

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO.1610 OF 2013

The Member Secretary,
Maharashtra Tribble Public School
society and Commissioner, Adivasi
Vikash, Nashk, Gadkari Chowk,
Old Agra Road, Nashik.

... **Appellant**

VERSUS

1. Shri Shankarrao Uttamrao Patil
Age 62 years, Occu: Contractor
R/o Plot No. 14, Lalbag Colony,
Near Wagheshwari Square,
Nandurbar, Taluka & Dist. Nandurbar

2. The State of Maharashtra
Through the Collector, Nandurbar.

3. The Principal Secretary,
Adivasi Development Department,
Maharashtra Government,
Mantralaya, Mumbai 32.

... **Respondents.**

Mr. Sachin A Pradhan, Advocate for the appellant
Mr. Shrikant S. Patil for respondent No.1.

CORAM : T. V. NALAWADE, J.

DATE : 16th July, 2015

JUDGMENT:

1. The appeal is filed against the judgment and decree of Special Civil Suit No.26/2011 which was pending in the Court of Civil Judge, Junior Division, Nandurbar. The suit, filed for recovery of money by the present respondent No.1 is decided in his favour.

2. Both sides are heard.
3. The respondent No.1, plaintiff is a Government contractor. He had filled tender for construction of school complex at Nandurbar in response to the tender notice issued by the present appellant. Cost of construction was around Rs.17.21 crores. As per the conditions mentioned in the tender notice, the contractor was expected to deposit earnest money of Rs.17,21,202/-. Alongwith plaintiff, other contractors had also filled the tender. When the proposals of the contractors were opened, the defendant- appellant found that the information supplied by the plaintiff, respondent No.1 regarding experience and works executed by the contractor in the past was not correct and on that ground, the proposal of the respondent contractor was rejected and the aforesaid earnest money came to be forfeited.

It is the case of the plaintiff, contractor that the defendant had already decided to give work to other contractor and defendant was trying to give flimsy excuses. This and other contentions need not be considered in the present matter as only the right of the plaintiff for refund of earnest money with interest is considered by the trial court and the original defendant has challenged that decision. It is the case of the original plaintiff that as per general conditions of contract, there was no power with the defendant to forfeit the earnest

money on the aforesaid ground. The relief of refund of the earnest money with interest was claimed.

4. The original defendant contested the suit only on two grounds. It is the case of the defendant that one of the conditions for filling the tender was that contractor had completed work of value of more than Rs.11 crores within three years prior to the date of tender. It is contended that this condition was not fulfilled. It is also contended that one work at Serial No.6 mentioned in the tender form by the plaintiff was not of category of building construction and therefore eligible conditions were not fulfilled. It is contended that due to these reasons, the proposal of the plaintiff was rejected. It is contended that as per the terms and conditions published in general conditions of the contract, the defendant had a power to forfeit the earnest money.

One more point was raised and that was about jurisdiction. It is contended that in the terms and conditions it was already made clear that Nashik Court will have jurisdiction to decide the dispute of such nature and so the Nandurbar Court has no jurisdiction in the matter.

5. The issues were framed by the trial court which were mainly on the entitlement of the plaintiff to get back the earnest money with interest. The issue of jurisdiction was not framed but that issue is dealt with by the trial court by observing that this point was not

contested by both the sides in the suit (Para 21 of the judgment of the Trial Court). Relevant portion reads as under :

“21. The learned counsel for the parties have not much contested the jurisdiction of this Court. The construction in dispute is situated and executed within the jurisdiction of this court. The parties cannot confer jurisdiction on any particular court and therefore I hold that this Court has jurisdiction to entertain and try this suit.”

6. In view of the aforesaid observations made by the trial Court, it is not open to the appellant to raise the point of jurisdiction. On this point, the learned counsel for the appellant placed reliance on some reported cases like-

- 1) 2011(6) ALL MR 886 (Hindustan Petroleum Corporation Limited Vs. Shri Ramgopal s/o Baliram Soni
- 2) 2009 ALL SCR 2604 (Balaji Coke Industry Pvt. Ltd. Vs. M/s Ma Bhagwati Coke (Guj) Pvt. Ltd., and
- 3) (2013) 9 SCC 32 (Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd.

