



W.P.No.4794 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON: 21.02.2025

ORDERS PRONOUNCED ON: 16.04.2025

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.4794 of 2025
and W.M.P.Nos.5308, 5309 & 5311 of 2025

M/s. P.S.T. Engineering Construction
Rep.by its Managing Partner
V.S.Thennarasu
2/352, Vavipalayam
Kolaram Post, Paramthi Velur Taluk
Namakkal District – 637 201.

.. **Petitioner**

Vs.

1.HSCC (India) Limited
Rep.by its General Manager (Engg.)
E-6A, Sector – 01
Noida – 201 301.

2.Government of Maharashtra
Department of Medicine
Mantralaya, Mumbai, Maharashtra.

3.Indian Bank, MCB Namakkal Branch
Rep.by its Branch Manager
1st Floor, No.31, Rangar Sannadhi Street
Namakkal Town, Tamil Nadu.

.. **Respondents**



W.P.No.4794 of 2025

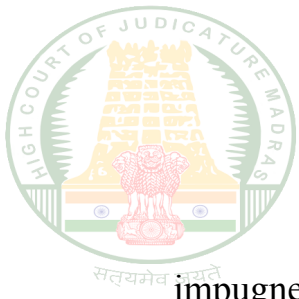
Prayer: Writ Petition filed under Article 226 of the Constitution of India seeking a Writ of Certiorari to call for the entire records relating to impugned order dated 07.02.2025 Ref.No.HSCC/DMER-MHA/MPGIMER/NASHIK/EPC/PST issued by the 1st respondent and the consequential impugned letter dated 07.02.2025 in Ref.No.HSCC/Banking /BG-2025, issued by the 1st respondent and quash the same and to pass such further or other orders.

For the Petitioner	: Mr.Srinath Sridevan Senior Counsel for Mr.S.Senthil
For the Respondents	: Mr.Vipul Ganda Nirti Dua for Mr.Arun Karthik Mohan for R1 Ms.Bhargavi Sundarrajan for R3

O R D E R

A.The Writ Petition:

This Writ Petition is filed by PST Engineering Construction, represented by its Managing Partner (hereinafter 'PST'), for the issuance of a Certiorari to call for the records relating to the impugned order dated 07.02.2025 in Ref.No.HSCC/DMER-MHA/MPGIMER/NASHIK/EPC/PST, passed by the first respondent, HSCC (India) Limited (hereinafter 'HSCC'), and the consequential letter dated 07.02.2025 in Ref.No.HSCC/Banking/BG-2025. By the first

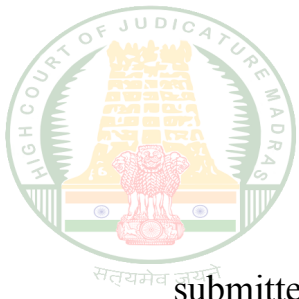


W.P.No.4794 of 2025

impugned order dated 07.02.2025, HSCC declared that PST had submitted false information while making its bid, thereby violating the undertaking submitted by it. Consequently, it ordered the forfeiture of the earnest money deposit (EMD) amounting to Rs. 3,28,40,000/- and invoked the bank guarantee, stating that steps would be taken for the encashment of the bank guarantee. By the second impugned order, a letter was issued to the bank for the encashment of the bank guarantee.

B.The Factual Background:

2. The brief facts under which this Writ Petition arises are that the second respondent, namely the Department of Medicine, Government of Maharashtra, sought to establish a Medical College and Hospital in Nasik, Maharashtra. The hospital is to be a 430-bedded facility with all the necessary infrastructure to accommodate 100 medical seats per year. The buildings and infrastructure were to be on a comprehensive design, engineering, procurement, and construction basis. Additionally, the hospital is to be maintained throughout the defect liability period. HSCC, acting on behalf of the second respondent, issued a tender on 09.09.2024, calling for bids as stated above on an EPC basis. PST



W.P.No.4794 of 2025

WEB COPY

submitted its bid for the tender on 30.09.2024. The value of the tender is Rs.318.40 Crores. Participants are required to deposit an EMD of Rs.3,28,40,000/-. PST submitted a bank guarantee for this amount through the respondent bank, Indian Bank, with Bank Guarantee No.0365324IPG000024 along with an undertaking dated 30.09.2024, which is valid until 29.03.2025.

