

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(C) No. 4974 of 2013

Atibir Industries Company Limited, through its
Director, Sameer Kumar Sarawgi, Giridih Petitioner

Versus

1. Central Coalfields Limited through its Chairman-cum-Managing Director, Ranchi
2. Chairman-cum-Managing Director, Central Coalfields Limited, Ranchi
3. Director (Finance & Marketing), Central Coalfields Limited, Ranchi
4. General Manager (Sales & Marketing), Central Coalfields Limited, Ranchi
..... Respondents

CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Petitioner : Mr. Sumeet Gadodia, Advocate
Ms. Shilpi Shandil Gadodia, Advocate
For the Respondents-CCL : Mr. Anoop Kr. Mehta, Advocate
Mr. Atul Rai, Advocate
Mr. Manish Kumar, Advocates

CAV ON : 28.07.2023

PRONOUNCED ON : 08.08.2023

Heard, learned counsel for the parties.

1. The instant Writ Petition has been filed against the forfeiture of the earnest money Rs.23,80,000/- towards earnest money deposited by the petitioner.
2. Petitioner's company is engaged in manufacturing of sponge iron and had participated in E. Auction conducted by Respondents-CCL in the Month of October, 2011. He was declared successful bidder and letter with respect to the aforesaid auction was communicated to the petitioner by 'e-mail' on 31.10.2011.
3. As per the stipulation of the bid notice, the payment had to be made by two designated accounts of the petitioner. However, the petitioner deposited the value of coal amounting to Rs.1,33,67,700/- through RTGS mode on 09.11.2011 by the account which was not one of the non-designated accounts by which the said payment was required to be made. Since payment was made from non-designated account, as such, the coal was not supplied nor the amount was refunded.
4. Consequently, the petitioner moved this Court vide W.P.(C) No.124 of 2012 for the supply of coal to the petitioner. The respondents-CCL took a specific stand that non-payment from the designated account was a breach of the term and condition of the contract, therefore, coal was not supplied and the earnest money was forfeited. Later, refund of coal value to the tune of Rs.1,33,67,700/- was made whereas Rs.23,80,000/- was forfeited as earnest money by invoking the forfeiture clause and being aggrieved by that, the instant Writ Petition (Civil) has been filed before this Court.

ARGUMENT ON BEHALF OF THE PETITIONER

5. Plea for refund of the earnest amount is premised on the ground that there was no material breach in the essential terms of the agreement. The new scheme requiring payment to be made from designated account was introduced in 2011

shortly before the e-tender, resulting in some confusion regarding the mode in which the payment had to be made. This breach was not to the essential part of the agreement but to its trivial term which did not result in loss to the Respondent Company.

6. Further, in terms of Clause 6.2 of the E-Auction Scheme, the EMD was not to be treated as earnest money but the sum was security deposit for performance of the bidders towards completion of the said transaction. Under clause 6.3, the security deposit (as converted from the EMD) could be adjusted as coal value only after completion of lifting of coal covered under coal value paid, excluding security deposit. However, in the events of default in the performance of the bidder, the provision of forfeiture of the security deposit, as stipulated, would be applicable.

7. Rs.1,33,67,700/-deposited by the petitioner through the non-designated account has been refunded in compliance to the order of this court dated 10.02.2012 passed in W.P.(C)No. 124 of 2012.

ARGUMENT ON BEHALF OF CCL

8. It is submitted by learned counsel for the Respondents-CCL that earlier coal value used to be deposited by coal consumers only through Demand-Draft/ pay orders. Subsequently, the system of deposit of coal value was converted to RTGS/ NEFT Mode only. This was notified to all the consumers that the payment shall be received only through this mode. The petitioner's company gave two designated accounts along with the undertaking that the payments would be made by these accounts and not from any other account. The payments of coal value were not made through the designated account(s), therefore, contract was not finally concluded and the coal value was returned, but the earnest money was forfeited in terms of the conditions stipulated in Spot E. Auction Scheme, 2007.

9. Considering this aspect of the matter, the Co-ordinate Bench of this Court in Cont. Case (Civil) No.257 of 2012 vide order dated 11.05.2012 dropped the contempt proceeding with a liberty to the petitioner to address its grievance regarding non-payment of earnest money by approaching appropriate forum.

