

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO.No.50/2007**

% *Reserved On: 09.12.2010*
Decided On: 04.01.2011

M/s OFFICE EQUIPMENT Petitioner
Through: Mr.Sandeep Sharma, Ms.Maryam
Sharma and Ms. Kanika Singh, Adv.

Versus

M/s POWER GRID CORPORATION OF INDIA LTD. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG,J.**

1. This appeal arises out of the order dated 16.12.2006 passed by the Id. ADJ, Delhi, whereby the Id. ADJ allowed the objections filed by the respondent to the award dated 28.01.2005 and directed the respondent to return a sum of ₹11,10,000/- to the appellant being the bid guarantee amount encashed by the respondent on the plea, that the appellant/contractor failed to perform the terms of the contract as awarded to them on 19.12.2001 by not submitting the performance guarantee within 15 days since 19.12.2001.

2. It is the case of the appellant/contractor that in terms of clause 16.1 of the tender documents, the appellant submitted a bid guarantee of ₹11,10,000/-, valid for a period of 30 days beyond the validity of the bid. As per clause 16.2, the bid security was required to protect the Employer against the risk of Bidder's which would warrant the

guarantee forfeiture. The Bid Guarantee was made payable to employer without any condition whatsoever.

3. As per the original offer submitted by the appellants, they were to complete the work within a period of 15 months. However, during negotiations the respondent impressed upon them to complete the work within 12 months. However, this condition was not acceptable to the appellant and, therefore, vide their letter dated 13.12.2001 they informed the respondent that they would require at least 15 months to complete the work as it was not possible for them to complete it within 12 months. This was in accordance with the original stipulation in their tender. No response was received from the respondent to the aforesaid communication till the contract was awarded to the appellant on 19.12.2001 which mentioned 12 months as a period for completion of work.

4. In these circumstances, the appellant/contractor again requested the respondent to amend the period of supply as 15 months instead of 12 months. This request was finally conceded by the respondents when they issued letter dated 04.01.2002, which is reproduced hereunder:-

“M/s. Office Equipment
F28 Hauz Khas Enclave,
New Delhi 110 016

Kind Attn: Mr. SPS Oberoi, Managng Partner

Sub: Interior and other Allied works for proposed
Office Complex Sector 29, Gurgaon.

Dear Sir,

This has reference to your letter dated 13.12.2001 and 01.01.2002 in regard to the letter of Award No. C-12204-C902-3/I OA 571 dated 19.12.2001 issued to you for the subject package.

We have examined your request and agree for a completion schedule of 15 months as provided in the bidding documents instead of 12 months period agreed by you earlier. All other terms and conditions as referred to in your above said Letter of Award shall remain unaltered.

Accordingly the completion schedule as indicated in the above said Letter of Award may be treated as 15 months instead of 12 months and the work against the subject LOA be carried out strictly

in time with the provisions of the Bidding document.

You are requested to acknowledge the receipt of Letter of Award issued to you on 19.12.2001 by signing on each page of the duplicate copy of the LOA and commence the work without further delay on your part.

Thanking you.

Yours faithfully

Chief Manager (C.S.-NR-I)”

5. The appellants have not disputed that in terms of the original award dated 19.12.2001, the period of supply was 12 months but it is their case, that in view of the clarification given by the respondent, the said award will have to be read in conjunction with the letter dated 04.01.2002. Thus, the period for submitting a performance guarantee by the appellant/contractor started on 04.01.2002.

6. Important developments took place thereafter, inasmuch as, one of the tenderor, namely, M/s. Woodfun who had also submitted his bid document along with appellant/contractor for the same tender but whose bid was rejected, filed writ petition in this Court registered as WP(C) No.7919/2001 challenging the award of the contract to the appellant/appellant/contractor. During the course of hearing of that writ petition, on 08.01.2001, a statement was made by the counsel for respondent in this Court which reads as under:-

“that the respondent would not act on the basis of existing bid of the appellant and would invite fresh bids on which all eligible can participate.”

7. In the aforesaid circumstances, the appellant also filed writ petition registered as CWP No. 7197/2001 in this Court on 26.12.2001, praying that since there was no valid and binding contract between the parties, and in view of the conduct of the respondent, they should be discharged and also prayed for release of bank guarantee of ₹ 11,10,000/- submitted by them in favour of the respondent along with bid document. The writ petition was dismissed by this Court on 31.12.2001 but the following orders were passed:-

“Heard learned counsel for the parties, in view of the instructions to bidding clause 16 and also clause 23, I find no ground to interfere. Dismissed.”

8. Against the aforesaid order, the appellant filed a Latter Patent Appeal before this Court which was heard by a Division Bench and was disposed of vide order dated 01.02.2002, a portion of the order reads as under:-

“CM 192/2002 in LPA No.85/2002
Allowed subject to all just exceptions.
LPA No.85/2002

The contention raised in this appeal arises out of a contract qua contract and no public law character is involved in the appeal. We are, therefore, of the opinion that the appeal is not maintainable. Accordingly, the appeal stands dismissed.”

9. The appellant also filed a review petition against the aforesaid order which was withdrawn by them on 09.05.2003 with liberty granted to them for raising disputes by way of arbitration. The said order dated 09.05.2003 is reproduced here:-

“Counsel for the appellant, Ms. Anuradha Dutt on the instructions says that she wants to withdraw application as she has advised her client to go for arbitration. On her request, the review application is dismissed as withdrawn.”

10. It is also the case of the appellant that meanwhile the respondent also called for fresh bids. On 08.01.2002 they also forfeited the bid guarantee submitted by the appellant to the tune of ₹ 11,10,000/-. Thus, giving rise to a dispute between them.

11. In these circumstance, the appellant invoked arbitration clause vide order dated 21.11.2003 and raised a dispute as to the validity of the claim by the respondent in forfeiting the bid guarantee.

12. It has been submitted that in terms of the contract two bonds were to be furnished by the contractor under the contract. One is bid bond or bid guarantee and the other is performance guarantee. The object of the bid bond or bid guarantee was to protect the employer from risk of the bidder's conduct who may leave the employer in the lurch by not furnishing performance guarantee and by not signing the contract. The performance guarantee is for the performance of the

contract. Relevant clauses of the bid documents having bearing on the issue involved in this case as extracted by the appellant in their written arguments is reproduced hereunder:-

“16.7 The Bid guarantee may be forfeited:

a) If a bidder withdraws its bid during the period of bid validity.

b) In the case of a successful bidder, in the bidder fails’

i) to sign the contract; or

ii) to furnish the contract performance guarantee

23.4

No Bid may be withdrawn in the interval between the deadline for submission of Bids and the expiration of the period of Bid validity specified by the Bidder on the Bid proposal. Withdrawal/modification of a Bid during this interval may result in the Bidder’s forfeiture of its Bid Guarantee.”

