

(2006) 01 BOM CK 0045

In the Bombay High Court

Case No : O.L.R. No's. 46 with 10 of 2003 in Company Petition No. 13 of 2002

In Re: Narendra Dada Agro Industries Ltd.

Date of Decision : 09-01-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 10, 126, 5, 7, 74

Citation : (2006) 4 ALLMR 586 : (2006) 5 BomCR 799 : (2006) 3 MhLj 467

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Judgement

B.P. Dharmadhikari, J.—On 10-1-2003 the company - M/s Narendra Dada Agro Industries Ltd. was ordered to be wound up by this Court and accordingly, the Official Liquidator took possession of the property from SICOM. SICOM, Central Bank and MSFC are the secured creditors. On 13-6-2003, the Official Liquidator filed OLR 10/2003 seeking permission to advertise the company property for sale. Thereafter, advertisements came to be issued on 15th/17th/18th June, 2003 calling bids in four lots with Earnest Money as under:

----- Property Earnest Money.
----- a) Land and Building Rs. 1
lakh. b) Plant and Machinery Rs. 5 lakhs c) Stocks. Rs. 50,000/- d) Composite
Offer Rs. 6,50,000/-. 2. The above advertisements also indicated that the
Company can be sold as "going concern" and bids can be submitted even for
such purchase. On 23-6-2003, tenders were opened in presence of bidders,
secured creditors. Out of total 9 offers received, 3 were interested in purchasing
the company as "going concern". In the inter se bidding held, following offers
were received :

----- PARTIES OFFER
----- Bhaskar Exxols Ltd. Rs.
4,87,00,000/- Sankh Impex. Rs. 4,85,00,000/- Mahendra Kumar and Co. Rs.
1,17,00,000/- -----

3. As Mahendra Kumar and Company were lowest and unwilling to go further in

inter se bidding, the Official Liquidator returned their earnest money. It is alleged that Sankh Impex had put certain conditions which were not accepted by the Official Liquidator and hence, it withdrew its offer to purchase as "going concern". According to Bhaskar Exxols Ltd., the sale notice was dated 13-6-2003 and it had quoted Rs. 3,11,00,000/- as its composite offer and it deposited Rs. 6,50,000/- as earnest money. On 23-6-2003, it provisionally increased its offer to Rs. 4,87,00,000/- as the Official Liquidator could not disclose details about liability status of the company in liquidation. It is alleged that, therefore, it and the other bidders did not sign the bid sheet and the proceedings dated 23-6-2003 remained inconclusive. The Official Liquidator held further meeting on 26-6-2003, but it was attended only by the Secured Creditors and none of the bidders were present. It appears that the Official Liquidator had received fresh offers and he decided to obtain appropriate orders from this Court to entertain the fresh offers and to hold meeting on 30-6-2003. It is stated that said permission was granted on 27-6-2003 and the meeting was held accordingly on 30-6-2003. No bidder was present and hence, there could not be any decision about selling the company as "going concern". On 30-6-2003, only Secured Creditors were present and it was decided to move High Court with proposal that - in case of Bhaskar Exxols Ltd., if sale is confirmed and they do not turn up to deposit balance amount, their Earnest money should be forfeited, while in case of - M/s Sankh Impex Ltd., the offer being second highest offer, said bid should be accepted. Accordingly, on 3-7-2003, OLR 46/2003 came to be filed seeking various reliefs, as mentioned therein including relief in the alternative to re-advertise.

