
(2018) 05 CAL CK 0052
In the Calcutta High Court
Case No : Writ PetitionNo. 262 of 2009

Shree Coal Enterprises India Pvt. Ltd. & Anr.	APPELLANT
Vs	
Coal India Limited & Ors.	RESPONDENT

Date of Decision : 01-05-2018

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (2018) 05 CAL CK 0052

Hon'ble Judges : DEBANGSU BASAK, J

Bench : Single Bench

Advocate : Krishnaraj Thakkar, Pradip Kumar Dutta, Rajarshi Dutta, Partha Basu, Sudhakar Prasad, Nikhil Kumar Roy

Final Decision : Disposed Of

Judgement

DEBANGSU BASAK, J.

1. The petitioners seek refund of earnest money deposit from the respondent no. 1.

2. Learned Advocate for the petitioners submits that, the first respondent is not entitled to forfeit the entire earnest money deposit. The first

respondent having received opportunity to file affidavit, has not disclosed any material to suggest that, the respondents have suffered any damage.

Sufferance of damage is sine qua non for the first respondent to forfeit the earnest money. The first respondent, not having suffered any damage, is

not entitled to adjust any amount on account of damage from the earnest money deposit. In support of such contentions, learned Advocate for the

petitioners relies upon 2015 Volume 4 Supreme Court Cases page 136 (Kailash Nath Associates v. Delhi Development Authority & Anr.). He

submits that, the existence of an arbitration clause in the contract, does not

make a writ petition, not maintainable. In support of such contention, he relies upon 2011 Volume 5 Supreme Court Cases page 697 (Union of India & Ors. v. Tania Construction Pvt. Ltd.). Relying upon 2016 Volume 5 West Bengal Law Reports (Cal) page 67 (Shree Enterprises Coal Sales Pvt. Ltd. & Ors. v. Coal India Ltd. & Ors.) learned Advocate for the petitioners submits that, in similar circumstances the High Court has allowed the writ petition and has quashed the decision of the first respondent, not to return the earnest money deposit. Consequently, he submits that, similar relief should be granted to the petitioners, in the present writ petition. 3.

Learned Senior Advocate appearing for the respondents submits that, the parties have entered into a written contract.

The parties are governed by the terms and conditions of the written contract. The contract stipulates that, in the event of happening of the specified event the petitioners would forfeit the earnest money deposit. Such an event has happened. The first respondent is, therefore, entitled to forfeit the earnest money deposit. The respondent has done so. Whether the forfeiture is correct or not has to be looked into by an appropriate forum and not by a Writ Court. It is appropriate that the parties are relegated to arbitration for the resolution of such disputes. In the present case, the contract between the parties stipulates imposition of penalty on the happening of a certain event. The forfeiture of earnest money deposit, is a penalty which is imposed, on the failure of the first petitioner, to lift the coal. The petitioners having agreed to the imposition of such penalty, cannot be heard to contend otherwise. In any event, the respondents have pleaded of loss being suffered by them in the affidavit-in-opposition to the writ petition. Moreover, the petitioners have cancelled the contract. The fact scenario obtaining in the present case is different to that obtaining in Kailash Nath Associates (supra). Therefore, the ratio of Kailash Nath Associates (supra) is not attracted, in the facts of the present case. He refers to Section 74 of the Contract Act, 1872 and submits that, the ratio of Kailash Nath Associates (supra) has to be understood in the context of the factual matrix obtaining in that case.

4. Whether the first respondent entitled to forfeit the earnest money, in the factual matrix of the present case, is the issue falling for consideration in the present writ petition.

5. The first petitioner participated in an auction undertaken by the first respondent. The first respondent put up coal for E-auction on April 29, 2008.

