

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Original Side)

A.P.O. No. 67 of 2021

With

WPO/619/2018

Essem Enterprise

Vs.

Kolkata Municipal Corporation & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Kausik Chanda

For the Appellants : Mr. Biswajit Mukherjee, Adv.
Mr. Soumyajit Mishra, Adv.

For the KMC : Mr. Alok Kumar Ghosh, Adv.
Ms. Manisha Nath, Adv.

Heard On : 24.11.2021, 09.02.2022, 09.03.2022,
23.02.2022, 23.03.2022, 29.03.2022,
31.03.2022

CAV On : 05.04.2022

For further Hearing On : 24.01.2023

Again CAV On : 03.02.2023

Judgment On : 05.04.2023

Arijit Banerjee, J.:

1. This appeal is directed against the Judgment and order dated June 22, 2022 whereby the appellant's writ petition being W.P. 619 of 2018 was dismissed. The writ petitioner had challenged the refusal on the part of

Kolkata Municipal Corporation (in short, 'KMC') to refund the Earnest Money Deposit (in short, 'EMD') on the ground that the same stood forfeited in terms of Clause 13 of the notice inviting the tender in question.

2. Although a point of law was not argued by the parties either before the learned Single Judge or before us, for the sake of completeness, I wish to briefly discuss the same. The writ petition was filed in the name of Essem Enterprise which has been described as the petitioner in the cause title of the writ petition. In paragraph 1 of the writ petition it is stated that the petitioner is a sole proprietorship. In the affidavit affirmed in support of the writ petition, the deponent, Santanu Mukherjee, has stated that he carries on business in the name and style of 'Essem Enterprise'.

3. It is settled law that a proprietorship concern is not a legal entity. No legal proceeding is maintainable in the name of such a concern. Any legal proceeding has to be instituted in the name of the proprietor of the business. In this connection one may refer to the following decisions:

- (i) ***Svapn Constructions v. IDPL Employees Co-operative Group Housing Society Ltd. & Ors.; reported at 2005 SCC OnLine Del 1392.***
- (ii) ***Miraj Marketing Corporation v. Vishaka Engineering and Anr.; reported at 2005 (79) DRJ 209 (DB).***
- (iii) ***Bhagvan Manaji Marwadi v. Hiraji Premaji Marwadi.; reported at (1932) 34 BOM LR 1112.***

- (iv) ***Neogi Ghosh & Co. v. Sardar Nehal Singh & Anr., reported at (1930-31) 35 CWN 432.***
- (v) ***Jamunadhar Poddar Firm v. Jamunaram Bhakat & Ors., reported at (1943-44) 48 CWN 203.***
- (vi) ***Samrathrai Khetsidas v. Kasturbhai Jagabhai, AIR 1930 Bom 216.***

Learned Advocate for the appellant relied on a decision of the Hon'ble Supreme Court in the case of ***Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon, reported at 1969 (1) SCC 869*** . In that case the plaintiff had sued in his individual name. Subsequently he sought leave to amend the plaint to sue as proprietor of a Hindu Joint Family business. The Trial Court allowed the amendment. The High Court reversed such order. The matter having been carried to the Supreme Court, setting aside the order of the High Court, the Hon'ble Apex Court held:

- (i) A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without causing injustice to the other side.

Amulakchand Mewaram and Ors. v. Babulal Kanlal Teliwala, 35 Bom LR 569 and Purushottam Umeddiar and Co. v. M/s. Mani Lal and Sons, (1961) 1 SCR 982, followed.

(ii) There is no rule that unless in an application for amendment of the plaint, it is expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint.

(iii) Since the name in which the plaintiff instituted the action was merely a misdescription of the original plaintiff, no question of limitation arises and the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted.

Learned Counsel also relied on the decision of a learned Judge of this Court in the case of **J.D. Singh and Ors. v. Calcutta Port Trust reported at AIR 1994 CAL 148**. In that case, while reiterating that the proprietor of a business must sue in his own name and not in the business name, the learned Judge, on an oral application of the petitioner allowed substitution of the petitioner's name in the place and stead of the business name. The learned Judge further observed that the reason for this rule is that if a person is allowed to sue in any name other than his own, the same leads to possibilities of fraud, deception or mistake which the courts must make it their business to avoid. If a legal proceeding is initiated in the business name instead of the name of the proprietor of the business, and there is no suggestion by any of the parties that the mistake was committed for any ulterior or dishonest motive like, e.g., tax evasion, the Court permits

rectification to be made so that an otherwise good claim of a claimant is not defeated for a mistake of the petitioner or his lawyer.

In the present case, I am of the view that institution of the writ petition in the business name and not in the name of the proprietor was a bona fide mistake and not for any oblique motive. Accordingly I grant leave to the learned Advocate on record for the appellant to substitute the name of Santanu Mukherjee as the writ petitioner and appellant in the place and stead of Essem Enterprise by appropriately amending the cause title of the writ petition and the appeal papers.

4. The facts of the case briefly stated are that for construction of an underground drainage system on PC connector from Gobinda Khatick Road to ITC Sonar Bangla, Kolkata, KMC floated a tender vide Notice Inviting Tender dated January 15, 2016. Since only one tenderer i.e. the appellant herein, participated, the tender was cancelled. A second tender was floated vide notice dated February 20, 2016, which also had to be cancelled for the same reason. The third tender floated vide notice dated May 25, 2016, also had to be cancelled.