4. On 4-7-2003, this Court passed orders in OLR 46/2003 and directed further negotiations to be held to dispose of the Company as "going concern". Accordingly, after due notice, meeting was conducted on 16-7-2003, but again none of the bidders participated in it. On 4-8-2003, the Official Liquidator filed pursis mentioning that Bhaskar Exxols Ltd. has, on 2-7-2003 and M/s Sankh Impex has, on 29-7-2003, written letters mentioning that they were not interested in purchasing the property and claimed refund of Earnest money. In this background, on 12-9-2003, this Court directed the Official Liquidator to issue notice to these two bidders for forfeiture of Earnest money and also permitted him to issue fresh advertisement. On 3-10-2003, this Court, after considering the fresh offers received, passed orders in OLR 54/2003 and permitted the company property to be sold to the highest bidder - M/s Tania Industries Private Ltd. for Rs. 3.25 Crores. In response to notice for forfeiture, on 23-11-2003 and 7-11-2003, the above-mentioned two bidder"s filed their replies and pointed out that there is no provision and also reason to order such forfeiture. The Official Liquidator has filed rejoinder on 29-9-2005 justifying the proposed forfeiture. All the parties were then heard and they have also placed on record written notes of arguments along with relevant case law. The question to be decided, therefore, now is whether the Earnest Money Deposit of Rs. 6,50,000/ each of Bhaskar Exxols Ltd. and Sankh Impex needs to be and can be forfeited.

5. Mrs. Wandile, Adv. for the Liquidator has relied heavily upon the terms and conditions of the sale to state that acceptance of tender or offer is subject to the decision of Company Court i.e. this Court and till then, there is no question of any party withdrawing from the process in which it has participated. The Earnest money can be refunded only after this Court accepts the appropriate bid. According to her, both the above bidders were not right in attempting to withdraw before finalisation as per orders of this Court and hence, the earnest money deposit furnished by them needs to be forfeited. She has relied upon *Andhra Pradesh Paper Mills Ltd. v. State of Maharashtra* reported at *Delhi Development Authority Vs. Grihsthapana Co-operative Group Housing Society Ltd.*, *Hasmukhlal and Co. Vs. Municipal Corporation for Greater Mumbai* and *Another, Narendra Kumar Nakhat Vs. Nandi Hasbi Textile Mills Ltd.* (In Liquidation) and others,

6. Mr. Bhangde, Adv. for Bhaskar Exxols Ltd. contended that its increase of offer to 4,87,00,000/- was only provisional as exact liabilities of the Company were not known and meeting dated 23-6-2003 remained inconclusive. According to him, thereafter two fresh bids were accepted and on 26-6-2003, fresh meeting for consideration of bids was held. His clients did not participate in that meeting and on 27-6-2003, this Court permitted the Official Liquidator to hold rebinding, in which, on 30-6-2003 again they did not participate. On 2-7-2003, the Official Liquidator was informed about withdrawal from bid and request was made to refund Earnest money. There was never any concluded contract between Bhaskar Exxols Ltd. and the Official Liquidator, and in view of acceptance of fresh bids and rebinding held, their earlier offer stood lapsed and rejected. By relying upon provisions of Section 5 of the Indian Contract Act, 1872, he contended that the offer can be withdrawn at any time before its acceptance is communicated. He relies upon the judgment at *Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others*, in support. He has also cited the case of *Andhra Pradesh Paper Mills Ltd.* (supra) relied already by the Official Liquidator. He has also drawn support from *Sekhsaria Exports Vs. Union of India (UOI)* and *Others*, and AIR 1998 AP 125 between *Aditya Mass Communicated Pvt. Ltd. v. AP State Road Transport Corporation*.

7. Mr. Jaiswal, Adv. for Sankh Impex Pvt. Ltd. contended that all the terms and conditions are in relation, to highest bid and the bid of his clients being second highest, the said terms and conditions are not attracted and the earnest money deposit of Sankh Impex is, therefore, liable to be refunded. There is no provision for negotiations and according to him, the act of Official Liquidator in undertaking negotiations itself meant that offers earlier received had not been accepted. He further argued that when fresh bids from new persons were received and they were called for meeting, the offer of Sankh Impex was not accepted. He further states that, in this background, withdrawal of his client's bid was communicated to the Official Liquidator and refund was claimed already. According to him, therefore, neither the earnest money deposit of his client nor that of Bhaskar Exxols Ltd. can be forfeited. He has also relied upon the same case law, as

mentioned above, by the Counsel for Bhaskar Exxols Ltd.

