

(1990) 03 AHC CK 0025
In the Allahabad High Court
Case No : C.M.W.P. NO. 17861

M/s. Shyam Biri Works Pvt. Ltd.

APPELLANT

Vs

U.P. Forest Corporation and another

RESPONDENT

Date of Decision : 20-03-1990

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 4, 56, 74
Evidence Act, 1872 — Section 115

Citation : AIR 1990 All 205 : (1990) 3 UPLBEC 1643

Hon'ble Judges : S.O. Agarwala, J; Ravi S. Dhavan, J

Bench : Division Bench

Advocate : R.P. Goel, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Ravi S. Dhavan, J.—This writ petition, amongst many others, before the Court, raises a question whether the Court may have the power of absolution in making a new contract or in the alternative whether it could spell out new conditions of a contract. The facts which raise these questions arise out of a situation when a State agency invited tenders for the purchase of tendu leaves.

2. Trading in tendu leaves was curtailed and settled on a state corporation, in effect, to create a State monopoly in the purchase and distribution of tendu leaves. This was done when the State of Uttar Pradesh enacted a legislation known as Uttar Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1972, hence forth referred to as the Act. In pursuance of the Act were framed the Uttar Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali, 1972, henceforth referred to as the Rules.

3. Tendu leaves are used in the manufacture of Bidis, in Uttar Pradesh amongst many other states. Bidi manufacturing, right from the stage of growing leaves, its sale and its consumption into a finished produce is a multi million rupees business in the country. The right to trade in tendu leaves has been intentionally

created into a State monopoly. This is clear from the object of the Act, aforesaid. The objects recite: "An Act to provide in the public interest for the creation of State monopoly in the purchase and distribution of Tendu leaves and for the matters connected there with." The monopoly is handled in the State through an agency. In reference to the context it is the Uttar Pradesh Forest Corporation.

4. Thus, the Uttar Pradesh Forest Corporation, referred after this as the Corporation inserted an advertisement in the local newspapers inviting tenders for the purchase of tendu leaves during the year 1989. The advertisement appeared in the newspaper on 19 July, 1989. Sealed tenders were solicited by 3 Aug., 1989. The petitioner, Shyam Biri Works, Private Limited Company, in response to the advertisement submitted 181 tenders. The petitioner company is a Biri manufacturer. Along with the tenders the petitioner company also forwarded in accordance with the condition of the contract a cheque for rupees fifty lacs dt. 1 Aug., 1989 drawn on the State Bank of India, Allahabad, as earnest money.

5. One condition upon which the finalisation of the contract was dependent became a matter of issue between the Corporation and the petitioner. The contract was not finalised within the time stipulated. Time was the essence of the contract.

6. Condition No. 10 of the conditions of the contract stipulates that should the purchaser making the tender be not intimated within forty days since when the tenders were made the purchaser must get in touch with the Corporation, failing which it will be presumed that the acceptance or the rejection of the tender, whichever be the case, would be assumed.

7. The petitioner company was not informed either of the acceptance or the rejection of the tender within forty days. Consequently in accordance with the conditions of the contract, the petitioner company had inquiries made at the office of the Corporation at Allahabad and was intimated that no decision has been taken on the tenders by the Corporation. These facts are not disputed.

8. By a letter of 18 Sept., 1989 addressed to the Corporation at Allahabad, the petitioner company sought the return of its earnest monies. The petitioner company received a reply to this letter within twenty four hours. The Corporation replied that in reference to the request for refund, as in the letter of the petitioner company, the matter is subjudice at the High Court. It was further stated that after the decision of the High Court the matter would be considered further. The letter was signed by one S. P. Rao, the Regional Manager of the Corporation. Even this fact is not disputed. What is more important is that the petitioner had not filed any case against the Corporation in any proceeding at the High Court and there was no list between the petitioner and the Corporation, in any matter arising out of the contract, whether the grant of it or rejection of it.