The facts of these three reported cases were altogether different than the facts of the present matter.

7. In the first case, dealership order issued in favour of the plaintiff was cancelled and the office from Nagpur had the power to issue dealership order and cancel it. The suit was filed in other Court like Dharni. It was held that there was no cause of action at Dharni. Business was not carried out in Dharni by the defendant. The head office was at Nagpur and so the court held that the matter will be Governed by Section 20(a) and (b) of the Civil Procedure Code.

In the second case, there was agreement under Arbitration and conciliation Act and parties had, by agreement, confined jurisdiction to a particular place. In view of the provisions of the Arbitration and Conciliation Act, 1996 and the agreement between the parties, the Apex Court held that when there are two or more competent Courts, which can entertain a suit consequent upon a part of the cause of action having arisen there and there is a contract to vest jurisdiction in one such court, such agreement will be valid and can be enforced.

The third case was also on the provisions of the Arbitration and Conciliation Act and Contract Act and the agreement was made by the parties under the provisions of Arbitration and Conciliation Act, 1996. Provision of Section 11 of the Act was to be used and for that, parties had conferred jurisdiction on a particular court and so, the Apex Court held that such agreement is enforceable and the parties need to approach only that court.

8. In view of the aforesaid circumstances and as the work was to be executed at Nandurbar, this Court holds that Nandurbar Court which was otherwise competent to decide the suit had the jurisdiction. Further, when that point was not contested in the trial court, it is not open to the defendant now to say that Nandurbar Court had no jurisdiction.

9. On the remaining point, i.e. entitlement of the defendant to get back the earnest money, General Conditions of Contract (GCC) needs to be referred. Relevant conditions at Clause 2(A) are reproduced:

“2(A) the contractor shall pay, along-with the tender, the sum of Rs.17,21,202/- as an by way of earnest money.

(i) The contractor may pay the said amount by forwarding alongwith the tender a Bank Challan/ Demand Draft for the said amount or/call deposit receipt for the said amount drawn on any Nationalized Bank for the like amount in favour of the Maharashtra Triable Public School Society/ Nashik. Rs.1721202/-. The said amount of earnest money shall not carry any interest whatsoever (Amended vide GRPW Department Corrigendum No. CAT-1073/16967-Q dated 14.05.1976).

(ii) In the event of his tender being accepted subject to the provisions of sub-clause (iii) below, the said amount of earnest money shall be appropriated towards the amount of security deposit payable by him under conditions of general conditions of contract.

(iii) If after submitting the tender, the contractor withdraws his offer or modifies the same, or if after the acceptance of his tender the contractor neglects to furnish the balance amount of security deposit without prejudice to any other rights and powers of the M.T.P.S.S. hereunder shall be entitled to forfeit the full amount to the earnest money deposited by him.

(iv) In the event of his tender not being accepted, the

amount of earnest money deposited by the contractor shall, unless it is prior thereto forfeited under the provisions of sub-clause (iii) above, be refunded to him on his passing receipt therefor (Amended vide GR B & C Department No. CAT 1272/44277 Q dated 03.03.1973.).

The aforesaid conditions show that only under two circumstances the earnest money can be forfeited and they are -

- (1) Contractor withdraws his offer or modifies the same;
- (2) after acceptance of his tender the contractor neglects to furnish the balance amount of security deposit.

10. The facts of the present case show that the defendant held that eligibility conditions were not satisfied by the plaintiff contractor and for that reason his proposal/offer was rejected by the defendant. In such circumstance, there was no power given to defendant to forfeit the earnest money. Thus the forfeiture of the security amount, which can be called as deposit, was illegal. Thus, this Court holds that the Trial Court has not committed any error in decreeing the suit. Interest @ 9% is only granted. There is no possibility to interfere with the rate of interest also.

11. In the result, the first appeal stands dismissed.

(T. V. NALAWADE, J.)

JPC