8. Andhra Pradesh Paper Mills Ltd. Vs. The State of Maharashtra and The Conservator of Forest, needs to be considered first because all the parties have placed reliance upon it. The Andhra Pradesh Paper Mills Ltd filed petition under Article 226 of the Constitution, of India for directing the respondent - State of Maharashtra and the Conservator of Forest, North Chandrapur Circle to refund an amount of Rs. 69,59,078/- with interest " 20% p.a. from 15-8-1987 till realisation of the said amount. Respondent No. 2 there had issued a Tender Notice dtd. 8-6-1987 for sale of Bamboo Units in Vadasa and Gadchiroli. The respondent No. 3 had also issued a Tender Sale Notice in respect of Bhamragarh of Chandrapur Circle for the same purpose. The terms and conditions of both the tender notices were identical. The tender was to be submitted in the prescribed form on or before 15-7-1987 and sealed tenders received from the bidders were to be opened on the same day and tenderers were to pay earnest money deposit "10% of the total royalty to be worked out on the basis of the total estimated yield of that Bamboo Unit. It was mentioned in the Tender Notice that the sealed tender should be accompanied with the treasury challan or demand draft indicating that earnest money has been deposited. It was further stated in the Tender Notice that in case of successful tenderers, the earnest money deposit would automatically stand appropriated towards the security deposit which is required to be furnished. It is the case of the petitioner that as per the conditions stipulated in the tender, after the submission of the tender, the offer would be considered valid for the period of 45 days from the date of the Tender Sale. Case of the petitioner was that, as per Clause 7 of the Tender, the final sale result was to be declared within 30 days for getting approval of the competent authority and since respondents 2 and 3 did not declare the final sale result even after the expiry of 30 days from the date of opening of the Tender i.e. 15-7-1987, the petitioner sent a telegram on 15-8-87 to respondent Nos. 2 and 3, in which it was stated that since the final sale had not been declared within 30 days, as per Clause 7 of the Tender Notice, the Petitioner had withdrawn their offer and requested for return of the earnest money deposit. The question whether the Petitioner could withdraw bid before the conclusion of the contract and claim refund of the earnest money which it had deposited was examined by Division Bench. Discussion in paragraphs 17 and 18 below is sufficient for present purposes :

17. In our view, the contract was not concluded and after the specified period as mentioned in the Tender Notice the Petitioner had withdrawn its bid and as a result the petitioner was entitled to get its earnest money back. If the terms and conditions of the Tender Notice were read as a whole, it is clear that the offer under the Tender was valid for the period of 45 days from the date of Tender sale and it was, thus, valid till 29-8-1987 as the last date of Tender Sale was on 15-7-1987, From the terms and conditions of the Contract, it is clear that the final sale result was to be declared within 30 days on getting approval of the competent authority that is to say till 14-8-1987 and if the highest tender was

not considered acceptable in any case the final sale result was to be declared within 45 days i.e. 29-8-1987. Thus, in our view, in either case the outer limit for declaring final result was either on 14-8-1987 or 30-8-1987. 18. The respondents had a right to forfeit the earnest money deposit as provided in Clause 5(v) only if the tender was withdrawn prior to the declaration of the final sale result i.e. either 14-8-1987 or 30-8-1987. In our view, taking into consideration the relevant clauses of the Tender Notice viz. Clause 5(iv), (v), (vi), (vii) and (ix), it will have to be held that the date of the final result was fixed by an outer limit and the said date did not depend upon the approval of the competent authority as submitted by the respondents. It is an admitted position that the petitioner has withdrawn its offer after expiry of 45 days when there was no communication from the respondents either of acceptance or rejection of its bid in the said auction. This being an admitted position the contention raised by the respondents that the period of final sale was to be calculated as 30 days after the approval of the competent authority cannot be accepted. It is an accepted principle of interpretation of the documents that effect has to be given to all the terms and conditions by reading it as a whole and not by reading a particular clause independently by excluding the rest of the clauses. The submission made by the respondents that the approval was given by the competent authority on 3-9-1987 and, therefore, the time limit for declaring the final sale result was 2-10-1987 i.e. 30 days after the said period and that the tender was withdrawn by the petitioner before 2-10-1987 and, therefore, the money deposited was forfeited and the Government had a right to forfeit earnest money deposit as per the provisions contained in Clause 5(iv) and (v), cannot be accepted. If the said submission is accepted, it would mean that the Government would have a right to declare the final sale result at an indefinite period of time and that the final sale could be declared as per the sweet will of the competent authority. This is surely not the position as the provisions of Clause 5(iv)(v)(vi)(vii) and (ix) are absolutely very dear. In the instant case, the respondents had invited tenders and the petitioner and others gave their offer in the form of bid, the petitioner had every right to withdraw its offer after the period stipulated by the respondents was over. In our view, the period was over on 30-8-1987 and thereafter the said period was over, the petitioner had withdrawn its offer. Thus, there was no concluded contract between the parties. Since the offer was withdrawn before the conclusion of contract, the petitioner was entitled to get its earnest money deposit back.