5. Finally, the tender in connection with which the present proceedings arise, was floated by Notice Inviting Tender dated August 16, 2016. Clause 13 of the notice reads as follows:-

“Bid shall remain valid for a period not less than 120 (one hundred twenty) days from the last date of submission of Financial Bid/Sealed Bid. If the bidder withdraws the bid during the validity

period of bid, the earnest money as deposited will be forfeited forthwith without assigning any reason thereof.”

6. The appellant Santanu Mukherjee submitted his bid on September 8, 2016, which was also the last date for submission of the financial bid. The bid was to remain valid till January 6, 2017, i.e., for 120 days from September 8, 2016.

7. The appellant was found to be the lowest tenderer (L1). He deposited the earnest money of Rs. 11, 99, 536/- according to the terms of the conditions of tender.

8. It appears that as per the direction of the Direction General (S&D) KMC, the appellant extended the validity of the bid for another four months, as recorded in a letter dated December 27, 2016, written by the appellant to the Commissioner of KMC. In the said letter it is stated *inter alia* as follows:-

“... Now we have extend the validity of the tender for another 4 months i.e., upto 09 Jan, 17 as per the direction of the DG (S&D).”

9. By a letter dated February 2, 2017, written to the Commissioner of KMC, the appellant complained of delay in issuance of the work order. In the said letter the appellant stated *inter alia* as follows:-

“ ... It is prudent to mention here that we had been asked to extend the validity of tender being LT, for 4 months which also has already expired on 09 Jan, 2017.”

10. This was followed by the appellant's letter dated February 23, 2017, written to the Commissioner, KMC wherein the appellant stated *inter alia* as follows:-

“... it now appears, the deptt. is not at all keen to place the necessary Work Order on us to execute the work. May be the job is no longer in your priority list.

In the circumstance stated above, it is requested to refund our EMD within 7 days as we do not envisage the job will be at all awarded to us in future in spite of being qualified for the job. Moreover, it would be extremely difficult to execute the work at the moment as the rate which we quoted an year ago is no longer workable.”

11. According to the appellant, thereafter the executive engineer of KMC asked the appellant to submit rate analysis on his quoted rate. Under cover of a letter dated April 12, 2017, the appellant submitted the rate analysis. In the said letter it was stated *inter alia* as follows :-

“At the cost of repetition we once again submit that validity of our quoted rate got expired on 09 Jan 17. Therefore the tender stands cancelled unless we further extend our validity of rate. In the circumstances stated above we do not intend to extend our rate any more.

However, we are enclosing our rate analysis as asked for in support of our rate quoted in the tender.”

12. On May 24, 2017 the appellant wrote a letter to the Commissioner of KMC stating *inter alia* as follows:-

“In the above tender we stood Lowest in the bid. However the validity of our rate got expired on 09 Jan, 17. Hence the tender stands cancelled. We have waited a long period expecting some favourable reply from your end but to of no avail.

You are therefore requested to refund our EMD of Rs. 11,99,536/- at the earliest please.”

13. The next correspondence on record is a letter dated November 16, 2017, written by the appellant to the Commissioner of KMC wherein reference was made to a meeting held between the appellant and the Commissioner in the latter's chamber.

14. A formal bill for refund of EMD was raised by the appellant on the Director General (S&D), KMC, under cover of a letter dated May 25, 2018.

15. Finally a letter dated October 31, 2018, was written by the appellant to the Commissioner, KMC, which was essentially a legal notice for refund of the EMD. There being no response to such notice, the appellant approached the learned Single Judge by filing the instant writ petition.

16. Before the learned Single Judge, KMC contended that the petitioner's EMD stood forfeited in terms of Clause 13 of the notice inviting tender which has been extracted above. This is because, the petitioner by asking for refund of his EMD during the validity period of his bid, withdrew his bid

before the expiry of the validity period thereby forfeiting his EMD in terms of Clause 13 of the NIT.

17. The learned Judge noted that initially the petitioner's bid was valid till January 6, 2017. However, the petitioner having extended the validity period by four months, such period stood extended till May 6, 2017. The petitioner having demanded refund of the EMD prior to such date, evinced an unequivocal intention of withdrawing his bid and therefore fell foul of Clause 13 of the NIT. It was held that the petitioner participated in the tender process with full knowledge of the terms and conditions thereof and Clause 13 is binding on the petitioner. The consistent stand of the petitioner in the letters written by him to KMC that the extended validity period expired on January 9, 2017, was rejected as based on erroneous calculation. The concluding portion of the impugned judgment and order reads as follows:-

"I do not, therefore, find any reason why the writ Court will aid the petitioner in getting a refund of the earnest money deposited in the facts and circumstances of the case. The contention that the respondent corporation is wrongfully withholding the earnest money deposit is, on the face of the records, and the notice inviting tender and its terms and conditions, not tenable. Rather, it is the petitioner who has acted wrongfully in seeking to withdraw the bid by demanding refund of the earnest money deposited during the extended period of validity of the said bid on the basis of a patently erroneous calculation as to when 120 days from January 6, 2017 would expire.

I find no unreasonableness in the stand of the respondent authorities and I also find no irregularity in the forfeiture of the earnest money which appears to have been done lawfully according to a specific clause of the Notice Inviting Tender. Accordingly, the writ petition is dismissed. There shall be no order as to costs.”

