

(2023) 09 CAL CK 0104

In the Calcutta High Court

Case No : WPA No. 4751 Of 2023, CAN 1 Of 2023

Sushil Kumar Thard

APPELLANT

Vs

National Jute Manufactures Corporation Limited & Ors.

RESPONDENT

Date of Decision : 27-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 226
Indian Contract Act, 1872 — Section 73, 74

Citation : (2023) 09 CAL CK 0104

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Tilak Bose, Suddhasatva Banerjee, P. Kar, Sagnik Majumdar, Aniruddha Chatterjee, Rahul Karmakar, Surya Prasad Chattapadhyay, Sourav Guchhait, Pourosh Bandyopadhyay, Barnik Ghosh

Final Decision : Allowed

Judgement

Moushumi Bhattacharya, J

1. The petitioner seeks a mandamus commanding the respondents to quash an order of withholding pre-bid earnest money deposit submitted by the petitioner in an e-Auction floated by the respondent nos. 1 and 2. The petitioner seeks refund of the earnest money.

The facts in brief:

2. The respondent no. 1 floated a tender for disposal of movable assets of Khardah Jute Mills by e-Auction. The e-Auction was to start on 9.2.2023 at about 12.00 P.M. and end on the same date at about 7.26 P.M. Several bidders including the petitioner participated in the process of auction which was conducted through MSTC Ltd. The petitioner deposited a sum of Rs. 2.20 crores towards pre-bid earnest money deposit. By a letter dated 14.2.2023 issued by the respondent no. 1 the highest bid of the petitioner was accepted and in terms of Special Terms and Conditions (STC) the petitioner was asked to make further

payment of Rs. 10,60,28,278/- on account of the balance security being 25% of sale value by 21.2.2023. The demand was made in terms of clause 3.0 of NIT which states after receipt of the full security deposit, NJMC will issue sale order.

3. Immediately after the letter dated 14.2.2023 and prior to making payment of the security deposit for the purpose of issuance of sale order, the petitioner approached the respondent no. 1 and sought various clarifications regarding the modalities of the work for removal of materials and demarcation of assets, without any digging of soil and also removal of factory shed of the godown. The petitioner states that no such clarification was provided. The petitioner sought further clarifications by a letter dated 20.2.2023. By a letter dated 21.2.2023 the petitioner shared the bank accounts screenshot to show that funds were ready but clarification was required for execution of work. The petitioner states that the petitioner did not want issuance of a sale order and deposit any security deposit therefor and felt that the same would only expose the petitioner to huge loss apart from the loss already incurred. The petitioner decided not to accept the offer of the respondent no. 1 or agreement for issuance of a sale order (main contract) upon providing security deposit and put an end to the arrangement or agreement and even offered to compensate the respondent no. 1 for the e-Auction.

Relevant Court orders:

? 2.3.2023 – The objection with regard to maintainability of the writ petition was overruled and the only question which remained to be adjudicated was the quantification of damages.

? 20.3.2023 – Direction was given to serve notice on the second highest bidder. The respondents submitted that earnest money has been returned to all unsuccessful bidders.

? 27.3.2023 – Respondent no. 1 filed an affidavit with an assessment of damages on account of failed e-Auction.

? 31.3.2023 – The respondents did not file any affidavit. The respondents were restrained from forfeiting the earnest money deposited by the petitioner.

? 11.4.2023 – The respondent no. 1 filed the second affidavit.

? 13.4.2023 – The Appeal Court refused to entertain the appeal and left all questions to be decided by the learned Single Judge.

The arguments made on behalf of the parties

4. Clause 2.0 of the Special Terms and Conditions in the e-Auction Catalogue for the bid relating to disposal of the movable assets of NJMC Ltd. through the platform of MSTC Limited forms the pivot of the dispute.

5. The material part of the clause relates to forfeiture of the pre-bid amount put in by the successful bidder on account of its failure to fulfil any of the terms and

conditions of the e-Auction and is set out below.

"Remittance of pre-bid EMD should be done strictly as per the process detailed above. The Pre-Bid amount will be liable for forfeiture for any failure of the successful bidder to fulfill any of the terms and conditions of the E-Auction. No interest is payable on this pre-Bid EMD."