13. Arbitrator while adjudicating the disputes framed following issues:-

“1. Whether there exists any arbitrable disputes between the parties in view of the order dated 31.12.2001 of the High Court in W.P.(C) No. 7919/2001 followed by order dated 01.02.2002 in LPA No.85/2002?

2. Whether withdrawal of the Review Petition No. 589/2003 in the High Court without liberty to invoke the arbitration on the same cause of action between the same parties would bar the present arbitration proceedings?

3. Whether the respondents were justified in forfeiting the earnest money of ₹ 11,10,000/-?

4. Whether the respondents committee breach of contract and liable for damages? If so, to what extent?

5. Whether any interest is payable? If so, to what extent?

6. Whether the respondent is entitle to costs?

7. Relief.”

14. The Arbitrator gave his award dated 28.01.2005 holding that :-

“(i) In view of the judgment delivered by the Hon’ble Supreme Court in National Highways Authority of India Vs. Ganga Enterprises (2003) 7 SCC-401

filing of writ petition before the High Court would not bar invoking of arbitration clause in the pecuniary facts of this case.

(ii) the request of the appellant that the time period be made 15 months instead of 12 months was very significant and was finally conceded by the respondent vide letter dated 04.01.2002 wherein it was specifically stated that time period is now 15 months.

(iii) The Ld. Arbitrator also concluded that on 04.01.2002 all the essential terms were for all purposes sufficiently settled and there was a contract which bound the parties. It has been specifically recorded by the Ld. Arbitrator, that as on 19.12.2001 that there was no consensus between the parties and it was only on 04.01.2002 that a very material term as to completion period was finally agreed to between the parties. It is the respondent who on 04.01.2002 finally agreed that the contract was complete and the parties reach a binding and firm agreement.

(iv) The contract having come into existence on 04.01.2002, the period of completion was to start from 04.01.2002 and for furnishing performance guarantee also 15 days start from 04.01.2002.

(v) The very fact the respondent made a statement before this Court on 08.01.2002 that they would not proceed on the basis of existing bids and would call fresh bids, no right to encash the bank guarantee was left with the respondent and, therefore, they had no power to forfeit the same because the question for forfeituring could have arisen only if the contract was to be performed which in the light of the statement made by the respondent in this Court was not to be performed and, therefore, no default could have been inferred and, therefore, there was no default on the part of appellant.”

15. The contention of the counsel for the respondent that the letter dated 04.01.2002 was a case of mere variation of Letter of Award dated 19.12.2001, was rejected by the Arbitrator, for the reason that even after 19.12.2001 negotiations continued and if the entire correspondence is seen as a whole, the only conclusion which can be reached is that the contract was concluded on 04.01.2002.

16. The Arbitrator also concluded that in this case no proof of loss caused to the respondent because of non-submission of performance guarantee by the contract was placed on record and, therefore, even otherwise, it was held that the respondents were not entitled to encash the bank guarantee.

17. By the award, the arbitrator has held that the contract between the parties concluded only on 4.1.2002 and it was on that day the contract was formed between the parties, which would have determined the responsibility of the appellant to furnish the performance guarantee. Taking note of the statement made by the respondent before the Court in a writ petition filed by the WP(C)7919/2001 whereby they decided to just abandon the contract and thereby taking a unilateral stand not to proceed with the contract. It was also held that the respondents were left with no right to encash the bid guarantee. Some observations made by the arbitrator in this regard are reproduced hereunder for the sake of reference:-

“Contract or No Contract : Incomplete Contract

38. The next question is about the formation of the contract. The Claimant Office Equipment was declared as the successful bidder. Before making the bid it had furnished a Bid Guarantee BG of ₹ 11,00,000/-. After Office Equipment was declared as the successful bidder the contractor was invited for negotiations. Negotiations were held on 5.12.2001. A memorandum of negotiations was drawn up. During the negotiations Power Grid impressed upon the contractor that he should complete the work within 12 months instead of the stipulated period of 15 months as given in the INB. To this the contractor agreed. Soon after on 13.12.2001 he wrote a letter to Power Grid that he will require 15 months to complete the work as it is reply to this Letter of Award (LOA). The LOA under the contract constitutes formation of contract. Therefore, according to Power Grid, the contract came into existence on 19.12.2001. The contractor repeated his demand for 15 months on 1.1.2002. On his persistent demand Power Grid took up the letter of 13.12.2001 out of the limbo and sent a reply on 4.1.2002 to the contractor.

39. This letter of Power Grid dated 4.1.2002 is a crucial document in the case. It reads:

POWER GRID CORPORATION OF INDIA LTD

January 04,2002

M/s. Office Equipment
F-28, Hauz Khas Enclave,
New Delhi-110016.

Kind Attn: Mr. SPS Oberoi, Managing Partner

Sub: Interior and other Allied Works for proposed Office Complex at
Sector-29, Gurgaon.

Dear Sir,

This has reference to your letter dated 13.12.2001 and 01/01/2002 in regard to the Letter of Award No. C-12204-C902-3/LOA/871 dated 19/12/2001 issued to you for the subject package.

We have examined your request and agree for a completion schedule of 15 months as provided in the bidding document instead of 12 months period agreed by you earlier. All other terms and conditions as referred to in our above said Letter of Award shall remain unaltered.

Accordingly, the completion schedule as indicated in the above said Letter of Award may be treated as 15 months instead of 12 months and the work against the subject LOA be carried out strictly in line with the provisions of the Bidding Document.

You are requested to acknowledge the receipt of Letter of Award issued to you on 19/12/2001 by signing on each page of the duplicate copy of the LOA and commence the work without further delay on your part.

Thanking you,

Yours faithfully,

Sd/-

(SUJAN GUPTA)
CHIEF MANAGER (CS-MR-I)

40. I go back a little. On 8.1.2002 the writ petition of Woodfun came up for hearing before Justice Sarin in the High Court of Delhi. I have already narrated that this writ was withdrawn on Power Grid's counsel making a statement in court which I have reproduced earlier.

On the same day BG of ₹ 11,10,000/- furnished by Office Equipment was forfeited.

41. Power Grid contends that the contract came into existence on 19.12.2001 when LOA was issued. The contractor, on the other hand, says that on 19.12.2001 the contract was incomplete as he had retracted from 12 months period for completion and had asked for 15 months. This request of the contractor was granted on 4.1.2002. The question is whether the contract was formed on 19.12.2001 or 4.1.2002.

42. The only question in this case is: when was the contract concluded? On 4th January, 2002 the two parties came to a final and complete agreement, for, if not, there was no contract. So long as they are in negotiation either party may retract. Office Equipment retracted and insisted that the completion period will be 15 months and not 12 months as agreed earlier.