18. Appearing for the appellant, Mr. Biswajit Mukherjee, learned Advocate, argued two points. Firstly, he said that there was no formal or definite demand for refund of the EMD till May 25, 2018, when the formal bill was raised. Such demand having been raised much beyond the extended validity period even taking such date to be May 6, 2017, Clause 13 of the NIT is not attracted and the EMD cannot be forfeited. Secondly, he argued that the entire EMD cannot be forfeited as that would amount to unjust enrichment of KMC. In KMC’s affidavit-in-opposition filed before the learned Single Judge, there is not a whisper that KMC has suffered any loss or damage by reason of what KMC perceived to be withdrawal of the petitioner’s bid within the validity period.

19. In this connection learned Counsel relied on the following decisions:-

(i) ***Maula Bux v. Union of India; 1969 (2) SCC 554*** (ii) ***Kailash Nath Associates v. Delhi Development Authority; (2015) 4 SCC 136*** and (iii) ***MBL Infrastructure Limited v. Rites Limited & Ors., AIR 2020 Cal 155.***

20. Appearing for KMC, Mr. Alok Ghosh, learned Senior Counsel supported the reasoning and conclusion of the learned Single Judge. He

submitted that Clause 13 of the NIT binds the appellant. Having claimed refund of EMD, by implication the appellant withdrew his bid during the validity period thereof, entitling KMC to forfeit the appellant's EMD. Mr. Ghosh, relied on the following decisions:- **(i) Michigan Rubber (India) Ltd. v. State of Karnataka & Ors.; (2012) 8 SCC 216 (ii) Meerut Development Authority v. Association of Management Studies & Anr.; (2009) 6 SCC 171 (iii) H.U.D.A & Anr. v. Kewal Krishan Goel & Ors.; (1996) 4 SCC 249 (iv) National Highways Authority of India v. Ganga Enterprises & Anr.; (2003) 7 SCC 410.**

21. In the case of **Maula Bux, (Supra)**, Section 74 of the Indian Contract Act fell for discussion. A three Judge Bench quoted with approval the following passages from an earlier decision of the Supreme Court in the case of **Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515:-**

“

“Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases: (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty x x x.” “The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74, reasonable compensation not exceeding the penalty stipulated for.”

...

“It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74, applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression ‘the contract contains any other stipulation by way of penalty’ comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture, and that,

“There is no ground for holding that the expression ‘contract contains any other stipulation by way of penalty’ is limited to cases

of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.”.”

22. The Court further held that forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 of the Contract Act applies, which reads as follows:-

“74. Compensation for breach of contract where penalty stipulated for.- [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception. – When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central

Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

23. In ***Kailash Nath Associates (supra)***, the Hon’ble Supreme Court held as follows:-

“(i) Section 74 of the Contract Act, 1872, is sandwiched between Sections 73 and 75 of the said Act, which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully rescinds such contract. Compensation is payable for breach of contract under Section 74 of the Contract Act, 1872, only by way of damage or loss is caused by such breach.

(ii) Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of

damages, only reasonable compensation can be awarded not exceeding the amount so stated.

(iii) Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found, *inter alia*, in Section 73 of the Contract Act.

(iv) Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine-qua-non* for the applicability of the Section.

(v) Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. (Emphasis is mine)

24. In ***MBL Infrastructure Limited (Supra)***, a coordinate Bench of this Court was considering the enforceability of a forfeiture clause in a notice inviting tender. The relevant paragraphs of the said judgment may be profitably extracted hereunder:-

“1. The issue involved is as to the enforceability of a forfeiture clause in a notice inviting tender. There is no doubt that the relevant clause provided for the forfeiture of the earnest deposit if material particulars were found to have not been disclosed by a tenderer. The legal question which has arisen is whether, upon there being a material non-disclosure or a material concealment,

the forfeiture clause would become applicable irrespective of the quantum of money sought to be forfeited and without reference to the nature of inconvenience or the extent of damages suffered by the party seeking to forfeit.

....

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

“9.4 The Earnest Money is liable to be forfeited

(a) if after bid opening during the period of bid validity or issue of Letter of Acceptance, whichever is earlier, any tenderer

i) withdraws his tender or

(ii) makes any modification in the terms and conditions of the tender which are not acceptable to the Employer.

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

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

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

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

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

....

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

25. The Court came to a finding that there was a breach of contract by the bidder in not disclosing a material fact while submitting its bid. The court referred to the decisions in the cases of **Kailash Nath Associates, (*supra*) and Fateh Chand, (*surpa*)** and finally the Court came to the following conclusion:-

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

interpretation were to be given, the clause would be penal and fall foul of Section 74 of the Act.

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

28. Several principles must be kept in mind while making the assessment. Merely because such a clause is included in the tender documents does not attach any level of sanctity to it than any other clause which is required to pass the test of reasonableness in the context in which it is applied. That a sum is specified as security deposit or earnest deposit does not imply that upon the breach, such amount is liable to be forfeited and the party forfeiting is entitled to the windfall without there being any loss or damage suffered by such party. Indeed, that is the exact reasoning in *Kailash Nath* where the Court was satisfied that DDA did not suffer any loss since the subsequent auction fetched a price of more than three times what the previous auction had. If,

on the other hand, the subsequent auction had fetched a lower price, the previous highest bidder could have been proceeded against for the difference as that would have been the quantum of damages suffered as a consequence of the previous bidder failing to honour its bid.

