

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.4100 OF 2008

Mohammed Iqbal John Mohammed Qureshi
Aged about 60 years,
R/o. 45, Khamb Talao Parisar,
Dr. Jakir Hussein Ward,
Bhandara – 441 904

...PETITIONER

VERSUS

The Collector, Bhandara

...RESPONDENT

Ms. R.V. Kukday, Advocate for the petitioner.
Mrs. K.R. Deshpande, Assistant Government Pleader for the
respondent/State.

**CORAM : A.S. CHANDURKAR AND
URMILA JOSHI-PHALKE, JJ.**

DATED : JULY 21, 2022.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard learned counsel for the parties.

2. **RULE.** Rule made returnable forthwith.

3. The order passed by the Collector, Bhandara dated 06/09/2008 accepting the bid of the petitioner in spite of his withdrawal and calling upon him to deposit the balance amount of Rs.1,41,44,786/- and order of the Collector dated 12/09/2008 forfeiting the earnest amount and the amount of

Rs.30,07,000/- deposited at the time of tender, are under challenge.

4. A public auction notice was published in the local newspaper “the Hitavada” dated 24/07/2008 by which auction and re-auction of Sand-Ghat’s of river and Nallah bed in Bhandara district for the period from 01/08/2008 to 31/07/2009 was proposed. As per the contention of the petitioner there were about 76 Sand-Ghats in district Bhandara which were put to auction. Out of 76 Sand-Ghats 15 sand ghats are situated within Bhandara taluka. The auction price for Arjun Reti Ghats which is one of the Ghat of which auction was published was fixed at the price of Rs.1,17,00,000/-. As per terms and conditions of public auction tender the appropriate authority would adopt both the sealed envelope as well as auction process. Initially, the auction process of Sand-Ghats would be conducted and after conclusion the sealed envelope would be open. The higher price from Open auction and sealed envelopes would be compared and the higher price in respect of Sand-Ghats would be finalised. It is further contended as per the terms and conditions that after a particular bid is finalised by the authorities, the highest bidder had to enter into an agreement by furnishing an undertaking that he is ready and willing to deposit the balance amount including 25% of the amount deposited at the time of submitting bid in the sealed envelope. The Collector, Bhandara would grant permission thereafter for extraction of the mineral. The petitioner had submitted his tender in respect of Sand-Ghat Arjun Reti on 29/07/2008 for consideration of Rs.1,71,51,786/-. He had also deposited 25% amount of Rs.30,07,000/-. As per the contention of the petitioner he had quoted higher price considering the reason that during rainy season other Sand-Ghat in and

around Bhandara are not operational due to strong flow of water, therefore, the Sand-Ghats which is in question i.e. Arjun Reti is easily accessible and the Sand-Ghats supplies the necessary sand for the construction purpose. One of the bidder Zia-Ur-Rahim challenged the tender process by filing Writ Petition No.3340/2008 in which this Court had directed the respondents to conduct auction of the Sand-Ghat Arjun Reti scheduled to be held on 29/07/2008 but not to finalise the acceptance of bids. The said petition was in the nature of Public Interest Litigation on the ground that due to excavation of sand there would be drastic drop in water level in the river. On perusal of the order it reveals that the present respondent i.e. the Collector, Bhandara had conducted the auction however, the bids could not be finalised. The very purpose for which the petitioner had taken part in the process was frustrated not only due to litigation but also due to inadequate rainfall.

5. In the above said circumstances, petitioner had preferred an application on 20/08/2008 requesting the respondent-Collector, Bhandara to treat the bid submitted by him as cancelled as he did not intend to proceed with the tender process and requested to refund the amount of Rs.30,07,000/-. In the meanwhile, Writ Petition No.3340/2008 was withdrawn by the then petitioner on 25/08/2008. The respondent-Collector, Bhandara finalised the process on 25/08/2008. As the higher price was quoted by the petitioner, vide letter dated 25/08/2008, petitioner was called upon to deposit the balance amount of Rs.1,41,44,786/- along with the earnest amount of Rs.5000/-. The petitioner had received the said letter on 27/08/2008. He immediately preferred representation but the respondent-Collector, Bhandara