43. The parties had agreed on all the cardinal points of the contract, yet the essential term as to completion time still remained to be settled. Till this was done there was no contract. The parties were in negotiation on this term as the Office Equipment's letter of 13.12.2001 and Power Grid's letter of 4.1.2002 clearly show. On this term the parties were not agreed. There was no consensus ad idem till 4th January, 2002. On this term negotiation continued from 5.12.2001 to 4.1.2002 when it was finally settled. On the construction of the two letters of 13th December and 4th January, I have come to the conclusion that on 4th January a binding and firm agreement was reached.

44. It is always a question of construction to determine whether the parties have really come to a firm agreement or not. As soon as the fact is established of the mutual assent of the parties to the completion term of 15 months the contract is complete. The uncertainty is resolved. Other things which Office Equipment raised in his letter as to rates being firm for 15 months, refund of retention money, and electrical work agency, were of minor significance and did not prevent the contract coming into existence.

45. The contract was complete when the period of completion was settled. There was a perfectly good contract on 4th January which satisfied the key elements of offer, acceptance and reasonable certainty. The other points raised by Office Equipment are minor matters of detail and did not prevent the letter of 4th January constituting a concluded agreement. This is how I read the

correspondence between the parties and in particular letters of 13.12.2001, 1.1.2002, 4.1.2002 and 5.1.2002. On 4th January, 2002 all the essential terms were for all purposes sufficiently settled and there was a contract which bound the parties.

46. No consensus was arrived at between the parties as to the period of completion on 19th December, 2001. This is clear from the contractor's letter of 13th December where he had said that the most suitable period is 15 months for completion. Ignoring that letter Power Grid issued the LOA on 19th December, 2001.

47. That the contractor was not agreeing to LOA is clear from the fact that Power Grid finally on 4th January, 2002 accepted the contractor's demand of 15 months which he had made before the issue of LOA. In spite of his request LOA of 12 months completion time was issued. That on 5th December, 2001 the contractor had agreed no doubt to 12 months as the period of completion but he retracted, as he was entitled to retract, and revived his demand for 15 months before the LOA was issued. There was nothing wrong with that. The fact remains that LOA could not be issued without arriving at a consensus on the period of completion. Therefore there was no contract on 19th December, 2001. This much is clear.

48. A very material term as to completion period was finally agreed upon on 4th January, 2002. If precious time is lost from 13th December, 2001 to 4th January, 2002 Power Grid is alone responsible because it took this much of time in making up its mind whether to grant the demand of 15 months made by the contractor on 13th December or not. Finally Power Grid agreed and accepted the contractor's request. Therefore 4th January, 2002 is the date on which the contract was complete and the parties reached a binding and firm agreement."

18. The letter dated 4.1.2002 stands already extracted in paragraph 39 of the award. Some other observations made by the arbitrator relevant for the purpose of deciding the controversies in this appeal are also reproduced for the sake of reference:-

"52. Power Grid did not wait to examine the request made by Office Equipment that 15 months is the appropriate period for a work of this magnitude. While the issue of completion time still

awaited settlement LOA was at once issued. Therefore it must be held that on 19.12.2001 that contract was not formed and LOA cannot be regarded as the contract as the parties were not at ad idem on all the mutual terms of the contract. When the LOA was issued the agreement was still incomplete. This is the fatal flaw in Power Grid's case. Unless and until all the material terms of the contract are agreed upon by both parties the agreement is not complete. As a consequence it must be held that the contract was formed on 4.1.2002 when all the essential terms were settled. On 19.12.2001 the contract was still incomplete. Uncertainty about period of completion was not resolved. No contract comes into existence until all the terms of the bargain are settled, and uncertainty, if any, is resolved. On the facts of this case it appears that there was no "unanimity of minds" on 19.12.2001 when LOA was issued.

53. The question of period of completion was left hanging in the air unresolved. It is impossible to classify the LOA of 19th December as a completed contract. Because negotiations were still going on and had not been completed.

54. The major and vital question as completion period had not been agreed upon. One party insisting on 12 months and the other on 15 months. In this state of uncertainty the LOA was issued on 19th December. In these circumstances LOA does not flower into a contract, whatever the contract documentation may say. Because it was issued in the middle of a continuing negotiation. It has been held:

"Where the parties have not reached agreement on terms which they regard essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms" {Pagnan Vs. Food Products (1987) 2 Lloyd Law Rep. 601 at p.611}

55. Pollock and Mulla say:

"Unless all the material of the contract are agreed there is no binding obligation". {Mulla-India contract Act (12th ed.) p.294}

56. Again at page 295 Mulla says:

"If there are some terms still at the stage of negotiations and the parties do not intend to conclude a contract without settling them, there would be no contract."

57. From the correspondence it is abundantly clear that the contractor meant not to conclude the contract unless his term of 15 months was agreed to. He wanted to make a contract on the terms originally proposed in the INB and not on the negotiated term of 12 months.

58. By essential term I mean a term which the parties have agreed to be essential for the formation of a binding contract. Completion time is fundamental to the contract. Contract documents say so. Without agreement on completion time contract cannot be made. This is as simple as that. Without it the contract, or the LOA for that matter, will remain incomplete. The law cannot enforce on incomplete contract. Therefore LOA was unenforceable. Power Grid is enforcing what is essentially unenforceable. This is the real issue.

59. Writers have defined contract as follows:

“A contract is an agreement giving rise to legally enforceable obligations”.

“A contract is an agreement giving rise to obligations which are enforced or recognized by law” { Treital Law of Contract 7th ed.p.1}

60. What is legally enforceable in this case? The contract of 4th January, 2002. Not of 19th December, 2001.

61. 4th January, 2002 is a milestone in the history of formation of this contract. Now the bargain possessed to the full the character and status of a completed contract. The parties were in contractual relationship with each other. There was true consensus. The two wills- one of the contractor and the other of the employer- became one will to complete the bargain invitation to work is the outward and visible sign of this outcome of two consenting minds.

62. Period of completion of 15 months will start from 4.1.2002 and for furnishing PG also 15 days will also start from 4.1.2002.”

19. The Arbitrator thus observed that,

“66. It is on 4th January,02 that the parties reached the agreement. They continued to negotiate till then. The court/arbitrator will then look at the entire course of negotiations and the whole of the correspondence to decide whether an apparently unqualified acceptance did in fact conclude the agreement. There are very strong indications that the parties intended to, and did, make a binding contract on January 4, 2002.”