9. The fact of the matter is that at the time when the petitioner was seeking refund of its earnest money, no action had been taken either to accept or reject

the tender.

10. The petitioner company was not intimidated, but gathered the information that six writ petitions were pending before the circuit Bench at Lucknow. These writ petitions were filed by the Biri manufacturers and including as association known as Uttar Pradesh Biri Manufacturers Association. In these writ petitions there were interim orders, to the effect, that the Corporation would not finalise the tenders. The first of the orders in these writ petitions was made on 3 Aug., 1989. Subsequently, interim orders of a like nature were passed in other writ petitions also. The interim orders were confirmed by the circuit Bench at Lucknow on 8th Sept., 1989. The Corporation moved the Supreme Court in these matters, which were pending at the circuit Bench. The order, which had been confirmed by the High Court, was set aside by the Supreme Court as also the prayer for an interim relief sought in the writ petitions. The Supreme Court directed the High Court to decide the writ petitions preferably within a month from the date when the orders in the SLP were passed, i.e. 21 Sept., 1989.

11. The contention of the petitioner company is that the finalisation of its contract with the Corporation, in so far as it is concerned cannot depend upon the vagaries of any litigation in which it is not involved. It is further contended that the time within which the contract is to be finalised, cannot be varied unilaterally after the tenders had been submitted. It is submitted that the acceptance and rejection of the tenders according to the terms and conditions are to be intimated to a purchaser within forty days or in the alternative the purchaser is to get in touch with the Corporation, should no information be received within these forty days. Thus, the petitioner company contends that it had also tried to find out the fate of the tenders, which it had submitted. The tenders were neither accepted nor rejected and were lying pending consideration. As both the alternatives which prescribe the outer limit for the acceptance or rejection of the tenders, that is, either the expiry of forty days or thereafter, the period during which the petitioner company as a purchaser had to get in touch with the office of the Corporation had crossed, the petitioner company sought refund of its earnest monies, as the contract was paralysed from being finalised as a result of litigation in which the Corporation was embroiled.

12. The frustration to finalise the contract became clear when even the request for refund of earnest monies was declined by the Corporation as it told the petitioner company that it would have to await the result of certain litigations. This implied that the Corporation would neither settle the tenders nor refund the earnest money to a party whose contract was admittedly not finalised and it was not a party to any litigation. Frustrated in having an amount of half a corer rupees tied up as an earnest money the petitioner company filed the present writ petition seeking refund of these monies as indeed blocking this huge amount and simultaneously having no positive result on the grant of a contract, the situation was one of inaction by the Corporation. A mandamus was sought in these

circumstances, that as the conditions to finalise the contract had been violated by a State agency, there was no reason why its earnest money must remain in storage depending upon a decision of certain litigation which was not between the petitioner company and the Corporation.

13. Upon filing of the writ petition on 27 Sept., 1989 the Court passed the following order:

"The petitioner Shri Shyama Charan Gupta, Managing Director of the petitioner company has appeared in person before us. Notices on behalf of respondent, Forest Corporation have been served upon Sri V.K. Singh, Advocate. Since the lawyers are on strike and the matter is of consequence, we direct that the petitioner shall serve copies of this petition on the respondents Nos. 1 and 2 within two days from today. Office shall handover dasti summons to the petitioner. Office shall fix 4th October, 1989 as the date on which the petition shall be taken up for admission. In case the lawyers on behalf of the respondents do not appear then we direct that the Regional Manager, respondent No. 2, shall appear personally before us on that date.

An interim mandamus is issued to the respondents to refund Rs. 50,00,000/- deposited as earnest money for the tender within a period of one week from today or show-cause on 4th October, 1989. It is, however, made clear that in case the amount is wrongly retained by the Corporation then this Court shall consider payment of interest on the said amount to the petitioner."

