



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

ARBITRATION APPEAL NO.1 OF 2014

Western Coalfields Ltd.
A Body corporate,
through its Area Manager,
Kanhana Area.

... Appellant

vs.

1. M/s Khandelwal Earth Movers
Transport Contractors and
Heavy Earth Movers, 117, Khare Town,
Dharampeth, Nagpur-440010
(Original Claimant & Contractor)

2. D. Janardan Rao
(Sole Arbitrator),
8E, Amol Apartment, Mecosabagh,
Nagpur

... Respondents.

Mr. C. S. Samundra, Advocate for the appellant.
Shri Naresh Roopkumar Nebhani, Advocate for respondent No.1.
Shri Kunal Kranti Nalamwar, Advocate for respondent No.2.

CORAM : ABHAY J. MANTRI, J.

DATED : 21-08-2025.

Oral Judgment :

The appellant/original respondent Western Coalfields Ltd. (hereinafter referred to as “**WCL**”), being aggrieved by the judgment and award dated 18/10/2013 passed by the learned District Judge (hereinafter referred to as the ‘**District Judge**’) in Misc. Civil Application No.229/2010 has preferred this appeal whereby the District Judge has rejected the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “**the Act of 1996**”) and confirmed the Award dated 08/02/2010 passed by the learned sole Arbitrator in Arbitration Proceedings, and allowed the application of the

claimant that is respondent No.1 herein and directed the appellant to refund the amount of Rs.10 lakhs with interest @8% pa to the respondent No.1.

2. Brief facts of the case are as under :

The appellant-WCL desired to execute the "*Hiring of HEMM, Tippers, Drills, Dozers for removal of all types of material in all kinds of strata with hits drilling, excavation, loading, transport, and dumping, spreading and dosing at specified places as directed by the Engineer-in-charge at OC patch of Damua Colliery A & B inclined of Kanhan Area.*" Accordingly, it issued tender notice No.44/2002-2003 on 24/10/2002. The respondent No.1 participated in the tender process and deposited Rs. 10 lakhs as earnest money. However, during the validity period of the offer, the respondent No.1 withdrew its offer, which resulted in forfeiture of the earnest money deposit (for short-'**EMD**') paid by them.

- (a) Being aggrieved by the same, the respondent No.1 filed arbitration proceedings before the learned Arbitrator. The learned Arbitrator, after considering the material on record, held that the forfeiture of the EMD of Rs. 10 lakhs by the appellant-WCL was neither legal nor justified and therefore directed the appellant-WCL to refund the said amount to the respondent.
- (b) Being aggrieved by the aforesaid Award, the appellant preferred an application under Section 34 of the Act of 1996 before the District Judge. The learned District Judge, after considering the material and facts on record as well as relying on the judgment of this Court in ***Andhra Pradesh Paper Mills Ltd. vs. State of Maharashtra and ors.*** reported in **2003(4) Mh.L.J. 760**, held that the order of the learned

Arbitrator is just and proper and thereby rejected/dismissed the application. Feeling dissatisfied with the said judgment and order, the appellant has preferred this appeal.

3. The learned Advocates for the appellant as well as respondent No.1 have filed short notes of facts as well as legal points. The same are taken on record and marked 'X' and 'X-1' for identification purposes.

4. Heard the learned Advocates for the appellant as well as respondent No.1. Perused the impugned judgment and order, short notes submitted by the parties, as well as proceedings as pointed out by the learned Advocates for both the parties. Also considered the judgments relied upon by the parties in support of their submissions.

5. Having considered the same, the following points arise for determination:

- (i) *Whether the impugned judgment and order passed by the District Judge, as well as the Award passed by the learned Arbitrator, are just and proper ?*
- (ii) *Whether any interference is required in the impugned judgment and award in the appellate jurisdiction ?*
- (iii) *What order ?*

6. I would like to mention the following undisputed facts of the case as under:

- 1) **On 24/10/2002** tender notice was issued.
- 2) **Till 17/12/2002**, up to 3 pm tender had to be submitted.

- 3) **On the same day** at 3.30 pm, the technical bid was opened.
- 4) **Till 16/06/2003**, Validity of the Tender/date up to which the offer was required to be kept alive.