2.1. On 01.10.2024, the technical bids (Cover – I) were opened, and PST was declared 'In the Competition'. On 05.10.2024, HSCC requested an explanation from PST via email, noting that in Form – N (Litigation History) submitted by PST with its bid, PST indicated that no quality-related matters, court cases, investigations, or arbitration were pending for any projects executed by PST. However, during bid evaluation, HSCC learnt that PST had filed a case bearing C.S.No.108 of 2021 in the High Court of Madras and also filed O.A.No.775 of 2021. Consequently, PST was asked to inform HSCC with supporting documents whether the above cases are still pending in court and, if not pending, to provide copies of the judgments or orders. On the same day, 05.10.2024, PST responded that the case was still pending, and the latest court order was enclosed for reference.



W.P.No.4794 of 2025

WEB COPY

2.2. It was further stated by PST that the suit was filed against the arbitrary action (demanding repair of the damages caused) of the Tamil Nadu Urban Habitat Development Board. In fact, it is further stated that the Hon'ble High Court of Madras, having been *prima facie* satisfied with the case presented by PST, was pleased to grant an order of interim injunction, which remained in effect and was extended periodically. The latest injunction order was also attached. PST's failure to mention the particulars of the pending suit is neither willful nor wanton. PST believes that its explanation is sufficient and requested HSCC to consider them for proceeding further as an eligible bidder.

2.3. Subsequently, on January 14, 2025, HSCC issued a show cause notice stating that, according to the tender terms, PST was required to submit the history of pending litigation concerning quality-related issues, court cases, and arbitration for any of the executed projects in Form - N, along with an affidavit strictly adhering to the format provided in Annexure - IV of the tender. Along with the bid dated September 30, 2024, an unconditional letter accepting the tender conditions was also annexed, and the affidavit dated September 30, 2024,



W.P.No.4794 of 2025

WEB COPY

was furnished. According to paragraph no.4 of the affidavit, PST confirmed that if any documentary information or certificate submitted by PST is found to be incorrect, false, or fabricated, HSCC may, at its discretion, disqualify, reject, or terminate the bid contract and forfeit the EMD or all dues.

2.4. The Form – N submitted by the PST was attached to the show-cause notice, which stated 'Nil' regarding the information related to litigation history, specifically whether any quality-related matters, court cases, investigations, or arbitrations were pending for any of the projects it executed. Furthermore, it was mentioned that clarification was requested, and PST replied on 05.10.2024. Upon review, it was revealed that PST itself acknowledged that the case was pending as of the bid date, which was not disclosed in Form – N. Consequently, the information provided in the bid is incorrect or false, granting HSCC the authority to forfeit the EMD. Therefore, the PST was asked to show cause as to why the EMD should not be forfeited.

2.5. In response to this, PST submitted a reply on 20.01.2025. The reply states that the suit is filed against the arbitrary action of the Board, demanding



W.P.No.4794 of 2025

WEB COPY

repairs for the damages caused. The High Court, after reviewing the case, was pleased to grant an interim injunction that remains in effect and has been extended periodically. This is the reason for not mentioning the ongoing suit in Form – N. The omission was neither intentional nor willful. Furthermore, they are executing another contract for the TNUHDB Department, specifically for the construction of 1,760 EVS tenements at Keerapakkam, Chengalpet District. A copy of the payment memo related to this work was also enclosed. It was further stated that PST promptly provided all necessary details to HSCC in its email clarification. Consequently, they requested HSCC to consider this as an unintentional mistake and accept their reply. However, without considering the explanation provided by them, the impugned order was passed, forfeiting the EMD amount and invoking the bank guarantee. Therefore, PST is before this Court.