14. The Court had, in effect, issued a mandamus virtually to the Uttar Pradesh Forest Corporation to refund Rs. 50,00,000/- within one week or else show cause. As directed the matter was listed on 4 October, 1989 when it was reported to the Court and on this aspect, there is no issue, that a sum of Rs. 40,96,640/- was refunded in pursuance of the interim mandamus issued by the Court. There was no restraint on the respondents not to refund it. The Court gave an option that should they not have sufficient reason to retain it, the monies be refunded failing which the reason or cause to retain it must be shown to the Court. Apparently no reason has been explained for retaining Rs. 40,96,840/-. The amount apparently was refunded within 48 hours of the petitioner filing the writ petition before the High Court. In reference to the refund of the amount, as made, only this much has been mentioned in the writ petition.

15. In paragraphs 28 and 30 of the counter-affidavit of S.P. Rao the following averments have been made:

"28. That out of aforesaid the tenders of the petitioner tendu in respect of 45658 bags were found to be highest hence, was accepted and/ the earnest money to the tune of Rs. 9,03,160/- was retained and the balance of Rupees 40,96,840/- was returned to the petitioner vide cheque No. Q.L.S. 555170 dated 29-9-89.

30. That the relief prayed by the petitioner in paragraph 1 is wholly misconceived. The petitioner is entitled for the refund of only that much amount

out of Rs.50,00,000/-which is not covered as earnest money towards the accepted quantity. The petitioner's tenders for 45158 bags have been accepted hence, the earnest money to the tune of Rs. 9,03,160/- has been retained and the balance of Rs.40,96,840/- has been already refunded at the earliest possible moment on 29-9-89."

16. In the counter-affidavit, no explanation has been offered why an amount of Rs. 9,03,160/- had been retained except mentioning that the petitioner's tender for 45, 158 bags have been accepted. The most crucial aspect upon which cause was to be shown, if monies were intended to be retained, was when had the tender been accepted so as to retain an amount of Rupees 9,03,160/-? The date is missing in the counter-affidavit. Surely the tender could not become the subject-matter of acceptance when the petitioner had filed the writ petition and the Corporation had been subjected to a writ of mandamus to refund the amount. This was not the stage to finalise the contract. The conditions of the contract can neither be varied unilaterally by any party to the contract, nor this Court, regard being had to the terms and conditions. The Corporation already had in its hands, before it had accepted or rejected the tenders, a formal request of the petitioner to refund the earnest monies, regard being had to the situation that no action had been taken upon the tenders within the time stipulated. The time to act on the tenders was up. The petitioner company exercised its option not to be considered for the contract.

17. This Court required the Corporation to disclose by further and better particulars why an amount of Rs. 9,03,160/- was retained. The Corporation was evading to place these facts on record. A supplementary affidavit had been filed by the Corporation through its Accounts Officer and the three annexures to it reveal that after the Court had issued a mandamus to the Corporation, it was thereafter taking a decision to accept the tenders against goods so as to retain an amount of Rs. 9,03,160/- as earnest money. Why was this information not given in the counter-affidavit?

18. Until the mandamus was issued by this Court to refund the amount the parties had understood the situation that (a) the contract had not been processed and insofar as the tenders were concerned they were lying dormant for being considered; and (b) no indication as a term of contract made the parties conscious of an agreement that the tenders could yet be finalised beyond the time schedule when it had to be finalised.