9. In subsequent paragraphs, the Division Bench has referred to various judgments to conclude that the Hon'ble Apex Court in the catena of cases has held that there is no concluded contract till the bid is accepted and that it is open for the bidder, before there is any concluded contract, to withdraw its bid and that by merely giving bid the bidders does not acquire any vested right and that merely because the Government is seller, it does not change the legal position, once its exclusive right to deal with the goods is conceded. The terms and conditions of each tender invitation document have played important role in

reaching this conclusion and interpretation. After appreciating these cases, the Division Bench concluded as under :

24. In the light of the ratio laid down in the aforesaid Judgment, we have no hesitation in holding that the petitioner had withdrawn its bid before the conclusion of the contract and, therefore, the petitioner is entitled to get the refund of the earnest money deposited which it had paid to the respondents at the time of making its offer in the form of a bid to the Tender Notice issued by the respondents. In the result, the impugned communication at Annexure 1, dated 23-9-1987 informing the petitioner that its earnest money deposit was forfeited on account of withdrawal of tender and communication at Annexure J dated 24-9-1987 informing the petitioner that the earnest money deposit could not be refunded because the State Government had accepted the tender on 17-9-1987, will have to be quashed and set aside. In the present case that the acceptance by respondents of the offer made by the petitioner was on 17-9-1987 which was communicated much after the last date of declaration of final sale result which was 30-8-1987 as per the relevant clauses of the Tender Notice, viz. Clauses (vi), (vii) and (ix) had before the communication of acceptance by the respondents, the petitioner had already withdrawn its offer after the period of 45 days as stipulated by clauses as above.

10. The Andhra Pradesh Paper Mills Ltd. kept its offer valid for 45 days, as required by tender and had withdrawn it only thereafter. It, therefore, did not breach any of the terms and conditions agreed between parties and was held entitled to refund of earnest. It is, thus, clear that the terms of such invitation, on the basis of which the bidders submit their bids, are determinative in the matter.

11. Both the bidders claiming refund of earnest Money have also relied upon *Sekhsaria Exports Vs. Union of India (UOI) and Others*, . The Division Bench considered the provisions of Section 10 and Section 126 of Contract Act (9 of 1872) to hold that concluded contract emerges and tenderer becomes bound only if his offer is accepted in toto within reasonable time by communicating the same. In the said case, there was failure to communicate acceptance of tender-offer within reasonable time and due to market pressure, there was withdrawal of offer by tendered/petitioner much prior to its acceptance. The Division Bench concluded that, in such circumstances, no question of breach of contract on the part of tenderer arises and in absence of concluded contract between the parties, invocation of bank guarantee alleging breach of contract was not proper. The discussion in Judgment does not show that the tender document contained any terms and conditions *pari-materia* with the terms and conditions in the present case and the view reached is, therefore, in the facts and circumstances of said case.