C. PST's Case:

3. In the affidavit filed in support of the writ petition, it is stated that the PST has not violated Clause 4.0 of the tender document and, therefore, the EMD cannot be forfeited. Furthermore, according to Clause 12, if any contractor is



W.P.No.4794 of 2025

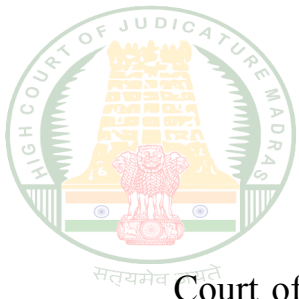
WEB COPY

found ineligible, HSCC can only retain the cost of the tender document and not the EMD paid by PST. The reason mentioned in the impugned order is not a stipulated condition and, therefore, is mala fide, intended to usurp the bank guarantee.

3.1. The litigation did not pertain to any quality-related issue. In any case, the forfeiture falls under Section 74 of the Indian Contract Act, 1872. Therefore, when there is no loss whatsoever and the contract is awarded to a third party, the forfeiture of the EMD is unwarranted.

D. HSCC's Case:

4. HSCC resists the Writ Petition by filing a counter affidavit. They state that on 05.10.2024, clarification was sought regarding the pending litigation and the Form – N submitted by the petitioner, which suppressed this information. Subsequently, on 07.10.2024, the PST was disqualified from the tender process. A show cause notice was issued on 04.01.2025, and after considering the reply dated 20.01.2025, the impugned orders were passed. PST approached the High



W.P.No.4794 of 2025

WEB COPY

Court of Delhi via W.P.(C)No.1442 of 2025, and since submissions were made regarding territorial jurisdiction, the petitioner withdrew the said Writ Petition and filed the present Writ Petition.

4.1. The EMD is forfeited for non-disclosure of pending litigation. In light of Form – H and Form – N submitted by PST, the EMD is subject to forfeiture. This non-disclosure constitutes material suppression. The purpose of the clauses in the tender is solely to ensure that only genuine bids are submitted, and the tendering authority retains the right to forfeit the EMDs in cases where bidders fail to comply with the conditions. The amount of the forfeiture cannot be challenged. Section 74 of the Indian Contract Act is not applicable, as the contract was never awarded to the PST.

E. The Submissions made by PST:

5. *Mr.Srinath Sridevan*, the learned Senior Counsel appearing on behalf of PST, submits that it must be noted that in Form N, the applicant should provide information regarding “litigation history related to quality matters, court cases, investigations, or arbitrations pending in any executed project”. PST genuinely



W.P.No.4794 of 2025

WEB COPY

believed that the litigation should pertain solely to quality-related issues. In this context, the omission of the aforementioned case in C.S.No.108 of 2021 cannot be considered a suppression of fact. At best, it can only be deemed a genuine mistake. The Hon'ble Supreme Court of India, in ***ABCI Infrastructures Private Limited Vs. Union of India and Others***¹, has addressed instances of genuine mistakes like this and has determined that only a token amount may be deducted; the entire EMD cannot be forfeited.

5.1. Furthermore, he contends that in this case, the forfeiture of EMD is governed by Clause No.4 of the tender conditions, which stipulates that if the bidder withdraws the bid after bid opening and during the validity period, any unilateral revision in the offer made by the tenderer during this validity, non-acceptance of the Letter of Intent(LOI) or Letter of Agreement (LOA), or if a successful bidder fails to sign the agreement within 30 days from the date of issue of LOI/LOA, or fails to furnish the required performance security or commence the work within the stipulated time, the EMD may be forfeited. In this case, it is forfeited due to the suppression of material facts.