19. It is the case of the Corporation that it had been bogged from taking any action on the tenders as they were precluded from doing so by a stay order granted in certain writ petitions filed at the circuit Bench at Lucknow. At the expense of repetition it must be again placed on record that the petitioner company did not file any writ petition against the Corporation. The legal implication of this would be that the filing of writ petitions at the circuit Bench at Lucknow may pose difficulties for those petitioners if they attempt to withdraw their earnest money as the inaction of the Corporation was consequential to their

writ petitions. But, the corollary qua the petitioner before this Court and the Corporation is the matter of finalisation of the contract was heading into the realms of frustration of a contract. When the petitioner company was seeking its refund, it was not in a position to foresee the result of the litigation initiated by others. Even the Corporation could not anticipate with any certainty, when it would be in a position to act on the tenders, without restraint, to accept or reject them. The petitioner company had blocked fifty lacs of rupees as earnest money and could not with any confidence hope that the tenders could be acted upon. The petitioner company was playing no hide and seek with the Corporation. In response to an invitation to make an offer by a public advertisement issued by the Corporation it made tenders and deposited the earnest money. It was no mean sum. It was half a cror rupees tendered as earnest money. The earnest money is a guarantee that a contract would be fulfilled, but in accordance with the terms and conditions and within the stipulation of time. The conditions put forward by the Corporation had made time the essence of the contract. Even an accepted tender could be rejected if the purchaser did not get in touch with the Corporation immediately upon forty days to inquire on the fate of the tender. Failure to adhere to the time schedule set by the Corporation gave the initiative leverage to the Corporation to bypass an accepted tender and pick up another on the ground that the party did not inquire about the tender within the time indicated in the conditions of the contract.

20. It is the admitted case of the parties that when the petitioner company did get in touch with the offices of the Corporation on the expiry of forty days to find out whether the tenders had been accepted or rejected, it was told that neither of the circumstances had occurred. In fact, if there was any doubt whether the finalisation of the contract was heading towards frustration, these doubts were becoming worse when the Corporation wrote to the petitioner company that nothing could proceed as the matter was embroiled in a litigation at the High Court and regard being had to the circumstances that matters were subjudice nothing further could be done. This implies that any one who had intended to contract with the Corporation and had involved it in a litigation would find it difficult to plead that the time was the essence of the contract. That party may have difficulty to take recourse to seek refund of its earnest money. But, the petitioner company was clear from the litigations between the Corporation and the others. Its earnest money of fifty lacs was a guarantee to go through the contract within the time stipulated. When it found that it's offer was not accepted within the time stipulated and further that no confidence was given that it would be accepted in the near future, it acted in prudence not to get involved in the hazards of litigation and withdrew its tenders and earnest money both, as any sane or wise businessman would do.

21. A faint argument was made on behalf of the Corporation that this Court ought not to reflect upon the conditions of the contract between the petitioner and the Corporation. It was not disputed before this Court at the time of hearing that it is a State contract. On record there are no disputed questions of fact. In

these circumstances, the submission that the Court ought not to reflect whether this contract has indeed matured or can go forward is a misconceived plea. The Supreme Court has already indicated that the High Court is not precluded under Art. 226 of the Constitution from looking into the arbitrariness of a State contract. The Supreme Court in the matter of *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, observed, "We are unable to hold that merely because of source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in *K.N. Guruswamy Vs. The State of Mysore and Others*, there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

22. The situation on record has turned out thus:

It was not a contract which had got frustrated from the performance of it, but the contract never took off. The Corporation at best made an invitation to offer. Its advertisement cannot be given any other interpretation except an invitation to make an offer. In response, the petitioner company filed its tenders along with the earnest money amounting to rupees fifty lacs. The conditions of making an offer with the tenders were that they would be processed within the stipulated time of forty days and information of this would be conveyed to the person who offers the tender. The conditions further set out that should the information on the acceptance or rejection of it not be received within forty days then such a person should find out the result from the office of the Corporation immediately on the expiry of forty days. If any person who has made a tender did not carry out this exercise then it will be assumed that the acceptance or the rejection of it is within his knowledge. This implied that if the tender has been accepted notwithstanding that the person who made it has not been intimated, such a party will be bound to carry out the contract.

23. The petitioner company exercised due diligence in accordance with the time table of the conditions of the contract to find out the result of the tenders. Without repeating the Corporation intimated the petitioner company that finalisation of the contract cannot proceed as it was restrained under injunction of the High Court from its being settled and finalised.