12. Mr. Bhangade, Adv. relied upon the judgment at AIR 1998 AP 125 between *Aditya Mass Communicated Pvt. Ltd v. AP State Road Transport Corporation*. In the said case, the question was of refund of earnest money and it has been

examined in the light of Sections 7 and 74 of the Contract Act. The relevant discussion in this respect is in paragraph 4 :

4. The only point in this case is whether the petitioner has withdrawn the tender before it was opened in accordance with the terms and conditions of the tender notice. According to the tender notice, the tenders were to be opened at 3 p.m. on 31-10-1996 by opening the tender box. But mere opening of the box is not sufficient. The tender forms are to be scrutinised as to whether they are valid tenders and find out who is the successful bidder. That process admittedly, was not gone through and even according to the respondent the sealed covers are not opened on the given date and were kept back in the box. The opening of tenders by removing the seals and scrutinising the tender forms was postponed because of the interim orders of this Court. Before the actual process started, the petitioner had asked for return of the E.M.D. Hence, it is not possible to accede to the contention of the learned Counsel for the respondent. Though the request of the petitioner did not specifically refer to withdrawal of the tender, still no one will ask for return of the E.M.D. unless there is an intention not to participate in the tender. The respondent had also understood this because in the reply dt. 14-11-1996 the respondent had clearly stated that the petitioner should participate in the opening of the tenders to which date it was postponed i.e. 16-11-1996 and expressed the inability to return the E.M.D. referring to Clause (12) of the tender notification. But that clause comes into operation only after the tenders are opened and the highest bidder is declared and such a declaration can come only after scrutinising the tenders. In the present case, that did not take place till 16-11-1996 and the petitioner had asked for return of E.M.D. second time on 15-11-1996 stating that he has no interest in participating in the opening of the tenders. According to the learned Counsel for the respondent, this communication dt. 15-11-1996 of the petitioner was received only at 12-10 p.m. on 16-11-1996 after the sealed covers are opened at 11 a.m. This contention appears to be contradicted by the office note on the said letter of the petitioner which indicates that a copy of the letter was given to the Chief Traffic Manager before opening of the tenders for information and necessary action. In any event, the petitioner having withdrawn the offer on 11-11-1996 itself, his tender was not available for scrutinising at the time it was opened at 11 a.m. on 16-11-1996. There cannot be any acceptance of the offer because the offer was not alive. The question of forfeiting the E.M.D. arises only after declaration of the tender as successful. In the present case, petitioner withdrew from the offer prior to the scrutiny and hence he cannot be said to be highest bidder and Clause (14) does not apply and the respondent had no authority to forfeit the E.M.D.

Thus, it is apparent that there was no Clause which prohibited said petitioner from withdrawing his offer and the judgment again turns on terms and conditions of the agreement between the parties.

13. He has also cited Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others, in support. It appears that the petitioner before the High Court was not

permitted to withdraw his tender on the ground that there was only one/single tender. The Division Bench held that tender condition No. 10 (b) (i) permitted petitioner to withdraw before commencement of opening of tenders subject to the condition that after opening remaining tenders there should be at least one valid tender available for consideration. The Division Bench held that a person who makes an offer is entitled to withdraw his offer or tender before its acceptance is intimated to him and by providing such a Clause in tender notice, Government could not take away said legal right of petitioner. It held that when the government accepted sole tender of petitioner, there was no offer by him and there could not be any contract between parties. Again, the tender permitted withdrawal and the view taken is in the background of condition mentioned above and the facts of the case.

14. Learned Counsel for the Official liquidator has relied upon Delhi Development Authority Vs. Grihsthapana Co-operative Group Housing Society Ltd., to point out the significance of payment or acceptance of earnest money in such contracts. The respondent-society before the Hon"ble Apex Court deposited fixed earnest money and formally applied for allotment to the Appellant before it. On acceptance of offer, formal allotment of plot was made by Appellate Authority. However, before delivery of possession Authority communicated enhancement of premium of land. Respondent allotted-society failed to make payment within time extended by Delhi High Court while upholding enhancement and hence Appellant forfeited earnest money deposited by it. Respondent-society again approached the High Court which directed the Appellant Authority not to make any deduction and to refund entire amount to the society. The Hon"ble Apex Court while allowing the appeal of Authority held forfeiture not to be illegal as communication by Authority as to enhancement was in continuation of earlier offer and respondent society had accepted offer contained in said communication. Paragraph 5 of Judgment is important and it reads :