¹ 2025 SCC OnLine SC 327



W.P.No.4794 of 2025

WEB COPY

5.2. Firstly, this cannot constitute a condition under the relevant tender documents. In any event, it would only amount to a penalty as held by the Hon'ble Supreme Court of India in *Maula Bux Vs. Union of India*². The learned Senior Counsel would also rely on the judgment of this Court in *M/s Hameed Enterprises Vs. The Registrar, Indian Institute of Technology and Others*³ for the proposition that, in respect of mistakes, the entire EMD amount need not be forfeited. The learned Senior Counsel would further rely on the Division Bench judgment of this Court in *Registrar, Indian Institute of Technology and Others Vs. M/s Hameed Enterprises*⁴, which was also confirmed by the Division Bench.

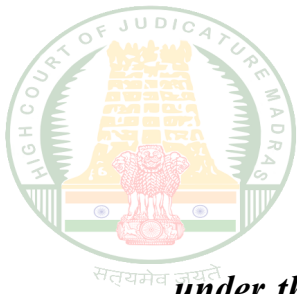
5.3. The learned Senior Counsel would further rely on the judgment of the Orissa High Court in *Pratap Chandra Parida Vs. State of Orissa and Others*⁵ to submit that forfeiture can only occur when there is a concluded contract and not prior thereto. The learned Senior Counsel would also rely on the judgment of the Hon'ble Supreme Court of India in *Yogesh Mehta Vs. Custodian appointed*

2 (1969) 2 SCC 554

3 (2014) 4 LW 903

4 (2015) 3 LW 125

5 2012 SCC OnLine Ori 38



W.P.No.4794 of 2025

WEB COPY

*under the Special Court and Others*⁶ for the proposition that if the bid itself is not accepted, forfeiture cannot take place. Reliance is placed on paragraphs Nos.27 to 34 of the said judgment.

F.Submissions made by HSCC:

6. *Per contra*, Mr.Vipul Ganda, the learned counsel representing HSCC, by taking this Court through the contents of Form – H and Form – N, would submit that the PST unequivocally agreed to abide by the conditions of the tender. According to Annexure – II of the tender conditions, the tenderer is required to submit the Form – H affidavit confirming the correctness of documents, information, and litigation history, along with Form – N. The Form – H clearly states that in case of providing any incorrect or false information, the bid or contract will be terminated, and EMDs and all dues will be forfeited. The affidavit confirms that the bidder agrees to these conditions. Therefore, the EMD is subject to forfeiture. The point raised by the learned Senior Counsel that it was a mistake cannot be accepted. This constitutes a wilful suppression of material facts. It is now argued before the Court that they believed the information was

⁶ (2007) 2 SCC 624



W.P.No.4794 of 2025

required only concerning quality issues. However, this was not the reason stated in the explanation to the show cause notice. The tender clause clearly stipulates that any litigation must be disclosed.

6.1. The learned counsel would further submit that, factually, the litigation was solely related to very serious allegations concerning quality. Therefore, the contention on behalf of the petitioner cannot be accepted. In this case, Section 74 of the Indian Contract Act is not applicable, because there was no concluded contract. It is not the case that the EMD is liable to be forfeited solely for the reasons mentioned in Clause 4. Even under Clause 8, if there is a withdrawal of the bid, the EMD is liable to be forfeited. Similarly, the affidavit also states that the EMD will be forfeited. All these form part of the tender conditions and must be read as a whole.

6.2. The learned counsel would rely on the Judgment of the Manipur High Court in ***Gaikhonlung Panmei Vs. Food Corporation of India and Others*** (W.P.(C) No.411 of 2020) to argue that if the petitioner's firm was disqualified by rejecting its tender bid at the evaluation stage, Sections 73 and 74 of the Indian



W.P.No.4794 of 2025

Contract Act would not apply. Paragraph No.11 of the said Judgment is cited.