6. The petitioner sees the above clause as unconscionable and un-behaving of a public entity with the constitutional mandate to treat all persons and entities equally. The petitioner is also aggrieved by the consequence of the impugned forfeiture which the petitioner says is in the nature of damages. According to the petitioner, damages, if at all, must arise naturally in the course of things and cannot be assessed on grounds which are remote and unreasonable.

7. NJMC/respondent no. 1 on the other hand contests the above position by urging that the petitioner had participated in the tender being fully aware of the terms and conditions including the fact that no complaints would be entertained after submission of bids. According to NJMC, the petitioner cannot argue that the "sale order" was not finalised or that no right accrued upon NJMC to forfeit the pre-bid amount as the terms "sale order" and "letter of acceptance" have been used interchangeably in the bid document.

8. The decision is captioned in accordance with the points argued by learned counsel on behalf of the parties. The conclusions form part of the headings.

Decision

NJMC's decision to forfeit the pre-bid earnest money is unfair

9. The respondent no. 1/NJMC is a Government of India undertaking as stated in the introduction to the e-Auction Catalogue. The respondent no. 1 would therefore fall within the boundaries of Articles 12 and 226 of the Constitution of India and must respect and conform to the benchmark of Article 14 of the Constitution. A public entity under Article 12 would be answerable for any violation of Article 14 of the Constitution even in the contractual sphere and decisions taken by such entities would be open to challenge on the charge of arbitrariness.

10. The Supreme Court in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*; (2004) 3 SCC 553, held that the constitutional safeguard of Article 14 would extend to the sphere of contractual matters for regulating the conduct of the State. The recent judgment of the Supreme Court in *M.P. Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited*; (2023) 2 SCC 703 held that every State action must be informed with reason and any infraction thereof would justify interference of the Writ Court.

11. The facts brought before the Court reveal that the forfeiture clause in the bid document is unconscionable since the successful bidder would be visited with the

penal effect of the clause even before signing a formal contract. The clause is hence in deviation of the principles of equality, fair play and natural justice. Fairness of action is all the more sacrosanct where one of the contracting parties is the State and the other party does not have equal bargaining power to negotiate the terms of the contract.

12. There is a little doubt that the facts involve a public element since statutory bodies cannot act arbitrarily. The argument of the petitioner being held to the terms of the contract without recourse to judicial review is misplaced and now contrary to the recent decisions of the Supreme Court on that issue.

13. Further, the right to forfeiture of earnest money cannot survive in the absence of proof of actual loss. Forfeiture of earnest money comes within the purview of section 73 as opposed to section 74 of the Indian Contract Act, 1872 where the factum of loss is a sine qua non; that is a seller can only forfeit a nominal amount on the seller proving that the seller has suffered loss caused to it on account of breach of contract by the buyer (*Rajesh Gupta v. Ram Avtar*; 2022 SCC OnLine Del 1482). Therefore the right to forfeit earnest money cannot be sustained in absence of any actual proof of loss.

14. It is also important to note that where the public entity has discretion whether to forfeit any part of the earnest money, the discretion must be coupled with a duty to prevent exercise of absolute power by the repository of such power. Power must necessarily be with limits and where the concerned authority exercises power, the discretion must be exercised with a view to promoting fairness and aiding equity; *Maya Devi (Dead) Thorugh LRS. v. Raj Kumari Batra (Dead) Through LRS.*; (2010) 9 SCC 486 and *Jagmohan Singh v. State of Punjab*; (2008) 7 SCC 38.

15. Forfeiture can also never be automatic without giving an opportunity to the concerned party to show-cause. Any forfeiture which is done contrary to the aforesaid would be impermissible and in violation of the principles of natural justice; *S.R.S. Infra Project Pvt. Ltd., Gwalior vs. Gwalior Development Authority*; (2010) 2 MP LJ 142.