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

26. Now coming to the decisions relied upon by the respondent Corporation, in the case of ***Michigan Rubber (India) Limited v. State of Karnataka & Ors. (Supra)***, where the Hon’ble Supreme Court was considering the extent to which a Court should interfere in tender or contractual matters, at paragraphs 23 and 24 of the reported Judgment it was observed as follows:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the

heartbeat of fair play. These actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. Unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by

court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached?” and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.”

27. In ***Meerut development Authority, (Supra)***, the Hon’ble Apex Court while discussing the nature of rights of a bidder participating in a public tender process at paragraphs 26 to 29 of the reported judgment, observed as follows:-

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his

obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

28. In ***H.U.D.A and Anr. v. Kewal Krishan Goel & Anr. (supra)*** the question that fell for consideration was where a land was allotted and the allottee deposited some instalments but thereafter intimated the authority about his incapacity to pay up the balance instalments and requested for refund of the money paid, was the allotting authority entitled to forfeit the earnest money deposited by the allottee or was it only entitled to forfeit 10 per cent of the total amount deposited by the allottee till the request was made by him for refund? At paragraph 12 of the reported judgment the Hon'ble Supreme Court held as follows:-

"12. This being the legal position and the allottee having accepted the allotment and having made some payment on instalment basis then made the request to surrender the land, has committed default on his part and therefore the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited as held by the High Court. The High Court was totally in error in issuing the direction in question on the ground that the respondents were not in a position to deliver the possession

of the land to the allottee. It may be stated that in the letter of allotment no period was stipulated within which the possession of the land was to be delivered. The land in question was required to be developed and then to be delivered and in the absence of any period in the letter of allotment, it was required to be delivered within a reasonable period. In the facts and circumstances, it cannot be said that the reasonability had lapsed particularly when the allottees had not paid up the entire instalment due and merely paid a part thereof.

29. In ***National Highways Authority of India v. Ganga Enterprises & Anr. (supra)*** the facts were very similar to the facts of the present case. A notice inviting tenders was issued for collection of toll on a portion of a particular highway. The notice required the bidder to furnish a bid security in the sum of Rs. 50 lakh in the form of bank guarantee or bank draft and a performance security in the form of bank guarantee of Rs. 2 crore. The bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid. The bid was to remain valid for a period of 120 days after the last date of bid submission. The respondent firm furnished a bank guarantee for Rs. 50 lakh. It was an “on-demand bank guarantee” stating that it could be enforced on demand if the bidder withdrew his bid during the period of bid validity. Before the validity period of the bid ended, the respondent firm withdrew its bid. The appellant Authority encashed the bank guarantee for Rs. 50 lakh. The respondent firm challenge this by way of a writ petition claiming refund of the amount. The High Court formulated

two questions:-(a) Whether the forfeiture of security deposit was without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act? and (b) whether the writ petition was maintainable in a claim arising out of a breach of contract. The High Court allowed the writ petition without considering the second question of maintainability.

The Hon'ble Supreme Court allowed the appeal, making the following observations:-

“(a) Thus, it is to be seen that the bid security of Rs. 50 lakh was not for performance of the contract. It was in the essence and earnest to be given to ensure that the bidder did not withdraw his bid during the period of bid validity and/or that after acceptance the performance security is furnished and the agreement signed. The other terms pertained to the anticipated contract for collection of toll. It must be mentioned that the bid validity period was 120 days.

(b) Of course, this did not mean that a completed contract in respect of the work of toll collection had come into existence.

(c) In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*, *State of U.P v. Bridge & Roof Co. (India) Ltd.* and *Bareilly Development Authority v.*

Ajai Pal Singh. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr. Dav, however, relied upon the cases of ***Verigamto Naveen v. Government of A.P. & Harminder Singh Arora v. Union of India***. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus, on the ground of maintainability of the petition should have been dismissed.

(d) In our view, the High Court fell in error in not so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. **A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned**

to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.” (Emphasis is mine).

30. From the aforesaid decisions, the following principles of law emerge:-

(a) Section 74 of the Contract Act imposes a duty on the courts not to enforce a penalty clause but only to award reasonable compensation in case of breach of contract.

(b) Forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty.

(c) Where a sum of money is stipulated in a contract as payable by way of damages in case of breach of contract, the party

complaining of breach can receive such named amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the stipulated amount.

(d) Section 74 of the Contract Act will apply to cases of forfeiture of earnest money under a contract. However, if forfeiture takes place in accordance with the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

(e) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude needs to be conceded to the State Authorities unless the tendering Authority's action is found to be malicious and misuse of its statutory powers.

(f) The Court will be slow to interfere with the terms and conditions of a public tender. Generally the terms of invitation to tender are not open to judicial scrutiny because the same are in the realm of contract.

(g) A tender is an offer. An invitation to tender is an invitation to the members of the public to make an offers to the tendering authority. A contract comes into existence upon the authority accepting the offer of the successful tenderer. Earnest money is

taken from a tenderer to ensure that he does not withdraw his bid during the period of validity of the bid.

(h) earnest/security money is taken to ensure that a contract comes into existence. It would be anomalous if a person who, by his own conduct, precludes the coming into existence of the contract, is then given the advantage or benefit of his own wrong by not allowing forfeiture.

(i) Particularly, in Government contracts, a forfeiture clause is always included to ensure that only a genuine party makes a bid. If such a term is not there, even a person not having the capacity or not having the intention of entering into the contract, would be free to make a bid. The whole object i.e., to see that only genuine bids are received, would be defeated if forfeiture is not permitted.