The first petitioner became the successful bidder and was allowed one rake coal in such E-auction at the bid price of Rs.882/- per metric tonne. The

E-auction was held in terms of the Spot E-auction Scheme, 2007. The first petitioner furnished a noninterest bearing earnest money deposit at the rate

of Rs.200/- per tonne. The first petitioner also deposited the entire value of the coal on May 5, 2008 with the first respondent. The first petitioner,

thereafter, took steps for receiving the delivery of the coal. The Indian Railway Authorities sanctioned movement of the rake to the destination station

at Shambhupura (Rajasthan). The first petitioner, thereafter, cancelled the initial destination station for another destination station. The Railway

Authorities, however, did not provide the rake for the new destination station. The new purchaser informed the first petitioner that, it would cancel the

purchase order. The first petitioner, thereafter, wrote to the Railway Authorities and the first respondent that, in the event the change of destination

station is not permissible, then, the order should be cancelled and the entire earnest money deposited should be refunded. The first respondent,

however, refused to release the earnest money deposit. Hence, the present writ petition.

6. Kailash Nath Associates (supra) is a case where the forfeiture of earnest money by Delhi Development Authority was put into question. In the

facts of that case, it has held that, there was no breach of contract on the part of the participant in the auction process and consequently, Delhi

Development Authority was not put to any loss. In the facts of that case, it has held that, it was arbitrary to allow Delhi Development Authority to

appropriate any amount without any loss being suffered. It is of the view that, compensation may be awarded in case where there is a breach of the

contract by one of the parties, and that, such breach has resulted in a loss, to one of the parties to the contract. In some cases, such loss may not be

ascertained with exactitude. In such circumstances, Section 74 of the Contract Act, 1872 allows the Court to award compensation for the damages

suffered, notwithstanding the party claiming the damages not succeeding in establishing the quantum of damages suffered in exactitude.

7. In the facts of the present case, although Coal India Limited has pleaded that, it suffered loss and damages by reason of the cancellation of the

contract by the petitioner, it has not quantified the loss and damage that it suffered. It has not stated in the affidavit, as to what it did with the coal

allotted to the petitioner, under the subject contract. These facts are material, for the purpose of considering the quantum of compensation, to be paid

to Coal India Limited, for the cancellation of the contract by the petitioner, and the so-called breach of such contract by the petitioner. Moreover, it is

the contention of the Coal India Limited that, the forfeiture happened as and by way of penalty. The word "penalty" is very wide. It would be

harsh to allow Coal India Limited, a public authority, to impose a penalty which is in the nature of punishment, on a defaulting party to a contract,

without any loss and damage, suffered by such public authority being established, even at a rudimentary level. The allegation of sufferance of loss and

damage of Coal India Limited in the affidavit-in-opposition remains unsubstantiated with any other material to suggest, even remotely that, Coal India

Limited suffered any loss and damage by reason of cancellation of the contract by the petitioner.

8. Tania Construction Pvt. Ltd. (supra) is of the view that, a writ petition is maintainable notwithstanding the existence of alternative remedy including

a clause for arbitration in a contract. It is of the view that, a contractual obligation can be looked into by a Writ Court in certain circumstances. In

Shree Enterprises Coal Sales Pvt. Ltd. & Ors. (supra) the Court in similar circumstances set aside the forfeiture made by Coal India Limited.

9. In such circumstances, the forfeiture of the earnest money deposit made by Coal India Limited is bad. Such forfeiture is set aside. Coal India

Limited is directed to refund the earnest money deposit of the petitioner along with reasonable interest at the rate of 8% per annum, on and from the

date of the first demand made by the petitioner, for refund of the earnest money deposit, until payment thereof. This rate of interest is awarded in

view of the fact that, the transactions between the parties are commercial in nature. The nationalized banks charge interest at the rates not less than

such rate of interest in respect of commercial transactions. Moreover, award of interest cannot be considered as a penalty. It is a just compensation

for the non-receipt of the money which the petitioner was entitled to receive without the decision of the Coal India Limited to forfeit such money. Coal

India Limited will refund the earnest money deposit within four weeks from the

date along with interest as stipulated herein.

10. W.P. No. 262 of 2009 is disposed of accordingly. No order as to costs.