24. In the facts and circumstances of this case insofar as the petitioner company is concerned, the period during which the contract was to be finalised, time being the essence of the contract had elapsed. On the day when the petitioner company sought its refund, the Corporation was not in a position to accept the tenders, the hazards of it being rejected were upon the petitioner company. To finalise the contract depending upon the result of the litigation to which it was not a party, put it in a position when it could not foresee the possibility of the performance of the contract in the near future. The time schedule set in the conditions of the contract could only be extended mutually not unilaterally. If the

petitioner company was the cause of delaying the finalisation of the contract, its earnest money could be forfeited, if it intended to bail out at the stage of finalisation of the contract. If it declined to perform the contract against accepted tenders and in the event of delaying the performance of the contract, it would have been put on the obligation of due performance of it and upon failure, liable to an action of damages. But no fault has been attributed to the petitioner company. There is no allegation against the petitioner company.

25. The offer had never been accepted against the tenders for rupees nine lacs odd within the time stipulated. The Corporation cannot insist on accepting an offer, which was never made as it had been withdrawn. An offer which has never been accepted by the seller as he has not acted upon it can be revoked. In the facts and circumstances of the present case, the status of the petitioner company is that it withdrew itself from the arena of participating in having its offer processed when the time to accept the offer had lapsed. Before the offer could be accepted, it was revoked. The matter, under the law, is strictly one of finding out when the proposal, the acceptance and revocation are complete by the communication of it.

26. The mechanics of this State contract in the process of it's making will have to be seen under the Contract Act. The parties, the Court is afraid, have not aided the Court to see the facts of this case, which are not disputed, with the law. The misunderstanding is in not appreciating the facts with the law.

27. The Contract Act refers to the formalities of communications and when such communications are complete. Both an offer or an acceptance are modalities of communications, without which a contract does not surface. Fortunately, when a communication is complete, in reference of time, is codified. It is Sec. 4 of the Contract Act, which is as under:

"4. Communication when complete -- The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete --

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge."

28. In the present contract, the exercise of the Corporation to advertise for tenders was an invitation to make an offer. The tenders, when submitted by the parties, the petitioner company included, were the offers. The tenders were to be

submitted within a certain period. This was done. The tenders were received at the offices of the Corporation from the petitioner company within time. On this there is no issue. Thus, under Sec. 4 of the Act, the tenders, as proposals or offers, were received by the Corporation, and the communication of the proposal or offers were complete when received by the Corporation.

29. What about the acceptance? It is on record that it was never made and the eventuality to accept the proposals never happened. The undisputed facts are that this is acknowledged by the Corporation. For the petitioner company as making an offer or proposal, the conditions of acceptance were harsh. The acceptance or the revocation of the contract could also happen if the petitioner company failed to find out the result of the contract, acceptance or rejection as the case may be, before forty days would expire since submitting the tenders. This is condition 10 of the terms of the contract. Implying that silence would be understood as a presumption that it knew of an acceptance or a rejection of the contract; an act unilateral to the Corporation. A price for remaining silent. Fortunately the petitioner company did not remain silent. About the time when forty days expired it inquired on the result of its offers. On this there is also no issue. What the petitioner company was virtually told was this: the Corporation cannot proceed to consider the contracts as it has been restrained by injunctions of the High Court in certain litigations. This has reference to the letter No. C-365 dated 19 September, 1989 it wrote to the petitioner company.