31. The facts of the present case have been noted in the first few paragraphs of this judgment. The appellant submitted its bid on September 8, 2016. The bid was to remain valid for 120 days i.e., till January 6, 2017. The appellant extended the validity of the bid for 4 months as recorded by it in a letter dated December 27, 2016. In such letter, there was an obvious error in stating that the validity of the tender stood extended till January 9, 2017. Extension of 4 months would mean that the bid would be valid till May 5, 2017. By a letter dated February 23, 2017, the appellant claimed refund of the earnest money deposit. In the letter he categorically stated that it would be extremely difficult to execute the work as the rate that had been

quoted is no longer workable. Further, by his letter dated April 12, 2017, the material portion whereof has been extorted in paragraph 11 of this judgment, the appellant made it abundantly clear that he had withdrawn his offer. In my view, by the letters the appellant withdrew his bid. Since the appellant did so before the validity period of the bid expired, Clause 13 of the tender notice came into play entitling the respondent Corporation to forfeit the earnest money deposit.

32. Learned Counsel for the appellant argued that the first time that the appellant evinced its intention to withdraw from the bid was on May 24, 2017 which was beyond the validity period of the bid. By a letter of that date the appellant stated that the tender stands cancelled. I am unable to agree with learned Advocate for the appellant. In my opinion, the letter dated February 23, 2017, which was written by the appellant to the respondent Corporation unequivocally indicates that the appellant withdrew the bid as otherwise he could not have claimed refund of the earnest money deposit.

33. Section 74 of the Contract Act comes into play only when there is a concluded contract and a breach thereof. It is elementary that for a legally enforceable contract to come into existence, there must be an offer, an acceptance of the offer by another person, consideration must pass and there must be an intention on the part of the contracting parties to create a legal relation. Once an offer is accepted and the other two elements are also present, a contract stands concluded which law may enforce.

34. The bid put in by the appellant was an offer given by it to execute the subject work at the quoted rates on the terms and conditions mentioned in the tender documents. Such offer was never accepted by the respondent corporation overtly by issuing letter of acceptance or otherwise. Hence, no concluded contract ever came into being. Therefore, Section 74 of the Contract Act would not have any manner of application as that provision of law deals with the measure of damages in case of breach of contract.

35. In ***MBL Infrastructure Limited*** (supra), a coordinate Bench observed that though the primary objective of a tender process was to identify a person who would be awarded the contract, upon a person inviting tenders and another person making a bid pursuant thereto, there is an agreement in place. The Bench went on to hold that the appellant by not disclosing a material fact was clearly in breach of such agreement. However, the entire earnest money could not be forfeited as Section 74 of the Contract Act would determine the quantum of compensation payable to the tendering authorities. Notice of the Coordinate Bench was not drawn to the decision of the Hon'ble Supreme Court in the case of Meerut Development Authority (supra) wherein the Supreme Court has clarified that a tender is an offer. Only upon an acceptance thereof a concluding contract will come into existence. In my respectful opinion, the observation of the Coordinate Bench that upon a bid being put in by a person an agreement comes into being, is not in consonance with the dicta of the Hon'ble Supreme Court in the ***Meerut Development Authority*** case. Of course, the Coordinate Bench did not have the occasion to consider that case. None the less, the opinion of the

Coordinate Bench that a contract/agreement is formed as soon as a tenderer puts in his bid, is *per incurium*.

36. I also note that in the case of ***National Highways Authority of India v. Ganga Enterprises (supra)***, the material facts whereof were almost identical with the facts of the present case, the Supreme Court held that a claim for refund of earnest money which had been forfeited by the tendering authority upon the tenderer withdrawing his bid during the validity period of the tender, was a contractual dispute for adjudication of which a writ court is not the proper forum. The Supreme Court further observed that withdrawal of an offer before the same is accepted, is a totally different aspect from forfeiture of earnest money which has been given for a particular purpose. A person may have the right to withdraw his offer but if the offer has been made on a condition that the earnest money will be forfeited if the bid is withdrawn within the validity period thereof, he has not right to claim that the earnest money be returned to him.

37. Accordingly I find no infirmity in the judgment and order assailed before us. The appeal accordingly fails and is dismissed. There will be no order as to costs.

38. Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)

Kausik Chanda, J.:-

1. I have had the privilege of perusing the draft judgment prepared by my esteemed senior brother, Arijit Banerjee, J. It is indeed a delight to read a judgment authored by him, owing to his unparalleled ability to articulate and convey intricate legal concepts with a clear and forceful narrative.
2. However, I regret that I am unable to concur with the perspective put forth by my esteemed colleague in this particular instance.
3. The facts of the case have been succinctly delineated by my esteemed senior colleague in his verdict. While it is not necessary to reiterate the same, I deem it appropriate to highlight certain supplementary factual aspects which, in my opinion, hold relevance.
4. It is worth noting that the tender in question was issued with the following date and time schedule.