WEB COPY

The learned counsel would also rely on the Judgment of the Supreme Court of India in *National Highways Authority of India Vs. Ganga Enterprises and Another*⁷, specifically referring to paragraphs 9 and 10. Paragraph No. 9 is cited to argue that if, by the parties' own actions, particularly concerning government contracts, a party prevents the contract from coming into existence, it cannot later claim that no contract was formed, and therefore, that the EMD should not be forfeited. Paragraph No.10 is cited regarding the non-granting of any interim orders concerning the invocation of the bank guarantee.

6.3. The learned counsel would rely on the Judgment of the Hon'ble Supreme Court of India in *Gujarat Maritime Board Vs. Larson & Toubro Infrastructure Development Projects Ltd and Another*⁸, particularly referring to paragraph No.11 for the proposition that no injunction can be granted against invoking a bank guarantee. The learned counsel would rely on the Judgment of the Hon'ble Supreme Court of India in *State of Haryana and Others Vs. Malik Traders*⁹, where the view taken in paragraph No.9 of the *National Highways*

7 (2003) 7 SCC 410

8 2016 SCC OnLine SC 1005

9 (2011) 13 SCC 200



W.P.No.4794 of 2025

WEB COPY

Authority of India case (cited above) was reiterated. Paragraph No.15 of the said Judgment is cited. The learned counsel would also rely on the Judgment of the Hon'ble Supreme Court of India in ***Kailash Nath Associates Vs. Delhi Development Authority and Another***¹⁰, specifically referring to paragraphs 29 to 39 to argue that Section 74 of the Indian Contract Act would not apply.

G.The Questions:

7. I have considered the opposing submissions and examined the material records of the case. The following questions arise for determination in this Writ Petition,

(i) Was it incumbent upon PST to mention the pending suit as of the date of the bid in C.S.No.108 of 2021 in Form – N ?

(ii) If so, can the non-mentioning be considered a genuine mistake of interpretation ?

(iii) If the petitioner has suppressed the information, can the entire EMD amount be forfeited ?

¹⁰ (2015) 4 SCC 136



W.P.No.4794 of 2025

WEB COPY

H. Question No.(i):

8. The Form – N, which is filled out by the PST, is reproduced hereunder:

ANNEXURE - II

M/s. P.S.T Engineering Construction - 614 -
An ISO 9001 : 2015 Certified Company
Admin. Office : 5/72-C, Salem Bye-Pass Service Road, Nallipalanyam Po., Namakkal Dt, Pin : 637 003.
Ph : 04286 281125 | Cell : 80125 88100 | E-mail : pstenggco@yahoo.com

Date: _____

"Form-N"

LITIGATION HISTORY

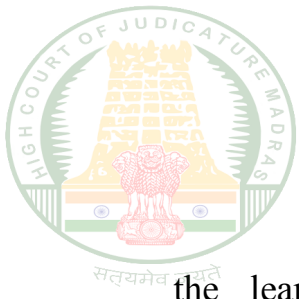
Applicants should provide information of litigation history regarding Quality related Matter/ court case/ Investigation/ arbitration is pending in any project executed.

Year	Name of the work/ project	Name of Client, with Address	Title of the court case/ Arbitration	Detail of the court/ Arbitration	Status Pending/ Decided	Disputed Amount (Current Value, the equivalent) in case of court/ arbitration	Actual Awarded Amount (Rs) in decided court cases/ arbitration
-----Nil-----							

For M/s. P.S.T. Engineering Construction

Managing Partner
Authorized Signatory of bidder

8.1. Thus, it can be seen that it can never be read in the manner argued by



W.P.No.4794 of 2025

WEB COPY

the learned Senior Counsel for the petitioner, that even court cases, investigations, or arbitration should relate to quality-related matters. The expression 'quality-related matter' is independent of the expressions 'court cases, investigations, and arbitration' . Therefore, the arguments made in this regard stand rejected. Accordingly, the question is answered that the petitioner – PST ought to have mentioned any court case, investigation, or arbitration apart from the quality-related matters.

