Mbl Infrastructure Limited vs Rites Limited And Others on 25 February, 2020

Equivalent citations: AIR 2020 CALCUTTA 155, AIRONLINE 2020 CAL 167

Author: Sanjib Banerjee

Bench: Sanjib Banerjee

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

The Hon'ble JUSTICE SANJIB BANERJEE
And
The Hon'ble JUSTICE KAUSIK CHANDA

APO No. 377 of 2018
In
WP No. 1645 of 2010

MBL INFRASTRUCTURE LIMITED
-VERSUS-
RITES LIMITED AND OTHERS

AND

APO No. 378 of 2018
In
WP No. 1649 of 2010

MBL INFRASTRUCTURE LIMITED
-VERSUS-
RITES LIMITED AND OTHERS

For the Appellant: Mr Ratnanko Banerji, Sr Adv.,
Mr Sankarsan Sarkar, Adv.,
Mr Shaunak Mitra, Adv.,
Ms Aryaa Chatterjee, Adv.

For the Respondent No.1: Mr Sarvapriya Mukherjee, Adv.,

Mr Chayan Gupta, Adv., Mr Sandip Dasgupta, Adv., Mr Ayan De, Adv.

Hearing concluded on: February 18, 2020.

Date: February 25, 2020.

SANJIB BANERJEE, J. : -

> The issue involved is as to the enforceability of a forfeiture clause in a notice inviting tender. There is no doubt that the relevant clause provided for the forfeiture of the earnest deposit if material particulars were found to have not been disclosed by a tenderer. The legal question which has arisen is whether, upon there being a material non-disclosure or a material concealment, the forfeiture clause would become applicable irrespective of the quantum of money sought to be forfeited and without reference to the nature of inconvenience or the extent of damages suffered by the party seeking to forfeit.

2. The two matters are similar, though they pertain to different notices inviting tender. The forfeiture clause is the same. The principal parties are identical. The nature of non-disclosure or concealment is also the same. The earnest or security deposit in either case is Rs.50 lakh, which is the amount sought to be forfeited. The subsequent reference in this judgment is to one of the matters. The principles involved are the same in both cases.

3. The Damodar Valley Corporation engaged Rites Limited for the purpose of supervising the construction of a railway siding for the Koderma Thermal Power Project in Jharkhand. Clause 9 of the notice inviting tender issued in January, 2009 provided for every tender to be accompanied by an earnest deposit of Rs.50 lakh. Such earnest deposit was to be refunded to tenderers whose technical bid was not found to be acceptable and the refund was to be made as soon as the scrutiny of the technical bid was completed by Rites. In respect of the bids which did not clear the technical stage, the earnest deposits of the unsuccessful tenderers were to be refunded within 28 days of the tender validity period.

4. Clause 9.4 of Section 1 of the tender terms provided as follows:

> "9.4 The Earnest Money is liable to be forfeited
>
> a) if after bid opening during the period of bid validity or issue of Letter of Acceptance, whichever is earlier, any tenderer
>
> i) withdraws his tender or
>
> ii) makes any modification in the terms and conditions of the tender which are not acceptable to the Employer.

b) in case any statement / information / document furnished by the tenderer is found to be incorrect or false.

c) in the case of a successful tenderer, if the tenderer

i) fails to furnish the Performance Guarantee within the period specified under Clause 1 of "Clauses of Contract".

ii) Fails to commence the work within 15 days after the date of issue of Letter of Acceptance.

In case of forfeiture of E.M. as prescribed here in above, the tenderer shall not be allowed to participate in the retendering process of the work."

5. The tender documents also included the format of a declaration to be furnished by every bidder by way of an affidavit executed on a non-judicial stamp paper of Rs.10/- attested by a notary or magistrate. The first three clauses of the format are relevant for the present purpose:

"i) We have not made any misleading or false representation in the forms, statements and attachments in proof of the qualification requirements;

ii) We do not have records of poor performance such as abandoning the work, not properly completing the contract, inordinate delays in completion, litigation history or financial failures etc.

iii) Business has never been banned with us by any Central / State Government Department / Public Sector Undertaking or Enterprise of Central/State Government."