30. In terms of Sec. 4 of the Contract Act, the acceptance was not complete, as it was never made. It was never put into transmission. The offers of the petitioner company were never accepted, within the period stipulated. The contract never saw the light of the day. It was frustrated when it was meant to be completed, though between the petitioner company and the Corporation neither party could foresee the cause of frustration. The offer on the tenders was revoked before it was accepted. The revocation, within the meaning of Sec. 4 of the Act was complete as it was received and within knowledge of the Corporation when it was frustrated from accepting the proposals. On this there is also no issue as these are matters of record. There is no agreement and, thus, no contract under the law. Condition 10 of the terms of the contract is very crucial as it first makes time the essence of the contract, and then places the obligation to find out the result should the Corporation not inform, on the person who makes the tender. The direction within which the finalisation of the tenders will be known is compressed, in fact, not beyond the fortieth day. This condition reads:

^10 fufonk Loh?fr dh lwpuk ?srk dh lEcU?kr izHkkxh; ykSfdd izcU/kd izHkkjh vf/kdkjh] rsUnwi?kk izHkkx] ds dk;kZy; ls jftLVMZ i=@i= okgd }kjk ?srk ds fufonk izi= ij mfYyf[kr irs ij nh tk;sxh A mDr Loh?fr dh lwpuk ;fn ?srk dh fufonk dh frfFk ls 40 fnu ds vUnj ugha izkIr gks tkrh] rks ?srk dks pkfg;s fd og lEcU/kr izHkkxh; ykSfxax izcU/kd izHkkjh vf/kdkjh] rsUnwiRrk izHkkx ds dk;kZy; ls lEidZ dj bl lEcU/k esa tkudkj izkIr djsa A ;fn ?srk ,slk ugha djrk gS] rks Loh?fr@vLoh?

fr tSIh Hkh fLFkfr gks] dh lwpuK mls izkIr gqbZ ekuh tk;sxh**

One day after the fortieth day, the Corporation, is in a position to tell a person making the tender that a tender accepted until the fortieth day has been rejected, or a tender not considered has been accepted. The risk to cross the fortieth day is that a contract may be imposed or denied. This makes one aspect manifest, that time is the essence of the contract, when it is being finalised.

31. Until when was the petitioner company to wait to know the result of the tenders? The Court will judge this situation with the same yardstick which the Corporation had adopted to bind or reject the tender. The Corporation was gagged by litigations and it could give no answer to the petitioner company in terms of the contract. The contract was frustrated.

32. The contract was not discharged by repudiation or by breach by any party, but on account of frustration and the petitioner company, as vendor, is entitled to its earnest monies. AIR 1968 Assam 26, Habib Ali v. Rafik-ud-din.

33. Now that the record shows that there is no issue on this State contract that the modalities of its performance were regulated by a time schedule, from the starting point itself, clock started marking time from the day the tenders were submitted with the earnest money. What is earnest money? Does it cease to be consideration?

34. The question on the characteristics of earnest money was interpreted by the Supreme Court, in the case of Maula Bux Vs. Union of India (UOI), . In this case it was held that earnest money is not merely a part payment but is also an earnest to bind the bargain. It is part of the purchase price when the transaction goes forward. Can this earnest money be forfeited in the present case? It is the case of the Corporation that it was paralysed in finalising the contract. The terms of S. 56 of the Contract Act, 1872, apply to the present case.

35. Section 56 lays a positive rule relating to frustration and does not leave the matter of frustration to the Court to be determined according to the intention of the parties, Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, ; The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, ; Smt. Sushila Devi and Another Vs. Hari Singh and Others, . The Courts cannot travel outside the scope of S. 56 of the Act, aforesaid, Raja Dhruv Dev Chand Vs. Harmohinder Singh and Another, . There was no agreement on altered circumstances and it has also been held that if a consideration of the terms of a contract in the light of circumstances, when it was made, shows that the parties never agreed to be bound, in a fundamentally different situation which unexpectedly emerges the contract ceases to bind at that point, not because the Court in its discretion considers it just and reasonable to qualify the terms of the contract but because on its true construction it does not apply in that situation, Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), .

36. Putting these propositions of law to the present case the situation which

emerges is this: When the Corporation was required by the Court to seize the opportunity to explain its defence not to return or refund the earnest money of Rs. 50,00,000 (fifty lacs) it chose (a) not to give an explanation and (b) refunded a sum of Rs. 40,96,840/- and (c) retained a sum of Rs. 9,03,160/- on the ground that tenders against these were accepted.