I.Question No.(ii):

9. The submissions made on behalf of the petitioner assert that it was a genuine mistake due to their interpretation of the aforementioned clause in Form – N. In fact, the suit seeks to declare the show cause notice issued for blacklisting the PST as illegal and to obtain a mandatory injunction for reopening the tenements to complete the remaining works in Blocks A, B, C, and D of K.P. Park, Phase I, Pulianthope, Chennai. It is evident that the tenements were constructed by PST following a tender issued by the Tamil Nadu Urban Habitat Development Board. The allegation is that the construction was shockingly of substandard quality, as indicated by the report of the Centre for



W.P.No.4794 of 2025

WEB COPY

Urbanisation, Buildings and Environment (CUBE), the Centre of Excellence of IIT Madras, and the Government of Tamil Nadu. Therefore, the entire issue pertains to the quality of the constructed buildings and is thus solely related to this quality issue.

9.1. Consequently, the arguments presented before this Court claiming it was a mistake are outright rejected. In the tender document, PST not only suppressed material information but also attempted to conceal it by stating that the suit was filed against the arbitrary actions of the Tamil Nadu Urban Habitat Development Board. Therefore, I hold that the non-disclosure of the suit and its proceedings is directly related to the quality issue. Any reasonable person on the tender committee, upon scrutinising the plaint, would certainly disqualify PST. Hence, it is very material information that has been sought to be withheld and suppressed from the tendering authority. Accordingly, I answer the question that it was not any mistake of interpretation by PST but a willful suppression of a material fact.

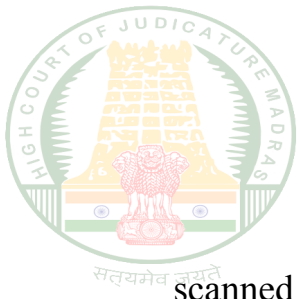


W.P.No.4794 of 2025

J.Question No.(iii):

WEB COPY

10. The conditions are outlined in the notice inviting tender. According to Clause 2, work experience and past projects of a similar nature are qualifying and additional qualifying criteria. As per Clause 13.0, HSCC reserved the right to assess the capabilities and capacity of the tenderer to perform the contract in the public interest and the overall interest of HSCC. If the tenderer's capabilities and capacities are found unsatisfactory, HSCC may reject the tender. According to Clause 16.0, tenderers must submit their responses to queries raised via email. Clause 19.0 lists the documents that need to be scanned and uploaded on the e-portal, specifying 23 documents to be submitted, including the litigation history in Form – N. Section 2 contains instructions for tenderers. Clause 4 (o) addresses the earnest money deposit. The tender is to be submitted by accepting the tender conditions as mentioned in Annexure – II. According to the said Annexure, a letter has been submitted by the PST. In paragraph 1 of that letter, the tenderer unconditionally accepts the tender conditions and documents in their entirety. Clause 3 states that the tenderer has reviewed and read the terms and conditions carefully and has downloaded the forms prescribed in (a) to (w), including Form – H and Form – N. It further indicates that the tenderer uploads the mandatory



W.P.No.4794 of 2025

WEB COPY

scanned documents, processing fee, EMD, and others. Clause 5 of that letter is extracted hereunder:-

“v) Should this tender be accepted, I/We agree to abide by and fulfill all terms and conditions referred to above and as contained in tender documents elsewhere and in default thereof, to forfeit and pay HSCC, or its successors or its authorized nominees such sums of money as are stipulated in the notice inviting tenders and tender documents.”

10.1. Form – H is an affidavit submitted by the bidder. Paragraph No.4 of the affidavit, as per the Form and as submitted by the PST, reads as follows:

“4.I hereby confirm that in case, any document, information & / or certificate submitted by me found to be incorrect / false / fabricated, HSCC at its discretion may disqualify / reject / terminate the bid / contract and also forfeit the EMD / All dues.”

10.2. Thus, it can be seen that based on a review and reading of the tender conditions as a whole, HSCC is entitled to forfeit the EMD in the event of any incorrect or false information.