6. There is no dispute that when the appellant, through a joint venture with Premco Rail Engineers Limited, submitted its bid, the appellant furnished a declaration in the prescribed format by way of an affidavit affirmed on February 10, 2009. On or about July 21, 2009, Rites issued a show-cause notice to the joint venture bidder that such bidder had suppressed material facts while submitting its tender and required the bidder to show cause why action should not be taken against it in terms of Clause 9.4(c) of Section 1 of the tender documents. It was alleged in such notice that the bidder had been engaged for the construction of a road between Adityapur and Kandra and for the widening and strengthening of the Kandra- Saraikella road in 2004-2005 and the contractor was unable to satisfactorily complete the work which resulted in a sum in excess of Rs.1.19 crore being recovered from the contractor after cancelling the agreement. It also alleged that steps had been taken to blacklist the contractor. Rites claimed that in the light of such previous performance of the bidder, the declaration furnished by it was false and the earnest money was liable to be forfeited as per the relevant clause.

7. The joint venture bidder replied to the show-cause notice on August 10, 2009, claiming that there was no fault on its part in the contract pertaining to construction of the road in Jharkhand and that

the defects were discovered long after the expiry of the defect liability period. It also claimed that the PIL that had been filed before the Ranchi High Court may have been at the behest of a business competitor and the matter was sub-judice.

8. To be fair to the appellant, it has accepted that there was a material non-

disclosure and that the declaration furnished in support of the bid may not have been accurate or appropriate. Thus, it is not necessary to waste time over whether there was a breach on the part of the bidder in making the fullest disclosures along with the bid. The assessment can proceed on the basis that the declaration furnished was at variance with the particulars contained in the bid papers.

9. However, the appellant asserts that as a consequence of the relevant fact not being disclosed by the bidder, neither Rites nor the ultimate employer has suffered any loss or damage or prejudice for Rites or the employer to retain any part of the earnest deposit or forfeit the same. The appellant insists that any forfeiture in such circumstances would amount to the imposition of a penalty.

10. The appellant refers to Sections 73 and 74 of the Contract Act, 1872. The appellant suggests that in terms of Section 73 of the said Act, the party which has suffered a breach is liable to be compensated by the party which has broken the contract by way of "compensation for any loss or damage"

> caused to the second party thereby, "which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." The appellant refers to the second paragraph of Section 73 of the Act that precludes compensation for any remote or indirect loss or damage sustained by reason of the breach.

11. The appellant places much emphasis on Section 74 of the Act and, since the legal issue involved herein is inextricably connected to such provision, the same may be seen in its entirety:

> "74. Compensation for breach of contract where penalty stipulated for. - When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation.-- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception. -- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the

> performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.
>
> Explanation.-- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

12. The appellant refers to Illustrations (d), (e) and (g) under Section 74 of the Act to maintain that damage or loss is the sine qua non for payment of compensation for breach of contract under Section 74. The appellant submits that the proof of loss or damage is not altogether dispensed with under Section 74 of the Act; but where the extent of the loss or damage is difficult or impossible to prove, the court is empowered to award the amount indicated in the contract if the court perceives the same to be a genuine pre-estimate of loss or damage for reasonable compensation for such loss or damage and not any penalty.

13. At the initial stage, the appellant had purported to suggest that there was really no contract between the parties and, as such, Section 74 of the Act may not be of any assistance in the matter. However, such argument cuts both ways since, in the absence of the applicability of Section 74, the prohibition of imposing a penalty may not apply to the respondents herein. At the end of the day, however, the appellant has accepted that there was a contract between the parties and the bidder in this case may be seen to have been in breach of such contract; but the appellant maintains that the mere breach would not entitle the respondents to forfeit the security deposit.

14. It must also be recorded that even the respondents did not initially put forward a sure-footed argument that there was a concluded contract between the parties and the bidder in this case had acted in breach of the same. In a sense, both sides initially proceeded on the basis that the consideration of the offer was pursuant to a notice inviting tender and it was only the successful tenderer which would be awarded the contract; therefore, what has happened between the parties is only a pre-contract exchange that could not be elevated to the status of a contract.