14) Date and Time Schedule:

Sl. No.	Particulars	Date & Time
1	Date of uploading of N.I.T. & other Documents(online)	16.08.2016 Upto 5.00 PM
2	Documents download/sell start date (Online)	17.08.2016 at 2.00 PM
3	Documents download/sell and date (Online)	08.09.2016 Upto 2.00 PM
4	Bid submission start date (On line)	17.08.2016 at 2.00 PM
5	Date of submission of original copies for the cost of Tender Documents	10.09.2016 Upto 2.00 PM

5. The clause for forfeiture of earnest money reads:

1

	and Earnest Money Deposit (Off line) to the Office of The D.G (S&D) S S.N Banerjee Road, Kolkata -700013	
6	Bid Submission closing (On line)	08.09.2016 Upto 2.00 PM
7	Bid opening date for Technical Proposals (Online)	13.09.2016 at 12.30 AM
8	Date of uploading list for Technically Qualified Bidder (online)	<i>To be intimated later on</i>
9	Date for opening of Financial Proposal (Online)	<i>To be intimated later on</i>

d shall remain valid for a period not less than 120 (*one hundred twenty*) days from the last date of submission of Financial Bid/Sealed Bid. If the bidder withdraws the bid during the validity period of bid, the earnest money as deposited will be forfeited forthwith without assigning any reason thereof.

6. Though the bid was opened on September 13, 2016, and the appellant turned out to be the lowest bidder, the Kolkata Municipal Corporation (in short, the Corporation) did not issue any work order accepting the bid of the appellant.

7. It appears that after about expiry of about two and half months from the bid opening date, the appellant wrote a letter dated November 28, 2016, to the Director General of the Corporation to convey the following message.

“Ref: EE/KMC/GK/001 Date: 28.11.2016

To

The Director General(S&D),
The Kolkata Municipal Corporation,
Kolkata.

**Ref: CONSTRUCTION OF UNDER GROUND
DRAINAGE SYSTEM ON P.C CONNECTOR
FROM GOBINDO KHATICK ROAD TO I.T.C
Sonar Bangla.**

**Tender Reference No: KMC /D G(S
D)/GOBINDOKHATICK/15-16/C**

Sub: Extension of validity of Tender.

Dear Sir,

It is seen from the competitive statement after opening of the tender that we stand as lowest bidder.

Accordingly, the undersigned contacted the D.G (S&D) and the issue of acceptance was discussed.

We now give our willingness to extend validity of our rate for another 4 months as desired please.

Thanking you,
Yours faithfully,

Sd/- Illegible
Santanu Mukherjee
(Proprietor)"

8. The appellant, therefore, only expressed its "willingness to extend the validity of its rate for another four months." Nevertheless, the Corporation did not provide consent to this proposal and there is nothing on record to suggest that such "willingness" was ever accepted by the Corporation.

9. In its next letter dated December 27, 2016, the appellant approached the Corporation for early acceptance of tender ahead of the monsoon season. In that letter, the appellant also noted as follows:- "Now we have extend the validity of the tender for another 4 months i.e upto 09 Jan 17 as per the

direction of the DG (S&D).” The said letter was also not replied to by the Corporation.

10. The appellant again wrote another letter to the Corporation on February 2, 2017, in which it was again indicated that the validity period of the bid submitted by him expired on January 9, 2017. The relevant part of the said letter is quoted below:

“Ref: EE/KMC/GK/003 Date: 02.02.2017

To
The Commissioner,
The Kolkata Municipal Corporation,
Kolkata.

**Ref: Construction of under ground
drainage system on P C connector from
Gobindo Khatick Road to ITC Sonar
Bangla,
Tender Reference No: KMC/DG(S
D)/GOBINDOKHATICK/15-16/C Dt.
16.08.2016.**

Sub: Request for Acceptance of Tender.

Dear Sir,

Please refer to our earlier letter No EE/KMC/GK/002 dt. 27.12.2016 (copy enclosed).

From the date of floating the tender i.e. 08/02/2016 it is observed that it may not be having enough priority to get the job done by the department. Had there been any interest for the tender, the department would have settled it long back.

It is prudent to mention here that we had been asked to extend the validity of tender being LT, for 4 months which also has already expired on 09 Jan 2017.

At this juncture, please let us know what should be our next course of action.

Thanking You,
Yours faithfully,

Sd/- Illegible
Santanu Mukherjee
(Proprietor)

**Copy to : Director General, (S&D),
KMC.”**

The Corporation did not provide any response to this letter as well.

11. Thereafter, by a letter dated February 23, 2017, the appellant requested to refund of the earnest money within seven days. The relevant part of the said letter is quoted below:

“...Since then we have been pursuing with the Deptt. for acceptance of the tender. However, later on at the direction of the D.G. (S&D), we extended the validity of our quoted rate for further 4 months, which eventually expired on 09 Jan 17.

We had expressed our concern vide our above quoted letter over the decision of your deptt. regarding acceptance of the tender, as we were very much keen to undertake the job as early as possible.

It now appears, the deptt. is not at all keen to place the necessary Work Order on us to execute the work. May be the job is no longer in your priority list.

In the circumstances stated above, it is requested to refund our EMD within seven days as we do not envisage the job will be at all awarded to us in future inspite of being qualified for the job. Moreover it would be extremely difficult to execute the work at the moment as the rate which we quoted an year ago is no longer workable. ...”

12. Though the said letters mentions that “at the direction of the DG (S&D)” the appellant extended the validity of the rate for further four

months, no letter or communication either by the appellant or from the Corporation was ever placed before the Court to demonstrate such direction.

13. The request for a refund of earnest money was, thereafter, repeated by the appellant in its letter dated May 24, 2017, November 16, 2017, May 25, 2018, and October 31, 2018. The Corporation did not bother to make any response.