did not take any action on the application. It is contended by the petitioner that there was no forfeiture clause in the tender agreement if bidder withdraws his bid before it can be finalised and acted upon. Thereafter the petitioner had received two letters from the respondent- Collector, Bhandara on 04/09/2008 and 05/09/2008 calling upon the petitioner to deposit the balance amount of Rs.1,41,44,786/- within a period of five days from the receipt of the letter which would expire on 09/09/2008 and 10/09/2008. The respondent-Collector, Bhandara further by letter dated 06/09/2008 had informed to the petitioner that his representations dated 20/08/2008 and 27/08/2008 could not be accepted in pursuance to the Government Resolution dated 05/09/2003, therefore, the petitioner was bound to deposit the balance amount. It was further informed that in default of making payment, the amount deposited at the time of bid Rs.30,07,000/- would be forfeited and would not be refunded. The petitioner had challenged the said order on the ground that he had withdrawn the bid prior to its finalisation, there was no forfeiture clause in the tender agreement if bidder withdraws his bid before its finalisation and acted upon, therefore, the communication of the respondent-Collector, Bhandara is illegal and liable to be quashed and set aside.

6. In response to the notice issued, the respondent-Collector, Bhandara had taken a stand that as per Clause II(3) of the Government Resolution dated 05/09/2003, the answering respondent has every right to forfeit the 25% amount deposited by the petitioner who was highest bidder and failed to pay balance amount within stipulated period. As the petitioner had failed to pay the remaining amount, the Arjun Sand-Ghat could not be

re-auctioned and resulted loss to the Government. The action taken by the respondent-Collector, Bhandara is just, proper as per the directions of the Government, hence, writ petition deserves to be dismissed.

7. Heard Ms. R.V. Kukday, learned Counsel for the petitioner. She submitted that admittedly the petitioner had participated in the auction, the purpose behind putting the highest bid is explained by the petitioner that during three months of rainy season when the other Sand-Ghats in and around Bhandara district are not operational due to strong flow of water but the Sand-Ghats which is in question i.e. Arjun Reti is easily accessible throughout the rainy season and as such commercially it had a higher price value as compared to other Sand-Ghats. Moreover, above Sand-Ghat is situated about 25 kilometres from the city whereas other Sand-Ghats are unoperational during rainy season. But the very purpose of the petitioner was frustrated due to filing of Writ Petition No.3340/2008 by Zia-Ur-Rahim. She further submitted that this Court vide order dated 29/07/2008 directed the respondents to conduct the auction as per schedule, but not to finalise without permission of the Court. As the very purpose for which the petitioner had taken part in the said auction was frustrated and, therefore, he decided to withdraw the bid and accordingly he communicated with the respondent-Collector, Bhandara by preferring an application dated 20/08/2008. The respondent-Collector, Bhandara had finalised the said process on 25/08/2008. Thus, the petitioner had withdrawn his bid/offer prior to finalisation of the bid. There is no clause of forfeiture in the tender document, therefore, the action of the respondent-Collector, Bhandara forfeiting the amount of Rs.30,07,000/- deposited by the

petitioner is illegal, arbitrary and liable to be set aside.

8. In support of her contention she placed reliance *on Vinod J. Agarwal Vs. Chief Officer, Mira-Bhayander Municipal Council, Bhayander and ors. 2006 (4) Mh.L.J. 126* wherein it is held by this Court that the terms and conditions regarding the tender did not contain any terms to the effect that the offerer would not be entitled for refund of the earnest money in case of withdrawal of the offer and certainly not in case of withdrawal of the offer beyond the period of validity of the bid. She further placed reliance upon *Bholenath Trading Company Vs. State Bank of India, Akola 2006 (5) Mh.L.J. 37* wherein it is held by this Court that the petitioner being highest bidder deposited security deposit however, before acceptance of his bid, he submitted application for withdrawal of offer and refund of the security deposit. In absence of any condition of tender or any other rule disentitling the tenderer to withdraw his offer, action of the respondent Bank of forfeiting security deposit not justified. She further relied upon the decision in *Writ Petition No.2009/2014 (Shri Abdul Quadir s/o Sultan Khan & ors. Vs. State of Mah. & anr.) decided on 04/09/2014* wherein it is held that the entire controversy now boils down to as to whether the petitioners should be allowed to withdraw from the tender proceedings and whether to quash and set aside the impugned communication. It is held that when it is the fact that upset price of each sand ghat is fixed considering the period of lease of one full year and quantity to be excavated is also fixed on that basis, the respondents were under an obligation to see that the auction purchasers get the entire said period for excavation. It is held that the auction purchasers deposited earnest

money on clear understanding that the environmental clearance would be received soon. The respondents failed to obtain such clearance, as such the petitioners cannot be said to have failed to comply conditions of auction by not paying the balance amount. Forfeiture of earnest money by the respondents, in such circumstances, is wholly arbitrary and unfair.