16. In any event, the forfeiture clause states that the earnest money will be "liable for forfeiture" as opposed to "shall be forfeited". The Webster's Seventh New Collegiate Dictionary, Chambers Twentieth Century Dictionary, Shorter Oxford English Dictionary 3rd Edition, have all construed the word liable to mean merely permissive or directory; equivalent to "may". In *Collins v. Collins and Dove*; 1947(1) All England Reports 793, the Probate, Divorce and Admiralty Division interpreted the words "liable to pay" as being subject to the conclusion of and to the extent of any discretionary order passed by the Court. In *The State v. Amru Tulsi Ram*; AIR 1957 Punjab 55, the Court likewise interpreted the word "liable" to mean "exposed to a certain contingency or casualty, more or less probable, in other words, a future possibility or probability, happening of which may or may not actually occur".

17. It is hence arguable whether the words used in the clause would entitle NJMC to withhold the EMD.

Forfeiture of earnest money is also not permissible before execution of contract

18. The clause contained in the Special Terms and Conditions states that the pre-bid amount will be liable for forfeiture on any failure of the successful bidder to fulfil any of the terms and conditions of the e-Auction. The forfeiture hence was admittedly pre-contract as no contract was executed between the petitioner and NJMC. NJMC alleges that the earnest money was forfeited since the petitioner (successful bidder) failed to fulfil the terms and conditions of the e-Auction.

19. Clauses H and 2.0 in the e-Auction Catalogue would show that there was no existing contract between the parties and no sale order was issued. Clause 2.0/ Special Terms provide that NJMC will issue a sale order. The relevant part of clause 2.0 would also show that the pre-bid amount is only for online bidding. Clause 3.0 further provides that NJMC will issue the sale order after receipt of the full security deposit and clause 5.0 says that the contract shall be treated having not been entered into until sale order is issued to the successful bidder by NJMC.

20. Significantly, NJMC's case in the first affidavit-in-opposition is that the purpose of earnest money is to prevent formation of cartel. This statement would cast an additional obligation on NJMC to prove that the earnest money was indeed forfeited as a measure against cartelisation. Contrary to the statement, there is no evidence before the Court to show any possibility of cartelisation or that the forfeiture was required for the reasons stated by NJMC in its affidavit.

NJMC's claim in the nature of damages is contrary to law

21. The entire earnest deposit cannot be forfeited since damages, under section 73 of the Contract Act, 1872, is assessed on the date of the complained breach of the contractual terms.

22. More specifically, section 73 of the Contract Act provides for compensation for loss and damage caused by breach of contract and the party who suffers is entitled to receive compensation for any loss or damage caused to him from the party who has broken the contract. The damages must also naturally arise in the usual course of things from the breach whether or not the parties knew at the time of making the contract that damages would result from the breach of the contract. Section 73 further requires compensation to be for causes which are direct and foreseeable.

23. In the present case, the breach complained of arises from the petitioner's refusal to sign the contract. Therefore, NJMC must prove that it has suffered loss or damage consequent to such refusal and is entitled to compensation for the loss caused to NJMC by reason of such alleged breach.

24. Section 73 of the Contract Act requires that compensation is not to be given

for any remote and indirect loss or damage sustained as a result of the breach. The absence of any disclosed reason for forfeiting the pre-bid amount leads to the inescapable conclusion that the damages imposed are speculative and remote. NJMC presumably has forfeited the pre-bid deposit on the basis of future loss which is in any event unquantified and lacks a reasonable pre-estimate. In other words, the damages in the form of forfeiture is unforeseeable.

25. In *Karsandas H. Thacker v. M/s. The Saran Engineering Co. Ltd.*; AIR 1965 SC 1981, the Supreme Court explained the illustration to section 73 of the Contract Act as the person committing breach of contract having to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party. The first party however does not have to pay compensation which the second party had to pay to the third party as the first party had not been told at the time of the contract that the second party was making the purchase of article for delivery to such third party.

26. NJMC's estimation of damages stated in the second affidavit affirmed on 11.4.2023 contains the details of expenses incurred by NJMC on account of charges, security service, overhead expenses, legal expenses and insurance cost. In summary, NJMC has charged Rs. 7.26 lakhs on account of security services, Rs. 2.90 lakhs in overhead expenses, Rs. 7.5 lakhs as legal expense and Rs. 45,000/- as insurance cost. The total expense shown for two years is approximately Rs. 1.66 crores.

