show that one of the Special Conditions of Contract, subject to which the intending bidders could submit their bids, was that the earnest money accompanying the bid shall be forfeited in any one of the three contingencies referred to in Condition No.2. One of these contingencies was revocation of the tender, which would in the context in which the special provision is made imply any withdrawal of the bid/tender by the bidder concerned. The High Court appears to have confused revocation of

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the tender with revocation of the tender notice. The expression “revocation of tender” does not obviously refer to revocation by the appellant-corporation, who had issued the tender notice. There is a clear difference between revocation of a ‘tender’ and revocation of the ‘tender notice’. While revocation of the tender notice is the prerogative of the appellant-corporation, revocation of the ‘tender’ could be only by the bidder/tenderer concerned. The expression “revocation” may have been loosely used by the corporation, but, in the context in which the same appears in the Special Conditions of Contract only means withdrawal/cancellation/ recall of the bid or tender submitted by the bidder. The High Court was in manifest error in holding that the forfeiture did not fall within the purview of Condition No. 2. It is no longer possible for the respondents to contend that the right to withdraw the bid in terms of Section 5 of the Contract Act, 1872 would entitle them to withdraw without suffering forfeiture of the earnest money even in cases where the submission and receipt of bids is itself subject to the condition that in the event of a withdrawal of the bid the earnest money stand forfeited. [Paras 7, 13] [392-E-H; 393-A-C; 397-F-G]

National Highways Authority of India v. Ganga Enterprises and Anr. (2003) 7 SCC 410; 2003 (3) Suppl. SCR 114; *State of Maharashtra and Ors. v. A.P. Paper Mills Ltd.* (2006) 4 SCC 209; 2006 (3) SCR 719; *State of Haryana and Ors. v. Malik Traders* (2011) 13 SCC 200; 2011(10) SCR 372 – relied on.

Case Law Reference

2003 (3) Suppl. SCR 114 relied on. Para 9

2006 (3) SCR 719 relied on. Para 9

A **2011 (10) SCR 372** **relied on. Para 9**

CIVILAPPELLATE JURISDICTION: Civil Appeal No(S).
1852 of 2015

B From the Judgment and Order dated 11.10.2013 of the
High Court of Judicature at Allahabad Lucknow Bench
Lucknow in Misc. Bench No. 9620 of 2013.

S. K. Dhingra, Shefali Mitra, for the Appellant.

C Alka Agrawal, Ajay K. Agrawal, for the Respondents.

The judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

D 2. This appeal arises out of an order dated 11/10/2013
passed by the High Court of Judicature at Allahabad, whereby
M.B. No. 9620 of 2013 filed by the respondents has been
allowed and order dated 19/09/2013 passed by the appellant-
corporation declining refund of the earnest money quashed
E with a direction to the corporation to refund to the respondents
the amount deposited by them.

F 3. The appellant-corporation floated two tenders one
dated 17/10/2012 and the other dated 19/11/2012 for
construction of a shed and a boundary wall. The respondent-
contractor submitted two separate tenders in response to
the said tender notices enclosing therewith an amount of
Rs.4,41,000/- and Rs.3,34,000/- respectively towards
earnest money deposit. The tenders were in two parts, one
G technical and the other commercial. While the technical
bids were opened and found compliant, the financial bids
had yet to be opened when the respondents moved an
application addressed to the AGM (C&M) of the appellant-
corporation at Rai Bareilly withdrawing the bids submitted
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by it and asking for being excluded from consideration A
besides praying for refund of the earnest money deposited
with the bids. This was followed by a representation on 1/5/
2013 whereby the respondent once again asked for the return
of the earnest money deposited by them. In response to
the said representation, the appellant-corporation issued a B
letter dated 26/4/2013 stating that although the bids offered
by the respondent were not being considered, the prayer for
refund of earnest money could not be considered as the
same stood forfeited. Aggrieved by the said order, the C
respondent filed Writ Petition No. 9620 (MB) of 2013 before
the High Court challenging the refusal of refund of the earnest
money deposit. The said petition was opposed by the
appellant herein but was allowed by a Division Bench of the
High Court of Judicature at Allahabad, Lucknow Bench, in D
terms of a brief order holding that since respondent's case
was not covered by condition No. 2 of the Special Conditions
of contract of the appellant-corporation, the refusal of refund
of the earnest money deposited by the respondent was
unjustified. The High Court observed as under: E

*“Thus, the position being clear that the tender has
not been opened and the petitioner is not covered
under any of the clauses of condition No. 2, we
hereby quash the impugned order dated 19/9/2013
and direct the NTPC to refund the earnest money. F*

Writ petition, thus, stands disposed of.”

4. The present appeal assails the correctness of the
above order as noticed earlier. G

5. Appearing on behalf of the appellant-corporation Mr.
S.K. Dhingra argued that the High Court was in error in
directing refund of the earnest money deposited by the
respondent. It was contended that in terms of condition No. H

A 2 of the Special Conditions of Contract revocation of tender was by itself sufficient to call for forfeiture of the earnest money. Inasmuch as the High Court had held that the respondent's case was not covered under condition No. 2, it committed a palpable error.

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6. Condition No. 2 of Special Conditions of Contract may be extracted. It reads:

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"2. The earnest money shall be forfeited on the following grounds:

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a. On revocation of the tender or,

b. On refusal to enter into a Contract afterward to a Contractor or,

c. If the work is not commenced after the work is awarded to a Contractor."