9. On the other hand, Mrs. K.R. Deshpande, learned Assistant Government Pleader supported the order passed by the respondent-Collector, Bhandara. She submitted that as per the Government Resolution dated 05/09/2003, the respondent-Collector, Bhandara had forfeited the said amount. The action of the Collector, Bhandara is justified and no interference is called for.

10. Heard both the sides and perused the documents on record.

11. The question which is to be decided is whether the petitioner is entitled to receive the 25% amount which is deposited by him at the time of submitting the bid. The facts on record show that the Collector, Bhandara had published a notice for auction and re-auction of Sand-Ghats of river and Nallah bed in the local newspaper "the Hitavada" dated 24/07/2008. As per the said notice published in on 75 Sand-Ghats were put for auction out of which 15 Sand-Ghats were situated within Bhandara taluka.

12. It is an admitted position that the petitioner had submitted bid for Arjun Reti Ghat. It is also a matter of record that the petitioner had quoted higher price i.e. Rs.1,71,51,786/- for the said Arjun Reti Ghat. As per the terms and conditions of public auction tender, the appropriate authority would

accept both the sealed envelope and also would carry out the auction process. As per the terms and conditions the auction process of Sand-Ghats would be conducted initially and after conclusion the sealed envelope would be open. The higher price from Open auction and sealed envelopes would be compared and the higher price in respect of Sand-Ghats would be finalised. The terms and conditions further reveal that after a particular bid was finalised by the authorities, the highest bidder had to enter into an agreement by furnishing an undertaking that he is ready and willing to deposit the balance amount excluding 25% amount deposited at the time of submitting his bid in the sealed envelope. Thereafter the Collector would grant permission for extraction of the minerals. It is apparent that the petitioner had submitted his tender in respect of Arjun Reti Sand-Ghat on 29/07/2008 for consideration of Rs.1,71,51,786/-. He had also deposited an amount of Rs.30,07,000/- which is 25% of the total consideration amount. It is further apparent as per the communication of the respondent-Collector, Bhandara and as per the contention of the petitioner that the petitioner had quoted the highest price.

13. As per the contention of the petitioner, he had quoted higher price considering the reason that during rainy season other Sand-Ghats are not operational but the Sand-Ghat which is in question i.e. Arjun Reti is easily accessible and the said Sand-Ghats supplies the necessary sand for the construction purpose. It is also a part of record that one bidder Mr. Zia-Ur-Rahim had challenged the said tender process by filing Writ Petition No.3340/2008. In the said writ petition, this Court had directed the respondents to conduct the auction as per schedule, on 29/07/2008 but not to

finalise the same. It also revealed from the record that on 22/08/2008, the said petitioner sought permission to withdraw the writ petition accordingly permission was granted. It is also a matter of record that on 20/08/2008 the petitioner had filed an application with the respondent-Collector, Bhandara mentioning the reason that he had quoted the higher price but as this Court had granted stay for further proceeding and the rainy season had also come to and end, therefore, he would suffer loss and, therefore, the very purpose for which he quoted the higher price is frustrated and, therefore, he was now not interested to proceed with the said bid. He also requested for refund of the 25% amount which he had deposited.

14. After perusal of the terms and conditions of the tender it appears that earnest amount of Rs.5000/- was fixed, the period mentioned about the auction was 01/08/2008 to 31/07/2009. The general conditions were mentioned in the said tender document. It reveals from the tender condition No.17 that after finalising the tender process if any bidder fails to deposit the remaining amount as agreed, his amount earlier deposited i.e. 25% would be forfeited and the earlier auction process would be re-auctioned. Thus the condition specifically states that after acceptance of the bid, concern person had to deposit the amount within 15 days and on his failure, the amount would be forfeited. The respondent-Collector, Bhandara had referred the Government Resolution dated 05/09/2003. Said Government Resolution condition also states that the person whose bid is not accepted their earnest amount is to be returned to them. It further states that the bidder who quoted the highest amount, the 25% amount is to be deposited by him along with the

earnest money amount. It further shows that after accepting the highest bid, the bidder had to deposit the amount within 15 days if he fails to deposit 75% amount within 15 days after accepting his bid then the amount which he had deposited i.e. 25% amount is to be forfeited. Thus the Government Resolution dated 05/09/2003 also states that the bidder whose bid had been accepted has to deposit the amount within 15 days otherwise the earlier amount deposited by him would be forfeited. Thus, this resolution nowhere prohibits the withdrawal of bid before acceptance. Said Resolution nowhere states that when bidder withdraws the bid before its finalisation then also respondent i.e. Government is entitled to forfeit the said amount.