5. In support of the first legal proposition, Shri Jaitley referred us principally to a three-judges Bench decision of this Court in Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, in which there is a detail discussion of what is meant by earnest money and what are the consequences of deposit of such money and when can the same be forfeited. The Bench after reviewing various decisions noted in the judgment which includes that of the Privy Council rendered in Chiranjit Singh v. Har Swarup AIR 1926 PC 1, culled out the following principles regarding the "earnest" at page 139 :

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out.
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchase.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

15. In *Hasmukhlal and Co. Vs. Municipal Corporation for Greater Mumbai and Another*, in paragraph 6, this Court has observed that Municipal Corporation invites bids involving large financial implications and interest of community. Withdrawal of offers by bidders results in escalation of costs of project and also delays to the detriment of public interest. Hence, by demanding appropriate undertakings from bidders, it protects itself and also public interest. It is observed that the petitioner before it who withdrew part of his offer on the ground that quarry owner with whom he had contacted had declined to effect supply could not make grievance about forfeiture of tender deposit.

16. *Narendra Kumar Nakhat Vs. Nandi Hasbi Textile Mills Ltd. (In Liquidation) and others*, relied on by the Advocate for Official Liquidator is the judgment of the Division Bench which considers sale of property of Company in liquidation by Official Liquidator as per directions of High Court. The opening para itself gives the terms and conditions of offer. It is observed that the characteristics of earnest money is that it serves two purposes - firstly, it goes in part payment of the purchase money for which it is deposited and, secondly, but primarily, it is security for the performance of the contract. There, the tenders for purchase of property of a company under liquidation were invited by the Official Liquidator at the direction of the High Court. The highest bidder deposited the amount of Earnest Money and also 25% of the bid amount as per terms of the tender notice. However, the bid of the highest bidder was not accepted by the Court and direction was given to invite fresh tenders. This was a case where the sale proceedings were cancelled on account of the conduct of the parties in not doing one or the other acts provided under the terms of sale. The act attributed to the highest bidder was that he had adopted the stance of filibuster by indulging in dilatory tactics in postponing the proceedings for confirmation of sale. If the Court had confirmed the sale, other terms and conditions in the offer of sale would have become applicable. In the absence of such an event of confirmation of sale, the only conclusion to be drawn as per the Division Bench was that the bidder is prima facie entitled to the entire refund of the money. However, the question whether the highest bidder did not perform his part of the Contract and were liable for damages, required adjudication at later stage. Under the terms of contract for sale, the party in breach had undertaken to pay a sum of money or to forfeit a sum of money already paid to the party complaining of breach of contract and thus, the undertaking had the nature of penalty. The Earnest Money Deposit was, therefore, treated as by way of liquidated damages and liable for forfeiture on account of any default by him. The highest bidder was, therefore, held not entitled to refund of entire amount deposited by him. Part of the amount was retained till further adjudication and amount of Rs. 50 lakhs with interest accrued on it was ordered to be released. The highest bidder, before making offer deposited a sum of Rs. 5 lakhs and after emerging as successful bidder, he deposited balance amount of Rs. 59 lakhs. However, sale in his favour was

subject to confirmation by the High Court and amount of Rs. 5 lakhs was to be forfeited in case of default on his part. The earnest money of Rs. 5 lakhs of unsuccessful bidders was to be refunded after conclusion of tender proceedings. The High Court cancelled the acceptance of highest bid and ordered fresh advertisement. Highest bidder thereafter wanted refund of entire amount of Rs. 64 lakhs and his application was opposed by Secured Creditors who contended that he was guilty of breach of contract and therefore, was not entitled to refund. They demanded an inquiry to fix quantum of compensation payable by him to creditors. It is in this background, after considering Section 74 of Contract Act, that the above view has been taken. Findings recorded in paragraph 8 are important for this case and the same are thus :