14. Ultimately, this writ petition was filed on or about December 12, 2018, seeking a refund of the earnest money of Rs.11,99,536/-. Only thereafter, by a letter dated December 14, 2018, did the Corporation inform the appellant that the earnest money deposited by the appellant had been forfeited as per instruction of the Special Secretary, Government of West Bengal. It is noteworthy that this is the only communication that the Corporation made to the appellant in approximately about two years and three months since the opening of the bid on September 13, 2016.

15. Before delving into the legal issues as discussed by my learned senior brother in his judgment, it is essential to address the crucial question of when the validity period of the relevant bid has expired in the facts of the case.

16. Learned Single Judge in the impugned judgment has held that 120 days from the last date of submission of the financial bid expired on January 6, 2017. The appellant by the letter dated November 28, 2016, extended the validity period by a further period of four months and four months from January 6, 2017, which expired on May 6, 2017. The appellant sought for a refund before May 6, 2017, which was within the extended validity period of the bid, which clearly showed the intention of the appellant

not to perceive or proceed with the tender. The forfeiture clause was a condition for the notice of tender and the appellant was bound to accept the same the moment it participated in the tender. The consequence of forfeiture from the language of the clause followed immediately and automatically.

17. My esteemed senior brother noted that the appellant extended the validity period for four months as recorded in the letter dated December 27, 2016. However, there was an obvious error in the letter stating that the validity of the tender was extended till January 9, 2017. The extension of four months meant that the bid would remain valid till May 5, 2017.

18. I am of the view that in the present case, there was no extension of validity of period the bid in the eyes law.

19. The letter dated November 28, 2016, of the appellant merely expressed his willingness to extend the validity of his bid for another four months. Significantly, in all subsequent letters starting from December 27, 2016, to October 31, 2018, which was the last letter preceding this writ petition, the appellant maintained that validity of the bid expired after January 9, 2017. In my view, the said date has not been mentioned due to an error.

20. The tender notice quoted above clearly suggests that the last date of online bid submission was September 8, 2016, up to 2 p.m., and the last date of offline submission of earnest money deposit was September 10, 2016, up to 2 p.m. The appellant appears to have calculated 120 days from September 11, 2016 (excluding the last date of submission of earnest money) and concluded that the bid was valid only up to January 9, 2017. The appellant never indicated its intention to extend the validity period of the bid beyond January 9, 2017.

21. The appellant's stand in its different letters as mentioned above regarding the extension of the bid's validity period can be interpreted in three possible ways.

- a) The appellant may have requested an extension of the validity period for a duration of four months from November 28, 2016, which is the date on which the willingness for an extension was expressed.
- b) The appellant may have intended to extend the validity period up to January 9, 2017, which is consistent with the appellant's stand in all correspondences addressed to the Corporation.
- c) The appellant may have sought to extend the validity period until May 6, 2017, as noted by both the learned Single Judge and my esteemed senior brother.

22. The fact remains that the appellant's willingness to extend the validity of the bid for another four months was never accepted by the Corporation. In absence of any written communication from the end of the Corporation regarding the extension of the validity period, the terms of the tender could not have been altered. There is nothing on record to show that at any point of time, the Corporation had any intention to extend the validity period of the bid.

23. When the Corporation floated a tender, it made a representation before the public and after floating the tender, the Corporation was not

entitled to alter any of the terms and conditions of the tender, particularly, when the Corporation did not reserve its right to make any such alteration.

24. The alteration of the validity period of a bid as indicated in the tender notice cannot be a unilateral action at the instance of the bidder. At no point of time, before the writ petition was filed, did the Corporation expressly or even by its implied act accept the proposal to extend the validity period of the bid. It bears repetition that no communication whatsoever from the end of the Corporation was produced to show its intention to extend the validity period of the bid. Therefore, the Corporation by way of an afterthought cannot take a stand in its affidavit that the validity period of the bid was extended by four months when in fact, there was no extension of the validity period of the bid in the eyes of law.

25. The aforesaid proposition of law is an elementary one. Nevertheless, should any authority be required, reference may be made to the judgment of the Supreme Court dealing with a case of unilateral alteration of the terms of a tender reported at **(2017) 16 SCC 757 (Suresh Kumar Wadhwa v. State of Madhya Pradesh)**. The relevant paragraphs of the said report are quoted below:

“26. Equally well-settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally “alter” the terms and conditions of the contract and nor they have a right to “add” any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional

terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, which adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply with such additional terms/conditions.”

26. I am of the view that the bid validity period was never extended beyond four months from the last date of submission of the bid (whether it was September 8 or September 10, 2016). The appellant was entitled to a refund of the earnest money on February 23, 2017, which was the date of its first letter seeking a refund since the validity period of the bid had already expired by then.