It is further not in dispute that **during the validity period on 11/03/2003, the respondent withdrew its offer and therefore their EMD was forfeited.**

7. At the outset, the learned Advocate for the appellant mainly emphasised that, as the respondent/tenderer withdrew its offer during the validity period of the offer, therefore, its EMD was forfeited. Accordingly, he has pointed out Clause Nos. **3, 18** and **19** of the tender agreement as well as condition No. **4.4** of the General terms and conditions, which is *pari-materia* to condition No.19. I would like to reproduce the same, which reads as under:

3. *Intending tenderers are advised to inspect the site before quoting rates. No dispute regarding lead and lift would be admitted.*

18. *The tender shall remain valid **for a period of 6(six) calendar months** from the date of opening of the tender. The tenderer shall not be entitled during the said period or within the period extended for mutual agreement, without the consent in writing of the Company, to revoke or cancel his tender or to vary the tender submitted or in terms thereof."*

19. EMD to be forfeited in the event of the tenderer :-

(a) **Withdraw his offer during the validity of the offer;**

(b) *changes the terms of the offer and submits a revised offer amounting to withdrawal;*

(c)

(d)

(e) *desires to withdraw his offer after the scheduled date and time for receipt of the tenders."*

8. Learned Advocate for the appellant Shri. Samudra submitted that the learned District Judge, based on the observations made in paragraph 24 of the judgment of this Court in **Andhra Pradesh Paper Mills Ltd.** (supra), held that the order passed by the Arbitrator is just and proper. However, he argued that the Hon'ble Apex Court in **State of Maharashtra and ors. vs. A. P. Paper Mills Ltd. (2006) 4 SCC 209** has set aside the order passed by this Court in **Andhra Pradesh Paper Mills** (supra), holding that since the tender is valid for a period of 45 days and withdrawal is before expiry of the period, therefore, the earnest money is to be forfeited. He has relied on the said judgment of the Hon'ble Apex Court. It was therefore submitted that the finding recorded by the learned District Judge cannot be sustained in the eyes of the law.

(a) He further relied upon the judgment in **National Thermal Power Corporation Limited vs. Ashok Kumar Singh and ors. (2015) 4 SCC 252** and pointed out paragraph Nos. 2, 3, 6 to 9 and 11 to 13 and propounded that forfeiture of earnest money when it is made for breach of auction/tender conditions at pre-contractual stage when no contract has yet come into existence, does not infringe any statutory right under the Contract Act, 1872 since earnest/security is given and taken in such cases to ensure that a contract comes into existence. It is further submitted that a tenderer has a right to withdraw his offer, but he will have no right to claim refund of earnest money if said offer is subject to a condition that earnest money will be forfeited if offer is withdrawn and therefore, he submitted that in view of the same, the respondent is not entitled to claim the refund of the earnest money. Hence, he urged that the impugned orders passed by the Arbitrator as well as the learned District Judge cannot be sustained in the eyes of law and those orders are liable to be set aside in view of the law laid down by the Hon'ble Apex Court.

9. *On the contrary*, learned Advocate Shri Nebhani for the respondent No.1-tenderer vehemently contended that the judgment and order passed by the Arbitrator as well as the learned District Judge are just and proper and no interference is required in it as the District Judge has rightly considered the grievance of the respondent in proper perspective and therefore there is no need to interfere in the impugned order. He further canvassed that in view of the provisions of Section 5 of the Indian Contract Act, 1872, the proposal of acceptance of tender may be revoked at any time before communication of its acceptance is complete. He pointed out Sections 2 to 5 of the Indian Contract Act regarding the applicability of those provisions.

(a) He further submitted that the appellant had not communicated the forfeiture of the EMD during the validity of contract and therefore he urged that passing of the order by the learned Arbitrator after considering Section 5 of the Contract Act as well as mandate laid down in the judgments on which he has relied upon are just and proper and no interference is required in the impugned orders. Therefore, he urged for the dismissal of the appeal.

(b) To buttress his contention, he has relied upon the following judgments :

- a) ***Rajendra Kumar Verma vs. State of Madhya Pradesh and others.***
AIR 1972 MP 131
- b) ***Food Corporation of India & Another vs. Sujit Roy 2000(4) RAJ 218 (Gou)***
- c) ***Sekhsaria Exports vs. Union of India & Ors. 2004(1) RAJ 211 (Bom).***
- d) ***T. K. Sarkar vs. State of West Bengal 2007(4) RAJ 131 (Cal)***
- e) ***Satna Stone & Lime Co. Ltd. ETC. vs. Union of India ETC 2008(2) Arb. LR 285(SC)***
- f) ***Oil & Natural Gas Corporation Limited vs. WIG Brothers***

(Business & Engineers) Pvt. Ltd. 2010 (4) Arb. LR 374 (SC).