ANALYSIS

10. After considering the rival submissions advanced on behalf of both the sides, it is apparent that the payment of the coal value was not made from the designated account(s). Consequently, the contract fell through. The main dispute is with regard to the forfeiture of the earnest money regarding which the Division Bench of this Court vide L.P.A. No.291 of 2012 has held that in W.P.(C) No.124 of 2012 the Hon'ble Single Judge has not decided any issue with respect to the entitlement of writ petitioner for refund of the earnest money. Meaning thereby the question of refund of earnest money was still open.

11. The matter for consideration is whether the forfeiture of earnest money deposit in terms of Clause(s) 6.1 & 6.2 read with Clause 9 of the Spot E. Auction Scheme, 2007 was justified or not?

12. Before proceeding further, it will be necessary to advert to the relevant forfeiture clause which is extracted here under:

“6. Terms of Payment

6.1 The coal value to be deposited in advance by the successful bidders shall be computed and deposited after making provision for the EMD amount for the successful bid quantity already transferred by the service provider to the subsidiary company. In other words, the coal value to be deposited and EMD amount together, shall be equivalent to the 100% coal value.

6.2 EMD amount shall not be treated as adjustment towards the coal value but would stand converted into a ‘Security Deposit’ for performance of the bidders towards the completion of the said transaction.

6.3 The above security deposit (as converted from the EMD amount) would be adjusted as coal value, only after completion of lifting of coal covered under coal value paid, excluding security deposit. However, in the event of default in performance by the bidder, the provision of the Security Deposit (as converted from the EMD) as stipulated, would be applicable.

9. Forfeiture of EMD

The EMD submitted by the successful Bidders will be liable for forfeiture in the following cases:-

9.1 If after completion of e-auction, a successful bidder fails to make payment for the coal value including all other charges within the stipulated time, the proportionate EMD equivalent to the failed quantity shall be forfeited subject to the provisions at clause 6.4 and/or clause 6.5 of this document, and/or

9.2 If the successful bidders does not lift the booked quantity within the stipulated validity period, the proportionate Security Deposit at @₹ 500 or ₹ 400 per tonne(as converted from the EMD amount) for the unlifted quantity is equal or more than a truckload i.e 9 or 10 tonnes as applicable.

Such forfeiture, however, would not take place if the coal company has failed to offer full or part of the successful bid quantity within the validity period. In such cases again, no forfeiture take place if the balance quantity is less than a truckload/rake load.

9.3 If the buyer cancels the order/rake after booking, the EMD @₹ 500 ₹ 400 per tonne (as the case may be) shall be forfeited for the rake cancelled.”

(Emphasis supplied)

13. From the terms and conditions of spot E-auction scheme 2007, it is evident that the EMD amount stood as security deposit and in the event of non-payment of the coal value or the failure to lift the coal as per the terms of agreement, the said deposit stood could forfeited.

14. There are some unique features of the present case, which deserves to be considered for just and equitable adjudication in the matter.

Firstly, indisputably the scheme for making payment through designated accounts by RTGS was a new scheme introduced in March 2011 when Respondent-Central Coalfield Ltd amended its policy of payment. The time for making payment was for seven working days and the same was to expire on 11.11.2011.

Secondly, the petitioner being sponge iron producer deposited the coal value with EMD within the stipulated period of seven days on 09.11.2011.

Thirdly, petitioner had given a written undertaking to make payment through designated account.

Fourthly, after the payment having been made from a non-designated account, the respondent company did not give opportunity or serve notice for making payment from the designated account.

Fifthly, neither the coal was supplied nor *suo motu* refund was made of the coal value by the respondent company after cancelling the contract.

Sixthly, there is nothing on record to suggest that the respondent suffered loss due to re-auctioning, after the contract with the petitioner fell through.

15. A contract is concluded on acceptance of offer. The petitioner was declared a successful bidder and therefore, the contract stood concluded. There was a breach in the contract on the part of the petitioner for not making payment from the designated account as per the terms agreed upon.