20. As regard the plea of the respondents that the letter dated 4.1.2002 was only a variation of one of the terms of the contract and in fact the contract had concluded on 19.12.2001, has been negative by

the arbitrator by making following observations in the award i.e.,

“77. Counsel for Power Grid says that it is a case of mere variation of a concluded contract embodied in the LOA dated 19.12.2001. He laid stress” on other terms remaining the same”, the expression used in the letter of 4th. I do not agree. The question of variation arises where there is previously in existence a concluded contract. After a contract is concluded it can be varied by mutual negotiations. An existing contract can be varied. What will you vary if there is no contract in existence? In this case my opinion is that the contract itself was concluded on 4th January and therefore there is no question of variation. The letter of 4th January is not a letter of variation but a letter constituting a completed contract on that day. On that day there was real formation of the contract.

78. Suppose this is a case of variation of contract as contended. Then also the original contract was replaced by the varied contract. For all practical purposes the varied contract is the new contract because it is the varied contract that can be enforced at law and not the original contract. The infirmity in Power Grid’s case is that the employer is enforcing the unvaried and unamended contract which stipulated 12 months as the period of completion. This cannot be done. Of course other terms of the varied contract remained the same. But that makes no difference.

The important point here is the variation in the period of completion. Whether on 4th January the contract is concluded or the original contract is varied the result is the same. Time of 15 days will start running from 4th whichever way you look at it. We cannot go back to the past, namely, 19.12.2001 because firstly on that day the contract was incomplete. Secondly the invitation to the contractor to work in the letter of 4th is a manifestation of the willingness to complete the contract. On that day that parties regarded the contract to be complete, whether original or varied. We have to see the entire course of negotiations. Power Grid stops at 19th December. If we read the correspondence as a whole and see what negotiations took place during the whole of the relevant period we can reach a correct conclusion.”

21. Holding that no right was vested in the respondents to encash the bank guarantee, considering the relevant clause which deals with the

submission of bid guarantee and the right of forfeiture, including clause 23.4 which requires furnishing of contract performance guarantee, the arbitrator observed that the respondent in view of their own conduct in the light of the statements made by them in this Court on 8.1.2002 as well as having called a fresh bid, were not entitled to encash the bid guarantee inasmuch as they themselves decided not to continue with the respective obligations with respect to the award dated 19.12.2001 as amended vide their letter dated 4.1.2002. Some observations made in this regard are again reproduced hereunder:-

“113. Now if on 8.1.2002 the respondents themselves decided “ not to proceed on the basis of existing bids given” and further decided “ to call fresh bids” allowing Woodfun and Office Equipment and all others “eligible to bid as per eligibility and tender conditions” what remains Nothing. The whole exercise of awarding the work to Office Equipment was nullified by one single statement made in court. Contract was to be signed by Office Equipment for the contract work awarded to them and PG was to be furnished for the due performance of the contract. But when the bid of Office Equipment itself was annulled and fresh bids were to be invited nothing remained of the old contract in which work was awarded to Office Equipment. Signing of the contract and furnishing of PG were now no longer required as the contract itself was unilaterally abrogated by Power Grid when before Sarin J Power Grid made the statement that it will invite fresh bid superseding the existing bids given by Office Equipment and accepted by Power Grid. It was in relation to this award of work to Office Equipment on 19.12.2001 that the contract was required to be signed and PG was to be furnished. If the contract does not exist and is cancelled, rightly or wrongly, Power Grid cannot forfeit the Bid Security. It was given “to protect the employer against the risk of bidder’s conduct which would warrant the guarantee forfeiture” as clause 16.2 says. After cancelling the contract and on inviting fresh bids there was no risk of any loss to the employer from the claimants’ contractor’s conduct. There was nothing to protect him against bidder’s conduct for which it was given. The whole thing had gone. Then bid security had no purpose to serve for which it was given. In all fairness it should have been returned. Because the altered circumstances did not warrant the forfeiture of bid guarantee.

The clause is not absolute in terms. It is dependent on circumstances warranting forfeiture. It

is surprising that on 8.1.2002 Power Grid immediately encashed the BG and thereby unjustly enriched itself by ₹ 11,10,000/-. Their forfeiture is unwarranted, unjustified, illegal and wrongful in the events that happened in court on 8.1.2002 before Sarin J. The foundation for action of forfeiture simply disappeared. Nothing remained to protect the employer against bidder's conduct. What "risk" was there from the claimants who had on 8.1.2002 ceased to be awardee of the works as they were no longer successful bidders and no longer lowest tenderers. What for security was forfeited. Just to penalize an innocent bidder.

114. There was no purpose for bid security to fulfil now that the contract to award work had been cancelled. Its sole raison d'être was to provide against "risk" from bidder's conduct who may not execute the work or may withdraw his bid. This was no longer possible now that the award of work to Office Equipment had been nullified and fresh bids were to be invited for that very work. This was the undertaking given to the court.

115. The contractual obligation to sign the contract and to furnish PG had ceased on 8.1.2002 and Power Grid had no right to encash the Bid Security on that very date after it had made the statement in court releasing Office Equipment from the liability to perform the contract. Power to forfeit is exercisable only if the contract is to be performed.

Default and Damages

116. Before the bid can be forfeited you have to show two things-(1) the default of the contractor as regards contractual obligation (2) the damage sustained by the employer from the default of the contractor. Power Grid has been unable to satisfy me that there was any default of the contractor in this case except that he did not sign the contract and did not furnish the PG. But after cancellation of his bid the contractor was not obliged to do these two things. He was on the other hand, entitled to the refund of his security. As regards damages the employer did not suffer any loss from the contractor's conduct. It was the employer's own choice to invite fresh bids in order to get out of a litigation in which it found itself embroiled and in which Office Equipment was unnecessarily dragged by Woodfun who ultimately managed to get the award of work from the employer as a result of the litigation it launched against the employer. If Woodfun was rewarded by the employer why was Office Equipment penalized. It had done nothing to incur the employer's wrath and forfeiture of a substantial security.

Woodfun was responsible for all that happened and it came out of the litigation with flying colours. The claimants lost the work and lost the bid security for no fault of theirs. Woodfun had lost in tendering on 19.9.2001. But it succeeded in getting the award of work on 1.3.2002 chiefly through litigation it launched against Power Grid. The old contractor went out and the new contractor came in to perform the contract. Woodfun had lost in the first chance. It won in the second. Office Equipment was nowhere. The first became the last. The last became the first.

117. the existing bid was abrogated not because of the default of Office Equipment but because of Woodfun's petition challenging the award of work to Office Equipment. When the existing bid was rescinded there was no contract to perform. Forfeiture was without good and sufficient reason. It was not warranted in the totality of circumstances of the case. Contractor says: " Give me back my money because you have of your own decided not to proceed with my existing bid for which I gave you BG". The defence is unsustainable and therefore, the claim must be allowed.

118. Bid Guarantee is a protection against possible risk. The only question in this case is: what is that "risk" against which the employer forfeited the security of ₹ 11,10,000/-. There can be no risk from a contractor who is now out of the playing field, out of the zone of consideration, unless he gives a fresh bid.