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7. A plain reading of the above would show that one of the Special Conditions of Contract, subject to which the intending bidders could submit their bids, was that the earnest money accompanying the bid shall be forfeited in any one of the three contingencies referred to in Condition No. 2 (supra). One of these contingencies was revocation of the tender, which would in the context in which the special provision is made imply any withdrawal of the bid/tender by the bidder concerned. The High Court appears to have confused revocation of the tender with revocation of the tender notice. The expression

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"revocation of tender" does not obviously refer to revocation by the appellant-corporation, who had issued the tender notice. There is a clear difference between revocation of a 'tender' and revocation of the 'tender notice'. While revocation of the tender notice is the

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prerogative of the appellant-corporation, revocation of the

'tender' could be only by the bidder/tenderer concerned. The expression "revocation" may have been loosely used by the corporation, but, in the context in which the same appears in the Special Conditions of Contract only means withdrawal/cancellation/ recall of the bid or tender submitted by the bidder. In any such event, the earnest money deposited by the bidder would be liable to the forfeited is the plain and the simple meaning of the Condition No. 2 extracted above. The High Court was in manifest error in holding that the forfeiture did not fall within the purview of Condition No. 2.

8. It was next argued on behalf of the respondent that the provision empowering the appellant to forfeit earnest money upon withdrawal of offer even before such offer was opened/accepted by the authority inviting the same will be impermissible in law. The financial bid in the instant case, it was contended, had not been opened by the appellant-corporation although the technical bid was opened and had been found to be compliant. The respondent could even so, at any time, before acceptance of the offer withdraw his bid. Inasmuch as respondent had done so, he was well within his rights to demand refund of earnest money accompanying the bids. The forfeiture of the amount was illegal and the High Court justified in holding that the respondent entitled to a refund.

9. On behalf of the appellant-corporation it was contended that the submission of the bid itself was subject to the condition that it shall be accompanied by an earnest money deposit which was liable to be forfeited in the event of the withdrawal of the bid. Opening of the bid or acceptance thereof in terms of Section 5 of the Contract Act, 1872 was, in that view, wholly immaterial and irrelevant to the validity of the forfeiture ordered by the appellant-corporation. Reliance in support of the submission was placed by Mr.

A Dhingra upon the decisions of this Court in ***National Highways Authority of India v. Ganga Enterprises and another*** (2003) 7 SCC 410; ***State of Maharashtra and others v. A.P. Paper Mills Ltd.*** (2006) 4 SCC 209; and ***State of Haryana and others v. Malik Traders*** (2011) 13 SCC 200.

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10. In ***Ganga Enterprises*** case (supra) this Court was examining a similar question. The argument in that case, as is the position even before us, was that withdrawal of an offer before it was accepted could not result in forfeiture of the earnest money/security money given by the bidder. Repelling that contention this Court held that while a person may have a right to withdraw his offer at any time before the acceptance is conveyed to him if the offer is itself subject to the condition that the earnest money will be forfeited for not entering into contract or if some other act is not performed, then, even though he may have a right to withdraw his offer he will have no right to claim the refund of the earnest money. Forfeiture of the earnest money, in any such case, does not, observed this Court, infringe any statutory right under the Contract Act, 1872 for earnest/security is given and taken in such cases only to ensure that a contract comes into existence. What is important is that this Court recognised that absence of any term stipulating forfeiture of the earnest money may lead to situations where even those who do not have the capacity or intention of entering into a contract venture into the bidding process for at times extraneous reasons. The purpose of such a clause providing for forfeiture of the earnest money clearly was to see that only genuine bids are received. This Court observed:

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“... .. *The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is*

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accepted, is a completely different aspect from forfeiture of earnest/security money which has 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 withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/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 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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11. In **A.P. Paper Mills** (*supra*) this Court was dealing with almost similar situation where according to Clause 5 of the tender notice the tenderer would withdraw the tender only on the pain of forfeiture of the earnest money. While refusing to interfere with the forfeiture of the earnest money this Court observed:

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"... ..But it is a case of withdrawal of tender and

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A *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
B *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
C *result has not been declared there is no bar on the*
withdrawal.”

12. Reference may also be made to a decision of this
Court in **Malik Traders** (supra). Even in this case this Court
was dealing with the effect of withdrawal of a bid before
D acceptance in the context of Section 5 of the Contract Act,
1872. Rejecting the submission that the bid can be withdrawn
without any forfeiture in view of Section 5 of the Contract
Act, this Court observed:

E “... .. Thus, even though under Section 5 of the
Act a proposal 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
F *the bid open for acceptance up to 90 days after the*
last date of receipt of bid and if the respondent
withdrew its 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
G *security) as agreed to by the respondent in Para 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
H *under the 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 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 under Section 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. In the absence of such 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.”

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13. The upshot of the above discussion is that it is no longer possible for the respondents to contend that the right to withdraw the bid in terms of Section 5 of the Contract Act, 1872 would entitle them to withdraw without suffering forfeiture of the earnest money even in cases where the submission and receipt of bids is itself subject to the condition that in the event of a withdrawal of the bid the earnest money stand forfeited. Inasmuch as the High Court remained totally oblivious of the true legal position while directing refund of the earnest money, it committed an error.

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A 14. In the result this appeal succeeds and is, hereby, allowed. The order passed by the High Court is set aside and Writ Petition No.9620 (MB) of 2013 dismissed but without any order as to costs.

B Devika Gujral

Appeals allowed.