8. Clause 6 of the conditions for sale provides for forfeiture of the sum of Rs. 5 lakhs in the event of default by the successful bidder. Section 74 of the Contract Act provides for measure of damages in two classes of cases- (i) where the contract names a sum to be paid in case of breach; (ii) where contract contains any other stipulation by way of penalty. In the latter case, the measure of damages is by Section 74 of the Contract Act-reasonable compensation not exceeding the penalty stipulated for. In *Fateh Chand Vs. Balkishan Das*, - it was observed that Section 74 of Contract Act boldly cut across the web of rules under English Common Law by enacting uniform principle applicable to all stipulations naming amounts to be paid in case of breach and stipulations by way of penalty. The Supreme Court explained the scope of Section 74 of the Contract Act in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, - and stated that the sum to be paid in repudiated contracts and stipulation for payment of the same by way of liquidated damages would exclude the right to claim unascertained sum of money as damages. The right to claim liquidated damages is enforceable u/s 74 of the Contract Act and when such a right is found to exist, no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages, there can be no presumption that they at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach. It has been noticed in *Maula Bux Vs. Union of India (UOI)*, that forfeiture of earnest under a contract of sale of property - if the amount reasonable does not fall within scope of Section 74 for forfeiture of a reasonable amount paid as earnest money which does not amount to Imposing penalty. But if forfeiture is of nature of penalty, Section 74 applies. Thus whereunder the terms of contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which has already been paid to the party complaining of breach of contract, the undertaking is of the nature of penalty. The Earnest Money Deposit in this case must be treated as by way of liquidated damages and in Clause (6), this position is made clear that such amount will be liable for forfeiture on account of any default by him. Therefore, by no stretch of imagination can we say that the respondent's can insist upon retention of money

in excess of the sum ordered by the learned Company Judge.

17. Thus, perusal of the above referred cases reveal that forfeiture is basically governed by and is the matter of terms and conditions agreed to between the parties. If there are no such agreed terms, the provisions of Contract Act have been made use of. In present case, existence of such terms and conditions is not in dispute. The validity or legality of such terms and conditions is also not in dispute. Relevant terms and conditions can be briefly stated now.

18. The very opening para of the document of terms and conditions of sale states that property is being sold on "as is where is basis" and "as is whatever is basis" subject to confirmation by High Court. Clause No. 2 specifies required earnest money against each property and also mentions that the person offering has liberty to purchase the company in liquidation as "going concern" with all liabilities known or unknown considering the fact that Company was run only for a few months. Earnest money is to be deposited in the name of Official Liquidator for participating in the auction sale. In clause No. 3, Official Liquidator has reserved the right to allow reply of bidders/negotiations for reply bids any time till it is confirmed by High Court. Clause No. 5 which is important states that "The earnest money deposit given for participating in the auction sale will be returned to respective bidder by the Official Liquidator in the event of his offer not accepted. No interest shall be payable on earnest money." Clause No. 6 reads - "No person shall at the bidding offer a sum less than that shall be fixed by the Official Liquidator or retract from bid". Clause No. 7 -- "The sale is subject to confirmation by the Hon'ble Court, Mumbai, Nagpur Bench, Nagpur." Clause No. 9 requires highest bidder whose bid is accepted by Official Liquidator to deposit balance 25% of bid amount within two weeks and remaining balance of purchase price within two months or three months depending upon whether his offer is composite or otherwise. Clause 10 which provides for forfeiture, it reads : "If the purchaser does not pay the balance of the purchase money in the manner and within the time as specified by the Official Liquidator or in other respect fails to perform these conditions or any of them the earnest money shall stand forfeited and the Official Liquidator, High Court, Nagpur shall resale the said property as described in the schedule by public auction and subject to such conditions and in such manner in all respects as the Official Liquidator shall think fit and proper and deficiency in price, if any occasioned by such resale and the costs thereof shall be made good by defaulting purchaser with interest on the amount of deficiency at the rate of 18% per annum from the expiration of two months in case of schedule Nos. 1 and 2 and in three months in case of composite offer till payment and in case of non-payment of the whole or balance of such sum the same shall be recoverable by the Official Liquidator from the defaulting purchaser as and by way of liquidated damage while any profit on such resale shall not belong to such defaulting purchaser." As per clause No. 13, if the sale is not confirmed or set aside, purchaser is entitled to refund of his deposit or earnest money, as the case may be without interest and is not entitled to any costs, damages on expenses. Clause No. 28 also enables Official Liquidator to treat the

contract for sale as at an end and to forfeit the monies paid by purchaser if he fails or neglects for any reason to pay in full the amount or the balance of purchase price and/or to complete the sale in terms of the stipulated conditions.