119. Looking at the case as a whole and having regard to the subsequent events that happened on Woodfun's writ it seems to me that forfeiture of Bid Security of Office Equipment was wholly unwarranted. It is an abuse of the power given to the employer under the contract. The truth is that the contractual liability to sign the contract and no furnish PG had vanished into thin air when Power Grid made the statement in court to invite fresh bids and not to proceed with the "existing bid" of Office Equipment.

120. The bond was unconditional. The contract says "The Bid Guarantee shall be payable to the employer without any condition whatever" (Clause 16.2). But forfeiture was unwarranted. Hudson in his 11th ed.(1995) on Building Contracts says at page 1557 that "there have been many reports of abuse by construction owners of their right to call unconditional bonds where no colourable breach by the contractor occurred". This case illustrates the point. For no rhyme or reason the bid bond was forfeited. This is my conclusion on the whole case."

22. The Arbitrator has considered the conduct of the parties between the fourth and eighth January, 2002 when the respondent himself made a statement before this Court stating that they are not proceeding with the award in this case and that they would call for fresh bids. The discussion in this regard appears from para 133 onwards, the same is also reproduced hereunder to understand the reasoning of the arbitrator:-

“133. On 4th January, 2002 time for completion was extended from 12 to 15 months. The letter of that date was an inducement and encouragement to the contractor to take up the work in hand and complete it “strictly in line with bidding documents”. On 8th Power Grid men went straight to the Union Bank Connaught Place, New Delhi from the Court of Justice Sarin and encashed the Bid Guarantee with startling speed. During those four days what was that which prompted this drastic action.

134. In the court “the existing bid” of Office Equipment was cancelled and Power Grid decided to issue fresh public tender calling for fresh bids from all those who wanted to participate and were eligible. Woodfun’s writ was opposed by Power Grid in its counter affidavit dated 7th January, 2002 on the ground that the work had already been awarded to Office Equipment and therefore Woodfun’s writ is infructuous. Power Grid having taken this position on 7th could not with any show of reason forfeit the amount of BG on 8th. Acting on an impulse to punish Office Equipment, Power Grid forfeited the BG. Apparently nothing had happened during these four days to give cause to the employer to forfeit the BG.

135. Power Grid’s counsel defended this forfeiture on the ground that Office Equipment had failed to furnish the BG within 15 days as from 19.12.2001, the date of the original LOA. But this defence is full of holes. Time must be reckoned from 4.1.2002 because the letter of even dated is a letter of invitation to the contractor to “commence the work without further delay on your part”. On 7th in counter affidavit it is admitted that work has been awarded to Office Equipment. The contract was subsisting on 7th. It existed in the eyes of law on Power Grid’s own pleading in court. On 8th suddenly BG is encashed and money forfeited to the great shock and surprise of Office Equipment.

136. On 8th January Power Grid cancelled the bid and the bargain of Office Equipment for no good reason except to finish in a hurry the litigation of Woodfun. This was illegal. The procedure of cancellation and termination of contract is laid down in clause 52 of GCC which requires a mandatory 15 days notice in writing to the contractor of employer's decision to cancel the contract. Similarly on contractor's default under clause 51 (GCC) the employer can take the work out of the contractor's hands and "re-contract" with another person to complete the work and recover the excess cost from the defaulting contractor. This also requires mandatory 15 days notice by the employer to the contractor if the latter "contravenes the provisions of the contract" before work is taken out of contractor's hands. If the employer wants to "recontract" with another party 15 days notice is mandatory. Office Equipment's contract was cancelled. Work was awarded to Woodfun, the new contractor. In cancellation of Office Equipment's contract neither clause 51 nor clause 52 was observed. The entire action of cancellation of the "existing bid" and termination of contract of Office Equipment was illegal. Outsmarting Office Equipment Power Grid encashed the BG in great haste. In this scenario can Power Grid's hurried action be said to be justified or "warranted"? Everything happened in the court of Justice Sarin. In one moment the "existing bid" was cancelled throwing the mandatory provisions of 15 days notice to winds. The very next moment BG was forfeited before 2 p.m. on the same day after the court case was over at about 11 or 12 noon."

23. In these circumstances, the Arbitrator has observed that it was not a case where the respondent suffered any loss. More so, no proof of loss was furnished by the respondent before the Arbitrator. It was thus observed that the respondent was not entitled to make profit once no loss was caused to the respondent as in view of the statement made by the respondent, the contract itself was not to be performed and, therefore, no right was left with the respondent to encash the bid guarantee having proceeded with calling for a fresh bid after deciding not to continue with the same contract. The discussion on this issue starts from para 137 onwards and reads as under:-

“Proof of Loss

137. The most important point in this case is that there was no loss to Power Grid by not furnishing the BG. On the contrary it gained by ₹ 13 Lacs. The forfeited amount of ₹ 11, 10,000/- of BG was another windfall profit. In issuing fresh tender there was profit as compared to the last and in cancelling the contract of Office Equipment there was another windfall profit of ₹ 11,10,000/-. Thus Power Grid was enriched by 24 Lacs. But in justice and equity it cannot retain ₹11,10,000/- of BG. It has to be returned to the party from whom it was illegally taken.

138. No party can make a profit out of forfeiture. Loss must be shown to have been suffered. In *Union of India Vs. Rampur Distillery* AIR 1973 SC 1093 (1098) the Supreme Court said:

“the party to a contract taking security deposit from the other party to ensure due performance of the contract is not entitled to forfeit the deposit on ground of default when no loss is caused to him in consequence of such default”.

139. The Supreme Court in *Fateh Chand Vs. Bal Kishan Dass* AIR 1973 SC 1098 said:

“It (law) does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things”.

These observations are apposite to this case. It means No Loss No forfeiture.

140. There are two questions in this case. One the question of contract or no contract. The other is the larger question: what loss has Power Grid suffered? If there was a second bid and a second tender, it was because of the pressure of Woodfun’s writ and the desire of Power Grid to settle the litigation at any cost because the work was urgently required to be completed. Not because of anything that Office Equipment did during the four days that intervened between 4th and 8th January, 2002.

141. “The Bid Security is required to protect the Employer against the risk of bidder’s conduct which would warrant the guarantee forfeiture”(cl. 16.2 of INB). The bid security was taken only to cover possible loss to the employer or risk of loss to him by withdrawing the bid or not furnishing PG or not signing the contract. Where there is no legal injury nor any actual loss has been suffered then the forfeiture of BG of rupees ₹ 11,10,000/- is not at all justified or warranted.