10. Having heard the learned Advocates for the parties, at the outset, the short but crucial point that arises for consideration is whether the forfeiture of the EMD of Rs. 10 lakhs by the appellant is just and proper?

For this purpose, I would like to rely on **Clause 19** of the tender notice. A bare perusal of Clause 19 would reveal that ***if the tenderer withdraws his offer during the validity of the offer, then EMD is liable to be forfeited.*** Undisputedly, the validity period in the case at hand was up to 16/06/2003, and the respondent withdrew its offer on 11/03/2003, i.e. before the validity period expired. Therefore, as per Clause 19 of the tender agreement, the said amount is to be forfeited automatically.

11. The next point argued by the learned Advocate for the respondent is in respect of the applicability of Sections 2 to 5 of the Indian Contract Act. However, Hon'ble Apex Court in ***National Thermal Power Corporation Ltd.*** (supra) has considered the tenor of Section 5 of the Contract Act and held that forfeiture of EMD when it is made for breach of auction/tender conditions at pre-contractual stage when the contract has yet come into existence, does not infringe any statutory right under the Contract Act, 1872 since earnest money /security is given and taken in such cases to ensure that a contract will come into existence. It is further held that it is no longer possible for the tenderer to contend that the right to withdraw the bid/offer in terms of Section 5 of the Contract Act, 1872 would entitle them to withdraw their offer without suffering forfeiture of the earnest money even in cases where the submission and receipt of bids is itself subject to the condition that in the event of a withdrawal of the

bid, the earnest money would stand forfeited.

13. Therefore, I do not find substance in the contention of the learned Advocate for the respondent that, in view of Sections 2 to 5 of the Indian Contract Act, the judgment and order passed by the learned Arbitrator, as well as the learned District Judge, are just and proper and no interference is required therein. On the contrary, in my opinion, in view of Clause 19 of the tender notice, during the validity period of the offer, if the tenderer withdraws his offer, then EMD is to be forfeited.

14. It is pertinent to note that the judgments on which the learned Advocate for the respondent has relied upon before the learned District Court and this Court was passed by this High Court as well as other High Courts however, in view of the mandate laid down by the Hon'ble Apex Court in ***State of Maharashtra vs. A. P. Paper Mills Ltd.*** as well as ***National Thermal Power Corporation Limited*** (supra), the observations made in the judgments on which the learned Advocate for the respondent is relying are hardly of any assistance to it while deciding the question in dispute and therefore those decisions are not helpful to the respondent in support of their contention.

15. The upshot of the above discussion as well as the law laid down by the Hon,ble Apex Court as referred above and as per Clause-19 of the tender notice, the appellant is entitled to forfeit the EMD as the offer was withdrawn during validity of the offer period and thus the learned Arbitrator as well as District Judge have erred in non-considering the contents of Clause-19 of the tender notice and have passed the impugned orders. Therefore, those orders

cannot sustain in the eyes of the law in view of the mandate laid down by the Hon'ble Apex Court in ***State of Maharashtra and ors. vs. A. P. Paper Mills Ltd.*** and ***National Thermal Power Corporation Ltd. (supra)***. As such, interference is required in the impugned judgment and order and Award in the appellate jurisdiction.

As a result, I answer ***point No. (i) in the negative and point No. (ii) in the affirmative***. As such, pass the following order.

16. As a consequence, the appeal is allowed.

(a) The impugned judgment and order dated 18/10/2013 passed by the learned District Judge in M.C.A. No.229/2010, thereby confirming the Award dated 08/02/2010 passed by the learned Arbitrator, are hereby quashed and set aside.

(b) As a sequel to the above, the dispute raised/filed by the original claimant, i.e. the respondent No.1, is hereby dismissed/rejected.

(c) Consequently, the respondent No.1 is directed to refund the amount of Rs. 10 lakhs, which was withdrawn by them in pursuance of the order dated 06/05/2015, with interest @ 5% p.a. till realisation of the amount as undertaken by them.

(d) The respondent No.1 is directed to deposit the said amount in the Court by 15/11/2025, failing which the amount will carry interest @ 8% p.a. till its realisation.

17. The Registrar (Judicial) is directed to transmit the amount lying in this Court (deposited by the appellant), along with interest accrued thereon, to the bank account of the appellant within eight weeks on its furnishing bank account

details to the registry.

18. It is made clear that upon deposit of the amount by the respondent No.1 in the Court as aforesaid, the same shall be transmitted to the bank account of the appellant within eight weeks thereafter. No further application is required for the withdrawal of the same. Appeal is disposed of. No order as to costs.

(ABHAY J. MANTRI, J.)