16. Technically there can be forfeiture of earnest money where the agreement has a forfeiture clause and breach is committed on the part of the purchaser. As held in *NTPC Ltd. v. Ashok Kumar Singh, (2015) 4 SCC 252* such a forfeiture can be even in case of withdrawal of an offer before it was accepted if the offer is itself subject to the condition that the earnest money will be forfeited for not entering into contract or if some other act is not performed, then, even though he may have a right to withdraw his offer he will have no right to claim the refund of the earnest money. The purpose of such a Clause providing for forfeiture of the earnest money clearly was to see that only genuine bids are received. Law settled in *Maula Bux v. Union of India, (1969) 2 SCC 554 at page 559* has been uniformly followed is that forfeiture of earnest money **if reasonable** under a contract for sale of property, movable or immovable, does not fall within Section 74 of the Contract Act. In *Kailash Nath Associates v. DDA, (2015) 4 SCC 136* it has been held that Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction *before* agreement is reached, Section 74 would have no application.

17. From the above authorities what can be safely culled out is that there is no specific bar to forfeiture of earnest money as per the terms of the agreement, provided it is reasonable and just. Under Section 74, it is not necessary that loss should be an imperative precondition for forfeiture of the earnest money. Such forfeiture can take place in terms of the forfeiture clause even before the acceptance of offer and conclusion of contract. The object of introducing such clause is to keep at bay dubious speculators in the tender process.

18. However, forfeiture is not automatic in all cases and it has to answer the

test of reasonableness and cannot be made arbitrarily. Existence of such a Clause in notice inviting tender does not give an unqualified right to forfeit the earnest money. It is for this reason that Courts in appropriate cases have insisted upon actual loss caused due to the breach. In *Fateh Chand v. Balkishan Dass*, (1964) 1 SCR 515 forfeiture of earnest money was struck down as there was no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. The principle was reaffirmed in *Kailash Nath Associates (supra)* wherein the law was summed in the following words,

33. *Section 74 occurs in Chapter 6 of the Contract Act, 1872 which reads “Of the consequences of breach of contract”. It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.*

Hon’ble Supreme Court held in *Jagmohan Singh v. State of Punjab*, (2008) 7 SCC

38. *that justice, equity and fair play cannot be given a go by while forfeiting the earnest money. It was observed **16.** In *Teri Oat* [(2004) 2 SCC 130] it was opined that the power of forfeiture should be taken recourse to as a last resort and the action of the statutory authority is required to be judged on the touchstone of Article 14 of the Constitution of India. The High Court in its judgment failed to consider this aspect of the matter. It is furthermore evident that Order 47 Rule 1 of the Code of Civil Procedure does not preclude the High Court or a court to take into consideration any subsequent event. If imparting of justice in a given situation is the goal of the judiciary, the court may take into consideration (of course on rare occasions) the subsequent events.*

(Emphasis supplied)

19. In the present case, the manner in which the supply of coal was cancelled appears to be somewhat bizarre and not in accord with the salutary principles of reasonableness and fair play. It was not that the coal value had not been paid within the stipulated time. The only fault for which the purchase order was cancelled was not paying the amount through designated account. No opportunity, no notice to make amend and pay the amount through designated account was given. The coal was not supplied and the full coal value was returned only after the intervention of the writ Court. The petitioner was running a sponge iron factory and cannot be said to be a speculator. Is this the manner, in which Public Sector coal supplier is supposed to deal with industries? Can the manner in which the contract was cancelled be said to be conducive to foster industrial growth? It should not be lost sight of the object of Contract law, which is to further and not to siffle trade, commerce and business activities. There is nothing on record to suggest that Respondent Company suffered any loss on account of non-payment by the designated account. The entire episode appears to be a callous attempt to make

capital out of a default in a peripheral part of agreement regarding the mode of payment.

Hon'ble Supreme Court in *LIC v. Consumer Education & Research Centre*, (1995) 5 SCC 482 at page 500 enjoined,

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

Under the aforesaid facts and circumstance and for the reasons discussed above, this Court is of the view that forfeiture of earnest money was made in an arbitrary manner without suffering any loss and not in accord with fair play and equity. Such forfeiture was indefensible.

The Respondent Company is directed to release the earnest money within two months of the order, with interest @ 9% per annum from the date when the earnest money was deposited till the date of its final payment.

Writ Petition is accordingly allowed.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi

Dated the 8th August, 2023

AFR / Anit