142. The necessity of a second tendering which was held on 23.1.2002 was brought about by Power Grid upon itself of its own volition by giving an undertaking to the Court of Justice Man Mohan Sarin. In any case second bidding on 23.1.2002 did not result in loss but in a profit of a sizeable amount. Whatever may be the legality of the second tendering it proved a blessing in disguise. It was a windfall. Power Grid gained 13 Lacs and over and above the forfeited ₹ 11,10,000/- of Office Equipment to which it was not entitled in all conscience. What is surprising is that on 7th January it affirmed a binding contract with Office Equipment and on 8th it cancelled it. Woodfun's writ for restraining Office Equipment from executing the work and for quashing the award of work to Office Equipment alarmed Power Grid. In a zeal to settle the litigation it bade goodbye to Office Equipment and went in for a second tendering and awarded the work to Woodfun in the end. In the end all was well with Power Grid and Woodfun. Woodfun was the fortune favourite. Power Grid had the best of both worlds. The only sufferer was Office Equipment. This contractor lost the bargain and lost the deposit. It was a great setback to him.

143. In my opinion the letters of 1.1.2002 and 5.1.2002 had no affect on the contract which stood concluded on 4.1.2002 and affirmed and recognized as binding as late as 7.1.2002 in the counter affidavit. Forfeiture in this scenario came a bolt from the blue to Office Equipment.

144. We have already seen that bid validity period was six months and 30 days beyond the date of opening the bid. But after the bid is accepted of a particular bidder and he is declared as the successful bidder the bid validity period is over as the Letter of Award of work is issued to him. Contract comes into existence and bid as such loses its identity and merges in the contract. Contractor is defined in clause 1.3 of GCC as follows:

“Contractor shall means the Bidder whose bid will be accepted by the employer/owner for the award of the works.”

145. Tender is an offer. The acceptance of the tender converts the offer into a binding contract. On acceptance the bidder becomes the contractor. Therefore, Power Grid's counsel was not right in building his arguments of withdrawal of bid by Office Equipment basing himself on the letters of 1st and 5th January, 2002.

146. Counsel for Power Grid referred me to Kilburn Eng Vs Oil and Natural Gas Commission Corp. AIR 2004 Bom 405 In support of his submission that a contract is based on three pillars, namely (i) certainty, (ii) communication and (iii) commitment. This is true. The contract concluded on 4.1.2002 in this case fulfils all three. There was a concluded contract which had the element of certainty and of a binding commitment.

147. The true legal position is that 15 days for furnishing PG did not start from 19.12.2001 and ended on 3.1.2002, as is the case of Power Grid. Power Grid was not entitled to forfeit the BG on 3.1.2002. Power Grid did two things. One it extended the time of completion from 12 to 15 months as was originally stipulated in INB. Secondly it invited the contractor to commence the work without delay. This means there was a new arrangement and a new contract. Now time would run from 4th January and end on 19th January, 2002. Till 19th January Power Grid had no right to forfeit the BG. But it forfeited it on 8th January. This was wholly illegal, unjust, and arbitrary under the terms of the agreement.

148. As Power Grid has not suffered any loss the bid money of ₹ 11,10,000/- deserves to be refunded. Forfeiture is unjustified and unwarranted.”

24. Thus, the Arbitrator held that in this case the contract came into existence between the parties on 04.01.2002 and as such, the application to furnish performance guarantee would start only w.e.f. 04.01.2002. The said guarantee was therefore to be furnished within 15 days thereafter. In the meanwhile, the respondent themselves decided to abandon the contract. They had also not suffered any loss on account of the conduct of the appellant and they had no right to forfeit the bid guarantee.

25. The Arbitrator answered the issues as follows:-

“Answer to the Issues

Issue No.1 Arbitral dispute existed between the parties which has rightly been referred to arbitration.

Issue No.2 The withdrawal of the review petition does not bar the present arbitration proceedings.

Issue No.3 In all the circumstances of the case the forfeiture of Bid Guarantee of ₹ 11,10,000/- was

unjustified and unwarranted. It takes the colour of a penalty.

Issue No.4 Power Grid was guilty of breach of contract in as much as it cancelled the contract of Office Equipment without notice to the contractor which is mandatory under the provisions of the contract in view of the position explained above. Claim for damages is rejected.

Issue No.5 Interest is payable @ 18% p.a.

Issue No.6 The respondent is liable to pay costs of ₹ 3Lacs.

Issue No.7 Power Grid is directed to refund ₹ 11,10,000/- with interest @ 18% p.a. from 8.1.2002 till actual payment. Power Grid will also pay ₹3 Lacs on account of costs.”

26. Consequently, the Arbitrator gave the award dated 28.01.2005 in favour of the appellant and against the respondent directing them to return a sum of ₹11,10,000/- being the bid amount with interest @18% p.a. w.e.f. 08.01.2002 till actual payment, besides a sum of ₹ 3 lakhs as costs.

27. This award was challenged by the respondent by filing objections under Section 34 of the Arbitration and Conciliation Act, 1996, which were allowed by the Additional District Judge vide impugned order, subject matter of the appeal.

28. Before the Additional District Judge, in nutshell, it was the case of the respondent that after the letter of award dated 19.12.2001 issued to the appellant and after negotiations took place on 5.12.2001, the appellant was obliged to submit performance guarantee within 15 days of the letter of award dated 19.12.2001. However, this was not done by him and, therefore, the respondent became entitled to forfeit the bank guarantee and which has been done by the respondent correctly in accordance with the right available to the respondent as per the terms and conditions of the bid documents and in particular, as per clause 11 of the letter of award, which is consistent with clauses 33 of INB and

clause 37 of GCC. They also relied upon clauses 16 and 23 of Instructions of bidder (INB) quoted above.

29. According to them, the contract between the parties had come into existence on 19.12.2001 and the decision given by the Arbitrator holding that the contract between the parties were formulated only on 4.1.2002 was incorrect. In this regard, they submitted that the respondent sent a letter dated 4.1.2002 agreeing for completion period of 15 months as provided in the Bidding Documents instead of 12 months period agreed earlier in the minutes of meeting dated 5.12.2001 between the parties. However, in the said letter dated 4.1.2002 the respondent stated that all other terms and conditions as referred to in the letter of award dated 19.12.2001 remained unaltered, and accordingly the completion schedule as indicated in the above said letter of award may be treated as 15 months instead of 12 months, and the works against the subject letter of award was to be carried out strictly in accordance with the provisions of Bidding Documents.

30. It is their case that the appellant having failed to furnish the performance guarantee as required in clause 11 of the letter of award dated 19.12.2001 read with clauses 33 INB and clause 37 of GCC, within a period of 15 days from the date of issue of letter of award which had expired on 3.1.2002, entitled the respondents to forfeit the bid guarantee pursuant to clause 16.7 of INB.