15. Before dealing with the other aspects of the matter, there must be some clarity on such aspect. Section 2(h) of the Act of 1872 defines a contract to be an agreement which is enforceable by law. Section 2(e) of such Act defines an agreement. It is necessary to see how an agreement is arrived at, since it is only an agreement which is enforceable by law that is a contract. Clauses (a), (b), (d) and (e) of Section 2 of the Act of 1872 are relevant for the present discussion:

> "2. ...
>
> (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) ...

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

..."

16. In the present case, a notice inviting tender was issued by Rites. On the basis of the terms of the tender documents, the joint venture bidder made a bid. Though the primary objective of the process was to identify a person who would be awarded the substantial contract, upon a person inviting tenders and another making of a bid pursuant thereto, there is an agreement in place. To boot, in this case there was also a declaration which was furnished by the bidder certifying, inter alia, that it had disclosed all that was necessary in accordance with the tender terms and had not concealed any relevant material. Even if such a declaration had not been furnished by the bidder in this case, there was an agreement between the parties which involved a basic promise on the part of Rites that it would consider the bid fairly and award the contract to the bidder if found eligible and the financial terms were the best. The corresponding promise that the bidder made while submitting the bid was that the bid conformed to the terms and conditions of the tender documents. Since the tender documents required disclosures to be made regarding the previous poor performance of the bidder, the non-disclosure of an instance of poor performance by the bidder was a breach of the agreement. There is no reason why the agreement between the parties that came about upon the bidder putting in the bid may not be enforceable by law. There is, therefore, clearly a breach of contract by the bidder in this case in not disclosing the material fact while submitting its bid.

17. The parties have referred to several decisions in support of the rival arguments but none of the judgments cited adequately deal with the legal issues that have arisen herein.

18. The appellant has first referred to a judgment reported at (2015) 4 SCC 136 (Kailash Nath Associates v. Delhi Development Authority). The matter pertained to a public auction conducted by the Delhi Development Authority for a plot. The appellant before the Supreme Court put in the highest bid and deposited 25 per cent of the bid amount as earnest money in accordance with the conditions of the auction. The tender terms provided that if the earnest money was not paid the auction would stand cancelled. Another clause provided that the breach or non-compliance of the terms and conditions of the auction or misrepresentation of the bidder would result in the earnest money being forfeited. The balance consideration was to be paid by the auction purchaser within three months of the acceptance in writing of the bid. Though the earnest deposit had been made

within time, the balance payment could not be made within the period stipulated or even within the extended time permitted by DDA. The earnest deposit was forfeited. A writ petition challenging the same failed and a suit for specific performance of the agreement was filed with an alternative relief for recovery of the earnest deposit. During the pendency of the suit the property was re-auctioned and it fetched a sum more than three times the value of the previous highest bid. The suit for specific performance was dismissed but the earnest deposit was directed to be refunded with interest. In appeal, the forfeiture of the earnest money by DDA was found to be in order. Hence, the appeal by special leave to the Supreme Court.

19. At paragraph 29 of the report, the Supreme Court observed that there may not have been any breach of contract on the part of the appellant before it and, in any event, "it would be arbitrary to allow DDA as a public authority to appropriate Rs 78,00,000 (Rupees seventy-eight lakhs) without any loss being caused." The court then referred to the famous decision reported at AIR 1963 SC 1405 (Fateh Chand v. Balkishan Dass) and summed up the legal position as follows at paragraph 43.1 of the report:

> "43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation."

20. The case of Fateh Chand has also been placed for the interpretation of Section 74 at paragraph 15 of the report. The Supreme Court observed that such provision does not confer a special benefit upon any party; it merely declares the law that notwithstanding any terms of contract pre-determining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount claimed or penalty stipulated. The appellant has relied on another judgment reported at 239 DLT 324 (Simplex Infrastructures Limited v. National Highways Authority of India) where the bid security furnished was to the tune of Rs.2.41 crore. The tender documents provided for appropriation of the security deposit in case of material misrepresentation, corrupt practice, fraudulent conduct and the like. On facts, the court held that forfeiture of the entire bid security was penal in nature and "absolutely unreasonable". The court concluded that no loss had been suffered by the employer, with respect to time and the processing of the bid. Since the bidder was ready to part with an amount of Rs.30,000/-, the balance earnest deposit was to be refunded.