15. Here in the present case, admittedly the representation made by the petitioner to the respondent-Collector, Bhandara shows that he had quoted the higher price as the concerned Arjun Reti Ghat was accessible in the rainy season. As the auction was not finalised before rainy season and, therefore, he was not interested to proceed with the said bid and desired to cancel the said bid. Accordingly he made communication on 20/08/2008 i.e. before finalisation of the bid by the respondent-Collector, Bhandara. The communication of the respondent-Collector, Bhandara also shows that the bid was finalised on 25/08/2008. Thus the record shows that before finalisation of the bid, petitioner had withdrawn the bid which he had submitted to the respondent-Collector, Bhandara.

16. Learned Counsel for the petitioner relied upon Vinod J. Agarwal Vs. Chief Officer, Mira-Bhayander Municipal Council, Bhayander and ors. (*supra*) wherein it is held that the provision of law contained in Section 5 of

the Indian Contract Act, the tender having been withdrawn before acceptance thereof, the respondents could not have proceed to forfeit the earnest money in the absence of any specific condition attached to the tender document that the offerers were not entitled to withdraw the offer, and that too, even after the expiry of the validity period of the offer. Same observation is made by this Court in Bholenath Trading Company Vs. State Bank of India, Akola (*supra*) wherein also it is held that petitioner being highest bidder deposited security deposit. However, before acceptance of his bid he submitted application for withdrawal of offer and refund of security deposit. In absence of any condition of tender or any other rule disentitling the tender to withdraw his offer, action of respondent-Bank of forfeiting security deposit not justified.

17. Section 5 of the Indian Contract Act, 1872 states that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards and an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. Here in the present case, the petitioner had revoked the proposal on 20/08/2008 before its acceptance on 25/08/2008.

18. It is no doubt that once the offer is accepted it may not be possible for a tenderer to back out from the tender process and he would have to abide by the terms and conditions of the said tender. It is also an admitted position that after the offer is accepted and if the balance amount is not paid within the stipulated time by the tenderer, in such situation the earnest money would stand forfeited. In the present case, it is undisputed fact that the terms

and conditions regarding the tender did not contain any terms to the effect that the offerer would not be entitled to refund of the earnest amount in the case of withdrawal of the offer and certainly not in case of withdrawal of the offer beyond the period of validity of the said bid.

19. It is also undisputed fact that the Government Resolution dated 05/09/2003 on which the learned Counsel for the respondent relied upon nowhere states that the offerer would not be entitled for refund of the earnest amount in case of withdrawal of the offer before its acceptance. It states that the offerer had to deposit 75% of the amount within 15 days after acceptance and on his failure, the amount deposited by him i.e. 20% amount, would be forfeited. Thus, the contention of the respondent is that the respondent is entitled to forfeit the said amount in accordance with the Clause mentioned in the Government Resolution dated 05/09/2003 is not sustainable. The law on the point of withdrawal of offer is very clear in view of the provisions of the law under Section 5 of the Indian Contract Act, 1872. It is not in dispute that the bid was finalised on 25/08/2008 whereas the petitioner had chosen to withdraw the offer prior to its acceptance on 20/08/2008. In the light of the provisions of the Indian Contract Act, 1872 which states that a person can withdraw his offer before the acceptance of his offer and nothing that withdrawal of an offer before its acceptance is completely a different aspect from the forfeiture of the earnest money given for the particular purpose. Admittedly, there was no such condition attached in the tender document that the offerer is not entitled to withdraw the bid. There was no condition that the offerer would not be entitled for refund of the earnest amount if he withdrew

the offer. Therefore, once the offer was withdrawn by the petitioner before the acceptance of the tender then the petitioner would be entitled for refund of the earnest money. As such the impugned orders dated 06/09/2008 and 12/09/2008 of the respondent-Collector, Bhandara rejecting the representation of the petitioner of seeking permission to withdraw and refund of amount and forfeiture of the amount is not fair and reasonable, therefore, liable to be quashed and set aside and the communications dated 06/09/2008 and 12/09/2008 are liable to be quashed and set aside.

20. We, therefore, pass the following order :

(a) The writ petition is allowed.

(b) The communications dated 06/09/2008 and 12/09/2008 forfeiting the amount and calling upon the petitioner to deposit the balance amount, are quashed and set aside.

(c) The respondent-Collector, Bhandara is directed to refund the 25% amount i.e. Rs.30,07,000/- to the petitioner within a period of four weeks from the date of receipt of the copy of this order.

21. Rule is made absolute in the above terms. There will be no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S. CHANDURKAR, J.)