31. It is further stated by them that Wood Fun whose bid was found non-responsive filed a Writ Petition being CW No. 7917 of 2001. No stay was granted but by order dated 8.1.2002 M/s Wood Fun withdrew its writ petition on the statement made by the respondent corporation that it would invite fresh bids. Fresh bid was accordingly invited by the respondent corporation on 23.1.2002. The fresh bid submitted by the bidders was opened on 4.2.2002 and the bid of Wood Fun was found the lowest. The appellant's bid was found non-responsive and in accordance with clause 16.8 of INB the appellant's bid was rejected and was not opened.

32. In these circumstances, the appellant invoked the arbitration and Justice Avadh Behari Rohtagi (Retd.) was appointed as Sole Arbitrator.

By the impugned award dated 28.1.2005, the learned Arbitrator made an award in favour of the appellant and against the respondent corporation for ₹ 11,10,000/- along with interest at the rate of 18 % per annum from 8.1.2002 till actual payment and also directed the respondent to pay a sum of ₹ 3 Lacks as costs.

33. It was therefore submitted by the respondent that the award given by the Arbitrator was against fundamental principles of Indian Law and was patently illegal being contrary to expressed provisions of Section 7 of the Contract Act and various clauses of invitation to bidders. They also submitted that the award also amounted to over-reaching/overriding of the order of the High Court dated 31.12.2001, by which order the writ petition of the appellant was rejected.

34. Primarily, the contentions of the respondent were that the contract had come into existence on the notification of award dated 19.12.2001. Since performance guarantee was not submitted within 15 days therefrom, the appellant became a defaulter which entitled the respondents to forfeit the bank guarantee in accordance with clause 16.7 of the INB.

35. The Additional District Judge vide impugned order accepted the case of the respondents and virtually reversed the findings given in the award by the Arbitrator.

36. According to the Additional District Judge, the contract in this case was concluded not on 14.1.2002 but on 19.12.2001 and since the appellant failed to submit the performance guarantee within 15 days w.e.f. the aforesaid date, the respondent became entitled to forfeit the bank guarantee by virtue of provisions contained under Section 73/74 of the Indian Contract Act. The observations of the Id. ADJ are reproduced hereunder:-

“The sum and substance of the authorities cited above, therefore, makes an empty clear that acceptance of the proposal must be absolute and unqualified and without condition. It is of the essence of a contract that there should be expressly or implied a proposal to which an unqualified assent is given. Without such as assent there is no contract as the minds of the contracting parties are not ad-idem. An acceptance which does not extend to all the terms of the contract cannot make a valid and binding contract. Further an

acceptance which is qualified by certain conditions cannot amount to an absolute and unqualified acceptance capable of resulting in completion of a valid contract. In other words, an acceptance with a variation is no acceptance but is only a counter proposal which must be accepted by the original promissory before the contract is made and a counter offer amounts to a rejection of the original offer. Section 7 Indian Contract Act, therefore, provides that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified and until there is such an acceptance, the stage of negotiations had not been passed and no legal obligation is imposed. When an acceptor puts a new condition while accepting, the contract already signed by the proposer is not complete unless the proposer accepts the condition (see Hazi Mohamed V/s Spinner 24 Bombay 410 and Moti Lal V/s Kishori Lal (1930) Lahore 374).

Applying the aforesaid tests to the facts of the present case, it is abundantly clear that the approach adopted by the Ld. Arbitrator in holding that a legal and binding contract came into being on 4th January, 2002 is flawed and is not in conformity with the principles laid down by section 7 of the Indian Contract Act. As per the Ld. Arbitrator, the parties were ad-idem on 4th January, 2002 which is not factually true. If ever the parties were ad-idem, they were on 5th December 2001 which is evident from the minutes of the meeting recorded and signed by the respective representatives of the parties. The respondent had retracted from the agreed conditions and had given a counter offer on 13th December 2001. The counter offer of 13th December 2001 had to be accepted in toto by the applicant in order to form a binding contract. The LOA dated 19.12.2001 had ignored the letter dated 13th December 2001. The letter dated 4th January, 2002 had also not accepted the counter proposal of the respondent in its entirety. Indeed, the respondent in his letter dated 5th January, 2002 had brought this to the knowledge of the applicant and had also asserted that no concluded contract had come into being. The findings arrived at by the Ld. Arbitrator therefore, with regard to the formation of a contract by the parties on 4th January, 2002 is against the Law of the Land and is against the public policy of India. The impugned award is, therefore, liable to be set aside on this score.

Another ground on which the impugned award has been challenged is as regards the findings of the Ld. Arbitrator that since the applicant had not suffered

any loss it would be inequitable to forfeit the bid guarantee of ₹ 11,10,000/-. It has been contended on behalf of the applicant that the Ld. Arbitrator has completely ignored the provisions of Sections 73 & 74 Indian Contract Act. Reliance in this regard has been placed to the judgment reported as ONGC Vs SAWPIPES (2003 (5) SCC 705) wherein the following principles and consideration for assessment of compensation/damages in case of breach of contract were recognized by the Hon'ble Supreme Court:

(1) Terms of the Contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damage is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

In the aforesaid case the Hon'ble Supreme Court has also held that where parties had expressly agreed on a pre-estimated genuine liquidated damages for breach of a contract there was no justification to arrive at a conclusion that the claimant was liable to prove the actual damage suffered by it. It would be of benefit to reproduce paras 40 to 42 of the judgment which read as under:

40. It cannot be disputed that for construction of the contract. It is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement if upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. (Re. Modi & Co. V. Union of India). Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. (Re. Provash Chandra Daldi V Biswanath Banerjee).

41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the Arbitral Tribunal to arrive at a conclusion that still the purchase or should prove loss suffered by it because of delay in supply of goods.

42. Further in arbitration proceedings, the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. The agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores within the stipulated time, the appellant will be entitled to recover from the contractor, as agreed, liquidated damages equivalent to 1% of the contract price of the whole unit per week for such delay. Such recovery of liquidated damages could be at the most up to 10 % of the contract price of whole unit of stores. Not only this, it was also agreed that

(a) liquidated damages for delay in supplies will be recovered by paying the authority from the bill for payment of cost of material submitted by the contractor.

(b) liquidated damages were not by way of penalty and it was agreed to be genuine pre-estimate of damage duly agreed by the parties.

(c) this pre-estimate of liquidated damages is not assailed by the respondent as unreasonable assessment of damages by the parties.

The Ld. Counsel for the respondent has not been able to cite any judgment to the contrary. It must, therefore, be held that the findings of the Ld. Arbitrator that since no loss had been suffered by the applicant/objector, it could not have forfeited the bid guarantee is against the law laid down by the Hon'ble Supreme Court. The findings being against the provisions of Section 73/74 of the Indian Contract Act are also liable to be set aside as being against the public policy of India.