21. The appellant here says that the stand taken by the respondents is that the respondents may not have suffered any loss or damages; but since the tender terms provided for forfeiture, the entire security deposit could be forfeited. In this context the appellant refers to paragraph 20 of the

affidavit affirmed by the second respondent to the writ petition on behalf of the first respondent. The following passage from paragraph 20 of such affidavit is relevant:

> "20. ... I say that a bare perusal of the relevant Clause 9.4 of the tender documents would reveal that the earnest money can be forfeited in case of any statement /information/document furnished by the tenderer is found to be incorrect or false at any stage during the period of bid validity, in case of all tenderers, successful or otherwise, and also in case of an unsuccessful tenderer after issuance of letter of acceptance. The question of any other contracting party namely that of the answering respondents suffering any loss or damage in connection with the misstatements and/or false representations made by the petitioners is immaterial and irrelevant inasmuch as the answering respondents have a specific right under the tender documents to forfeit the earnest money in case of the tenderers making any false or misreading (sic, misleading) statements in their declaration. The actual damage or loss suffered by the answering respondents is immaterial ..."

22. The respondents first refer to a judgment reported at (2003) 7 SCC 410 (National Highways Authority of India v. Ganga Enterprises). In such case the bid was sought to be withdrawn by the bidder during the period of bid validity. Upon the earnest deposit being forfeited by encashing the relevant bank guarantee, a writ petition was filed to challenge the same. Such petition was allowed on the ground that "in law it is always open to a party to withdraw its offer before its acceptance". However, when the order was carried to the Supreme Court, it held that the High Court had fallen into error as the "whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted." Without going into the quantum of the forfeiture or the extent of the loss or damage suffered by the employer in that case, the forfeiture was endorsed. Though several other judgments were noticed in that case, the key judgments in Fateh Chand and Kailash Nath may not have been brought to the notice of the Supreme Court.

23. In the next judgment brought by the respondents, reported at (2015) 4 SCC 252 (National Thermal Power Corporation Limited v. Ashok Kumar Singh), the tender was in two parts: one technical and the other commercial. The quantum of security deposit furnished was about Rs.4.41 lakh in one case and Rs.3.34 lakh in the other. The court referred to the Ganga Enterprises case, set aside the High Court judgment and dismissed the writ petition, thereby upholding the forfeiture. The entire reason is based on the dictum in Ganga Enterprises that the whole purpose of such a clause is to see that only genuine bids are received and such purpose would be lost if forfeiture was not permitted. Again, the aspect of penalty was not considered.

24. The next case cited by the respondents is reported at (2018) SCC Online Cal 5613 (Kolkata Metropolitan Development Authority v. South City Projects (Kolkata) Limited). In that case, this court observed that the assessment of the quantum of damages suffered may not be possible in the summary procedure adopted in proceedings under Article 226 of the Constitution and such forum may not be the ideal place for such adjudication.

25. The respondents finally refer to a judgment reported at (2010) 15 SCC 380 (Aggarwal Associates (Promoters) Limited v. Delhi Development Authority) for the principle that any person who approaches a court of equity must demonstrate that he has acted with fairness. Paragraph 11 of the judgment instructs that since the appellant in that case did not act fairly and the transaction failed by reason of the default of the appellant, the appellant was not entitled to any sympathetic consideration of his demand for refund of the earnest money. The judgment did not dwell on the propriety of a forfeiture clause or the permissibility to forfeit a large amount without indicating any corresponding loss or damage of commensurate value. It is such issue which has arisen here.

26. In a claim for damages there is first the factum that has to be established before the quantum of damages can be assessed. When the breach is of the kind as complained in the present case - of non-disclosure of material facts or concealment thereof - the extent of damages that may have been suffered would depend on how far the bid had progressed and at what stage the discovery of the breach was made or at what stage such discovery could be made upon exercise of ordinary diligence. The legal issue has to be answered with reference to Sections 73 and 74 of the Act of 1872 and cannot be seen to be beyond the pale of such provisions. Notwithstanding the stray lines in some of the judgments cited that there may not have been any concluded contract for Section 74 of the Act of 1872 to come into play, it has already been discussed above that there was an enforceable agreement in place upon there being a notice inviting tender and a bid being deposited in terms thereof. The breach is established and unquestionable but it would not necessarily follow that the breach would result in the entire quantum of the earnest deposit being forfeited. If such interpretation were to be given, the clause would be penal and fall foul of Section 74 of the Act.