37. The anomaly or the inconsistency in the stand of the Corporation begins during the pendency of the writ petition of which it had knowledge and it began acting on the conditions of the contract only when faced with a mandamus to refund or show cause.

38. The Corporation had already taken its policy stand when refund was sought by the petitioner before the filing of the writ petition that the contract cannot go forward as it was freezed and cannot be acted consequent upon injunctions of the Court to stay its hands from finalising it. Estoppel bars the Corporation from saying anything otherwise after it has declared its intentions to the petitioner company not to be able to act on the contracts. To act to finalise the contract after the time schedule is not a contract but a unilateral act. Only mutuality of understanding would render the contract alive. The contract was frustrated within the time schedule during which it was to be finalised.

39. The earnest money is liable to be refunded in absolute terms, as this Court or no Court can spell out a new contract as this would violate the principle of mutuality on which contracts are based, and beyond the powers and the competence of the Courts.

40. Condition No. 14 of the contract stipulates that should the schedule of payments be not kept, referring to conditions set in paragraph 13, then the delayed installment would be paid to the Corporation from the day when it was due at the rate of 0.25 paise per hundred Until 30 days. After 30 days, the default clause is harsh. It stipulates that should the default continue the security, in the context, will be forfeited.

41. As the contract could not go forward, for a reason which neither party could foresee, no advantage can be derived by the Corporation of the monies it received as securities. Parties had agreed to a stipulation of interest if the petitioner company defaults in timely payments of installments towards the contract money. Implying that what would be rightly due to the corporation be paid at the right time, failing which delayed payment was to be levied with a charge which is penal. This was mitigation of damages.

42. If the same equity were to be applied to the Corporation for being accountable for keeping another's money without cause, then monies it has kept are refundable with the same interest it has desired from another, if the contract had subsisted. Thus, interest on Rs. 40,96,340/- will be payable from the date the petitioner company sought refund until the day it was paid, that is, from 18 Sept., 1989 up to 29 Sept., 1989 (the date of the cheque)

43. Rupees 9,03,160/- retained unjustifiably, is to be refunded within fifteen days and this issue as a direction by mandamus. This amount is the balance earnest money retained by the Corporation. The contract has fallen through by frustration during the time schedule when it was to be finalised. This amount will be refunded with interest, from the date when the refund was sought, being 18 Sept., 1989 until it is paid.

44. Now the question on the rate of interest which the Corporation has to pay as it had and retained monies which did not belong to it. The Corporation, in the conditions of the contract had every intention to saddle interest on delayed payments if the terms and conditions of the contract were not adhered to within time. The rate was Rs. 0.25 (twenty five paise) per hundred per day. This was penal interest, as it virtually works out to Rs. 92.25 on Rs. 100/- for one year -- $0.25 \text{ paise} \times 365 \text{ days} = \text{Rs.} 91.25$. In other words 91.25%. This Court could impose the same rate of interest on the Corporation, but will not do so for the reason that the contract did not go forward. The only aspect which remains is how to adjust equities so that one party may not have wrongful gains out of another's money. The petitioner company has demanded interest at the rate of 19.25%, as it submits in the writ petition, that it has to pay at this rate on over drafts from its bankers. This may be so. This Court feels, that it would be just and equitable that the Corporation pay interest at the rate of 15% (fifteen) for the duration of the periods, as already indicated above.

45. No suit for damages will lie by any party against the other, in the circumstances of the case for the duration when the contract could be finalised, that is from the date of submitting the tenders until forty days thereafter. We clarify this as this Court has adjusted the equity upon the same standards as parties had agreed in the conditions of the contract, if it had subsisted.

46. This writ petition, thus, succeeds with costs, with directions as above.

47. Petition allowed.