27. Moving on to the next question as to the applicability of Section 74 of the Indian Contract Act, 1872, two different views taken by the Supreme Court Bench of equal strength must be noticed. A Two Judge Bench of the Supreme Court in ***National Highways Authority of India v. Ganga Enterprises*** reported at **(2003) 7 SCC 410** dealt with the issue of forfeiture of earnest money. In that case, during the validity period of the bid, the bidder withdrew its bid for which the tendering authority forfeited the earnest money deposited by way of a bank guarantee. The High Court held since the bid of the appellant was not accepted, there was no completed contract between the parties and there could be no breach of contract until the offer is accepted unconditionally, it creates no legal right and the bid can be withdrawn at any point of time. The Supreme Court set aside the judgment of the High Court and held as follows:-

“3. In terms of this tender document the respondent gave his bid or offer. The offer/bid was in terms of the tender and thus it was also in two parts, the first part being an offer that the bid would not be withdrawn during the bid validity period and/or that on acceptance the performance security would be furnished and the agreement signed. The second part of the offer dealt with the terms and conditions pertaining to the performance of the contract of collection of tolls, if the offer was accepted. As earnest/security for performance (of the first part of the offer), the respondent along with his bid furnished a bank guarantee in a sum of Rs 50 lakhs as bid security. The bank guarantee furnished was an “on-demand guarantee” which specifically provided that the bank guarantee could be enforced “on demand” if the bidder withdraws his bid during the period of bid validity or if the bidder, having been notified of the acceptance of his bids, fails to furnish the performance security or fails to sign the agreement. The amount of the bank guarantee was to be paid by the bank without demur on a written demand merely stating that one of these conditions had been fulfilled. The moment the bank guarantee was given and accepted by the appellants the first portion of the offer, regarding bid security, stood accepted. Of course, this did not mean that a completed contract in respect of the work of toll collection had come into existence.”

[emphasis is supplied by me]

28. The Supreme Court, in this case, allowed to forfeit the earnest money on the ground that the same was deposited by way of bank guarantee and the Court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. The relevant paragraph of the said judgment is quoted below:

“10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an “on-demand bank guarantee” is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an “on-demand guarantee” in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.”

29. The aforesaid judgment of the Supreme Court makes the position of law clear that a forfeiture clause is a complete and separate contract by itself, even if there is no concluded contract in respect of the work order of the tender in question. The moment earnest money is deposited by a bidder and accepted by the tenderer, the offer as to the submission of the bid stands accepted and in such an event, the existence of a concluded contract with regard to the underlying contract i.e. the contract for execution of work becomes irrelevant.

30. It must be noticed that the said judgment was delivered in a factual context where the earnest money was deposited by a bank guarantee and in the said case despite noticing a contract between the parties, the Supreme Court had no occasion to consider the implication of Section 74 of the Indian Contract Act, 1872, as against a forfeiture clause.

31. The issue of applicability of Section 74, however, as noticed by my learned senior brother, was answered in negative in the judgment reported at **(2015) 4 SCC 136 (*Kailash Nath Associates v. Delhi Development Authority*)**. The relevant paragraph is quoted below:

“**43.7.** Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction *before* agreement is reached, Section 74 would have no application.”

32. Significantly, in the said judgment the Supreme Court directed a refund of the earnest money as it found the existence of a concluded contract between the parties involved.

33. The view expressed in the judgment reported at **AIR 2020 Cal 155 (*MBL Infrastructure Limited v. Rites Limited*)** seems to align with the view expressed in the ***National Highways Authority of India (supra)*** insofar as it relates to the issue of the existence of a concluded contract in relation to a forfeiture clause.

34. The argument advanced on behalf of the Corporation in this case with regard to the scope of interference by a writ Court in a contractual matter appears to be self-destructive. If there is no concluded contract between the parties in the facts of the present case, then the question of limitation of a

writ Court to interfere in a contractual matter becomes irrelevant. Bereft of any contract between the parties, like any other administrative action, the act of arbitrary forfeiture of earnest money by the Corporation becomes a subject of judicial review by a writ Court.

35. The Corporation in this case never extended the bid validity period. It did not even forfeit the earnest money before filing the writ petition. The action of the Corporation, therefore, to forfeit the earnest money after the validity period of the bid cannot be sustained. Even if, it is assumed that there was no concluded contract between the parties, the Corporation should be allowed to forfeit the earnest money only proportionate to the damages or losses suffered by it due to the withdrawal of the bid by the appellant. A writ Court should not be hesitant to apply the principles of Section 74 of the Indian Contract Act, 1872 as elucidated in ***Fateh Chand v. Balkishan Dass***, reported at **(1964) 1 SCR 515**, even in the absence of a concluded contract between the parties and allow a party to forfeit the amount proportionate to the damages suffered by it. The Corporation has not established a case to demonstrate any losses suffered. The Corporation's approach to the tender process cannot be condoned. Following the relevant tender, it received the appellant's lowest bid, on September 10, 2016, it accepted the earnest money deposited by the appellant yet failed to take any further action for approximately two and a half years. Furthermore, the Corporation neglected to respond to any of the appellant's letters. It was only when the appellant filed a writ petition to reclaim the earnest money, the Corporation forfeited the same. In light of these facts, it is evident that

only the appellant has suffered losses and damages due to the procrastination of the Corporation.

36. I respectfully concur with the view expressed by my learned senior brother regarding competence of the writ petitioner to maintain the writ petition.

37. In view of the discussion above, I am inclined to allow the appeal and direct the Corporation to refund the earnest money together with an interest @ 7 % per annum to be calculated from February 23, 2017, i.e. the date when the appellant first asked for a refund of the earnest money, till the date of actual payment.

38. Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon compliance with necessary formalities.

(Kausik Chanda, J.)

The Court:- Since there is a difference of opinion between two of us, let this matter be placed before the Hon'ble the Acting Chief Justice for appropriate direction.

(Kausik Chanda, J.)

(Arijit Banerjee, J.)