In view of my discussion above, I hold that the impugned award cannot be sustained in the eye of law and is liable to be set aside on the ground that it is against the public policy of India. File be consigned to record room."

37. It has been submitted by the appellant that in this case, the learned ADJ has acted beyond the scope of jurisdiction available with him while entertaining the objections of by the respondent inasmuch as the ld. ADJ has virtually acted as an Appellate Court. Moreover, the observations made by the ld. ADJ are completely in contradiction to the factual statistics of this case inasmuch as, admittedly, vide letter dated 4.1.2002, the request for change of period in supply schedule from 15 months to 12 months was accepted by the respondent. It was not a case where the respondent had forfeited the bid guarantee after a period of 15 days after 19.12.2001 by treating it a failure on the part of the appellant. In fact, many things happened subsequently which have been simply ignored by the ld.ADJ though admitted by the respondents in the averments made in their objections as well as in the documents available on record, which support the conclusions drawn by the arbitrator that the contract was formed only on 04.01.2002 and not on 19.12.2001 i.e.,

(i) A request was made on behalf of the appellant for changing the period of supply form 15 months to 12months.;

(ii) This request was accepted by the respondent as per communication dated 4.1.2002 (the aforesaid letter is quoted above);

(iii) The bid guarantee was not forfeited by the respondents after 15 days of 19.12.2001 and the very fact that they accepted change of time of supply, they themselves waived of the requirement of furnishing a performance guarantee within 15 days from 19.12.2001.

(iv) The respondent themselves had made a statement before this Court in a writ petition filed by M/s Wood Fun that they would not proceed with the contract and in fact, would call for fresh bids. Admittedly, they have called for fresh bids as noted above.

This shows that the entire process of calling of bids in this case in which the appellant participated was brought to an end by the respondent voluntarily and without any loss suffered by them on account of any act/omission on the part of the appellant. Even otherwise, there is nothing to show that situation warranted recovery of any loss by the respondent having suffered by them which could have been recovered by invoking the provisions contained under Section 73/74 of the Contract Act, including the bid conditions.

38. I have considered the submissions made by the parties and have also perused their written submissions. The grounds available to an objector who object to an award are limited. Section 34 of the Arbitration and Conciliation Act, 1996, reads as under:-

“34. Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or,

failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. Explanation.- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

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39. Primarily, the case of the respondent, as accepted by the Id. Additional District Judge, that the award given by the arbitrator is contrary to public policy, is not correct, inasmuch as the meaning given by him to public policy in this case is in fact not in accordance with the observations made by the Apex Court in the case of *ONGC VS. SAWPIPES*, 2003 (5) SCC 705. Those observations are extracted hereunder:-

“WHAT MEANING COULD BE ASSIGNED TO THE PHRASE ‘PUBLIC POLICY OF INDIA’?”

16. The next clause which requires interpretation is Clause (ii) of Sub-section 2(b) of Section [34](#) which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

17. For this purpose, we would refer to few decisions referred to by the learned counsel for the parties. While dealing with the concept of public policy, this Court in ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr.*** (1986) IILLJ171SC has observed thus:--

"92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. ***There are two schools of thought -- "the narrow view" school and "the broad view" school.*** According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of the "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in

these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.* (1902) AC 484: "**Public Policy is always an unsafe and treacherous ground for legal decision**". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* (1824) 2 Bing 229 described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls Lord Denning, however, was not a man to shy away from unmanageable horse and in words which conjure up before our eyes the picture of the young Alexander the Great laming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* (1971) Ch. 591; "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "*History of English Law*", Volume III, page 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation. necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience. and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Public Co. Ltd. v. Macaulay* (1974) 1 WLR 1308, however, establishes that where a contract is vitiated as being contrary to public policy, the party

adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani v. Prahlad Rai* [1960]1SCR861 , reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved. then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

The type of contract to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void.”

40. Applying the aforesaid principles in the facts of this case, it cannot be said that the conclusions drawn by the Arbitrator having discussed each and every aspect can be termed violative of any statutory enactment or the terms and conditions of INB. The conclusions are supported by the factual matrix admitted by the parties, inasmuch as after notifying the contract to the appellant on 19.12.2001 the respondents themselves agreed to change of supply schedule from 12 months to 15 months vide their communication dated 4.1.2002. This being an essential variant, the arbitrator rightly

concluded that the contract was concluded not on 19.12.2001 but on 4.1.2002.

41. At this stage, it would also be relevant to take note of Section 73/74 of the Contract Act, which reads as under:-

“73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him 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.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation of 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 or 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 the 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.”

42. A bare reading of these provisions goes to show that for the purpose of unforeseen liability and in particular, forfeiting bid guarantee or performance guarantee, the pre-requisite is suffering of a loss, may be quantified or not, coupled with breaking of the contractual obligation by the party against whom the bid guarantee or performance guarantee is to be invoked.

43. As observed by the arbitrator, in this case, neither the respondent suffered any loss nor could the appellant be held guilty of breaking the terms of the contract. It is apparent from the statement made by the respondent in this Court on 8.1.2002 that they themselves abandoned the contract, and therefore, they cannot find fault with the appellant in this regard. The question of invoking or encashing the bid guarantee in the facts and circumstances of this case therefore does not arise. In these circumstances, it was rightly held by the arbitrator that the respondent was left with no right whatsoever to forfeit the bid guarantee as has been done in this case. The questions determined by the arbitrator which arose for consideration have been answered by the arbitrator in accordance with law and does not call for any interference as it cannot be said that anything said by the arbitrator could have been objected to by the respondent in accordance with the provisions of

Section 34 of the Arbitration and Conciliation Act, 1996. Therefore, it cannot be said that the award given by the arbitrator contravene even the public policy as mentioned under Section 34(2)(b) of the Act, even if a wider definition is given to those provisions taking into consideration the judgment of the Apex Court in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (supra)* as quoted above.

44. In these circumstances, the decision given by the Additional District Judge is not sustainable as the Additional District Judge has virtually tried to act as an appellate court. This Court, therefore, fully endorse the conclusions drawn by the arbitrator and hold that in the facts and circumstances of this case, the forfeiture of bid guarantee by the respondent was only an attempt by the respondents to make themselves more rich illegally and unjustly, which cannot be permitted.

45. Consequently, the appeal is allowed. The order passed by the Id. ADJ is reversed. The award given by the Arbitrator is upheld. The respondents would pay the award amount to the appellant along with interest as awarded by the arbitrator. They would also pay a further sum of ₹ 1 lakh as costs. TCR be sent back forthwith along with a copy of this judgment.

C.M.No.1861/2007

Dismissed as infructuous.

MOOL CHAND GARG, J

JANUARY 04, 2010

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