27. It is, thus, that the quantum of damages suffered has to be assessed with reference to how the bid was received, how it was processed, the extent to which it progressed, the nature of the work involved and like factors. It is inconceivable that in processing the bid, the respondents here would have expended an amount of Rs.50 lakh or even a substantial part of such amount. It would seem that it is for such reason that the respondents suggest at paragraph 20 of their affidavit that once the amount was quantified they were not required to prove the quantum of loss actually suffered.

28. Several principles must be kept in mind while making the assessment.

Merely because such a clause is included in the tender documents does not attach any level of sanctity to it than any other clause which is required to pass the test of reasonableness in the context in which it is applied. That a sum is specified as security deposit or earnest deposit does not imply that upon the breach, such amount is liable to be forfeited and the party forfeiting is entitled to the windfall without there be any loss or damage suffered by such party. Indeed, that is the exact reasoning in Kailash Nath where the court was satisfied that DDA did not suffer any loss since the subsequent auction fetched a price of more than three times what the previous auction had. If, on the other hand, the subsequent auction had fetched a lower price, the previous highest bidder could have been proceeded against for the difference as that would have been the quantum of damages suffered as a consequence of the previous bidder failing to honour its bid.

29. It may bear repetition that a judgment is an authority for what it actually decides and not an authority for what is perceived to have been incidentally decided. In neither Ganga Enterprises nor Ashok Kumar Singh, did the court go into the appropriateness of the quantum or the propriety of the forfeiture in the light of Section 74 of the Contract Act.

30. While it is salutary to introduce clauses that provide for forfeiture in the case of non-disclosure or concealment of facts or for corrupt or fraudulent practices being adopted, if a nominal amount is fixed, the court may not frown upon the same, depending on the value of the work proposed to be awarded, the degree of specialization involved in undertaking the work and others similar factors. In addition to the imposition of a penalty being impermissible, when the employer or the person inviting tender is a State or a statutory body, it is expected to act reasonably and rationally and such an entity cannot be permitted to unjustly enrich itself merely on the basis of a clause that may be altogether unreasonable. Contractors have, per force, to apply for obtaining work from government employers. There is always a degree of inequality involved in the bargain. While, theoretically, it can be said that a person is not obliged to participate in a tender process when it does not like the terms stipulated therein, government agencies cannot be permitted to incorporate unreasonable terms or take advantage thereof.

31. A balance has to be stuck in every case, when the assessment of the quantum becomes a difficult or an impossible task; to allow the forfeiture in principle, but to limit the quantum so as not to make it punitive or extortionist. Indeed, there is always an element of approximation and guesswork involved in assessing the quantum of damages even after receipt of the best evidence possible. After all, the court is trying to put a person in the position as if the breach had not happened, though the breach has, in fact, happened.

32. Considering the nature of the contract in this case and the value of the work, the offer made by the appellant for Rs.2 lakh to be forfeited in either case appears to be reasonable and appropriate. Indeed, the quantum of loss that may have been suffered by the respondents in either case may not be Rs.2 lakh; but since the appellant has fairly offered that such should be the amount that the forfeiture should be restricted to, this court perceives a sum of Rs.2 lakh in either case to be appropriate compensation for the respondents having received the applications, processed the same and proceeded therewith for some time before discovering the non-disclosure and concealment of material facts.

33. Accordingly, the appeals are allowed by setting aside the judgment and order impugned dated December 14, 2017. APO 377 of 2018 and APO 378 of 2018 succeed. The relevant writ petitions, WP 1645 of 2010 and WP 1649 of 2010, are allowed by setting aside the forfeiture attempted to be effected by the respondents herein in excess of Rs.2 lakh in either case. The balance amount should be refunded to the writ petitioner-appellants within eight weeks of this order, failing which such amount will carry interest at the rate of six per cent per annum from November 1, 2009 till the payment.

34. There will be no order as to costs.

35. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.) I agree.

(Kausik Chanda, J.)