27. The estimation of damages as given in a tabulated form in the second affidavit is neither reasonable nor foreseeable in terms of section 73 of the Contract Act. This is also by reason of the fact that the petitioner had offered to pay Rs. 25 lakhs for the first auction and Rs. 2.5 lakhs for auction proposed to be held together with legal costs. The petitioner's offer was based on the first affidavit of NJMC which failed to state any quantum of losses suffered or expenses incurred for the first auction. NJMC's only case in the first affidavit was that quantification of damages was not permissible in writ jurisdiction. It is evident from the second affidavit of NJMC that the estimation of damages is inflated, exaggerated, unreasonable and remote, apart from failing to disclose any basis for the computation.

28. 'Guesstimates' are commonly used to undermine a claim for damages. The law however is that in admitting proof of such damage, the amount must be established with reasonable certainty. The uncertainty of damages is not by reason of the loss sustained being incapable of proof or that the certainty requires mathematical precision. The threshold of credibility is that the loss of damage must be as far removed as possible from speculation so as to create in the minds of reasonable men the belief that the loss caused is the most likely consequence from the breach of the contract and was a probable and direct result thereof.

29. Apart from the mandate of section 73 of the Contract Act which requires damages to be reasonable and not remote, a statutory body like the NJMC cannot be allowed to make a windfall.

30. NJMC, despite being given an opportunity to bring on record the basis for claiming damages, has failed to discharge the burden. The petitioner has prayed for a writ of certiorari directing the respondents for producing records so that conscionable justice may be done. The records produced by NJMC do not disclose any evidence of either the damages claimed being reasonable compensation of any breach suffered by NJMC or being specific in respect of the computation.

31. The decisions cited on behalf of the respondent NJMC are distinguishable. *Meerut Development Authority v. Association of Management Studies*; (2009) 6 SCC 171 cited by the petitioner, relies upon *ABL International Ltd.* and recognises that the Court can interfere in contractual matters in case of arbitrariness. *State of Maharashtra v. A.P Paper Mills Ltd.*; 2006 0 AIR (SC) 1788 and *State of Haryana v. M/s. Malik Traders*; 2011 0 AIR (SC) 3574 are factually not applicable since in the present case the petitioner was not under any financial constraints at the relevant point of time. *National Highways Authority of India v. Ganga Enterprises*; (2003) 7 SCC 410 and *National Thermal Power Corporation Limited v. Ashok Kumar Singh*; (2015) 4 SCC 252 did not deal with deposit of earnest money but with bid security where the bid security was to be forfeited if the bidder withdraws from the bid during the period of validity. *Ashok Kumar Singh* was also concerned with revocation of tender. *Infotech 2000 India Limited v. State of Punjab*; 2007 0 AIR (P&H) 58 did not discuss the question of remoteness or sufficiency of damages under section 73 of the Contract Act. The unreported judgment of the Madras High Court in *Rubina v. The Authorised Officer, M/s. Axis Bank Limited* held that existence of a forfeiture clause does not imply that the entire amount deposited has to be forfeited and that the right to forfeit must be balanced against the rule of unjust enrichment.

Conclusion

32. The above discussion leads this Court to the considered view that the respondent NJMC's act of forfeiting the entire pre-bid amount put in by the petitioner in terms of clause 2.0 of the Special Terms and Conditions of the e-Auction Catalogue on the alleged non-fulfillment of the terms and conditions of the e-Auction is unreasonable, arbitrary and contrary to the statutory mandate of section 73 of the Contract Act. Further, the assessment of damages which NJMC has put on record is unreasonable and remote and lacks any factual or logical basis. NJMC simply seeks to make a windfall at the expense of the petitioner. As a Government of India undertaking, the act of forfeiture is also discriminatory and in breach of equality and fair play.

33. WPA 4751 of 2023 is accordingly allowed and disposed of by directing the respondent nos. 1 and 2, i.e. NJMC and its General Manager, to quash the order withholding the pre-bid earnest money deposited by the petitioner and refund

the same to the petitioner within

21 days from the date of this judgment. The petitioner shall provide the mechanism for facilitating the refund to NJMC within 7 days from the date of this judgment.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.