19. From the above, it is clear that the bid is to be accepted finally by this Court. The Official Liquidator, therefore, rightly retained two consecutive highest bidders i.e. Bhaskar Exxols Ltd. and Sankh Impex for placing their matters/offers before this Court. The offers were of Rs. 4.87 Crores and Rs. 4.85 Crores respectively. Both these bidders accepted the terms and conditions including clause No. 10 and clause No. 28 above and also deposited earnest money of Rs. 6.5 lakhs each to show their bona fides. Having participated in the auction, both these bidders could not have withdrawn/retracted from the process or, bid. The auction was being conducted as per directions and under the supervision of this Court and unilaterally, Bhaskar Exxols Ltd. and Sankh Impex could not have retracted their bids and withdrawn from auction process. Their bids were not rejected and were under the process of consideration of this Court. Merely because two new bids were received or negotiations were held, that did not mean that their bids were rejected. The terms and conditions in this case cannot and does not prescribe any time limit, but here, in any case, both the bidders raised their bid only in negotiations on 23-6-2003 and the bids were placed for consideration of this Court in these proceedings on 3-7-2003 in a very reasonable time. Advertisements were issued by the Official liquidator on 15th/17th/18th, June only. Both these bidders could have made appropriate grievance before this Court at the time of consideration of their offers. If they wanted to retract, they could have done so after seeking permission of this Court and only if such permission was granted. Otherwise, they were duty bound to continue to participate till appropriate orders in this respect were passed by this Court. The obligation cast by "terms and conditions" is on each bidder whose offer is to be placed for consideration of this Court. The second highest bidder, therefore, cannot take shelter behind the first highest bidder. Otherwise, the very purpose of incorporating clause Nos. 6 and 8 in said terms and conditions will stand defeated. The said property was required to be re-advertised and sold by undertaking fresh exercise, expenditure and at less price. The breach of Clauses 10 and 6 above by Bhaskar Exxols Ltd. and Sankh Impex is established in the matter. Where the parties have deliberately specified the amount of Rs. 6,50,000/- as Earnest Money for each bidder and agreed to stipulation in clause No. 10 above, there can be no presumption that, at the same time, it was intended to allow the bidder responsible for the breach to give a go-by to the sum specified. Here the Clause of forfeiture is included in tender document only in the interest of Creditors of the Company and to avoid unnecessary delays in restoring to them their legal dues. The clause is, therefore, in the public interest. The offer made by both the bidders was subject to this condition and by paying earnest Money they also accepted it, it represents a guarantee that the contract will be fulfilled as per its terms and conditions. Said amount is part of the purchase price to be adjusted accordingly when the bid is accepted by this Court.

It is liable for forfeiture when the transaction falls through by reason of the default or failure of the purchaser/bidder. Clauses 10 and 28 of the terms and conditions practically covered all situations in which the contract can fall through on account of any mistake on the part of such bidders. There is nothing to the contrary in the terms of the contract to avoid application, of forfeiture clause and hence, on default committed by the bidders, the Official Liquidator is entitled to forfeit said earnest.

20. The Official Liquidator is, therefore, entitled to forfeit and retain Earnest Money Deposit of Rs. Six Lakh Fifty thousand only i.e. Rs. 6,50,000/- placed with him each by Bhaskar Exxols Ltd. and Sankh Impex Pvt. Ltd. respectively. Prayer "c" in OLR 46/2003 is allowed. In view of these orders and as the property is already sold, the proceedings in OLR 10/2003 and 46/2003 are hereby disposed off accordingly.

Bhaskar Exxols Ltd. and Sankh Impex Pvt. Ltd. to pay Rs. 5000/- each to the Official Liquidator as costs in OLR 46/2003.