10.3. The next contention is that forfeiture cannot occur even before the contract is finalized, with reliance on the judgments from ***Yogesh Mehta's case*** (cited supra) (Paragraph No.32) and ***Pratap Chandra Parida's case*** (cited supra) (Paragraph No.7). However, this cannot be accepted. Regarding the contention



W.P.No.4794 of 2025

WEB COPY

based on *Pratap Chandra Parida's case*, it involved a petitioner who applied for withdrawal of the tender, with the amount sought to be forfeited on the grounds of not producing the original documents. In the case of *Yogesh Mehta*, there was ongoing litigation when the bid was made before the Special Court, and even after vacating the interim order, the Special Court did not take immediate action to finalize the bid. Subsequently, an order was belatedly sought for the forfeiture of the EMD. In this context, by referencing *Maula Bux's case* and *Saurav Prakash Vs. DLF Universal Limited*¹¹, the Hon'ble Supreme Court of India held that forfeiture of EMD is permissible only if there is a concluded contract.

10.4. On the contrary, in the present case, it is evident from the tender that it allows for forfeiture under various circumstances. If any information is found to be incorrect or false and the bid is rejected, the EMD may be forfeited. Additionally, the EMD may be forfeited if any of the four conditions in Clause 4, as stated above, are met. Furthermore, the EMD may also be forfeited if the party attempts to withdraw its offer during the validity period, according to Clause 8. Therefore, in this instance, where there are conditions to the contrary, it

¹¹ (2007) 1 SCC 228



W.P.No.4794 of 2025

WEB COPY

cannot be legally argued that no EMD can be forfeited unless there is a concluded contract.

10.5. As a matter of fact, the Hon'ble Supreme Court of India, in the case of the *National Highways Authority of India* (cited supra), categorically held that if a party, by its own conduct, precludes the coming into existence of a contract, it cannot be permitted to take advantage of its own wrongdoing, and forfeiture must not be denied. Paragraph No.9 is extracted hereunder for ready reference:-

“9. In our view, the High Court fell in error in 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 supplied)

Thus the above contention is liable to be rejected.

10.6. The next submission is made based on Section 74 of the Indian Contract Act. In this regard, Sections 73, 74, and 75 of the Indian Contract Act are extracted hereunder for reference:

“73. Compensation for loss or damage caused by breach of contract.When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

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

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



WEB COPY



W.P.No.4794 of 2025

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

74. Compensation 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 the condition of any such instrument, to pay the whole sum mentioned therein.

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

75. Party rightfully rescinding contract, entitled to compensation. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.”

10.7. In *Kunwar Chiranjit Singh v. Har Swarup*¹², the Privy Council held

12 1925 SCC OnLine PC 63

Page 24 of 40



W.P.No.4794 of 2025

as follows:
WEB COPY

“Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.”

10.8. The issue was considered by the Hon'ble Supreme Court of India in ***Fateh Chand vs. Balakishan Dass***¹³. It is useful to extract the relevant portions of the Constitution Bench judgment, which reads as follows:

“11. 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 where upon 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.

.....

.....

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the

¹³ 1963 SCC OnLine SC 49



WEB COPY



W.P.No.4794 of 2025

aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.”

(Emphasis supplied)

10.9. Subsequently, in *Maula Bux's case* (cited supra), it has been clearly stated that when the amount exceeding the EMD that was deposited was intended to be forfeited, the Hon'ble Supreme Court of India ruled as follows, and the relevant paragraphs are extracted below:

“4. That in the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money.

5. 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 applies. Where under the terms of the



contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.”

(Emphasis supplied)

10.10. Furthermore, the matter was considered by the Hon'ble Supreme Court of India in *Shree Hanuman Cotton Mills and Others Vs. Tata Aircraft Limited*¹⁴, and it is beneficial to extract paragraph No.21 of the judgment:

“21. From a review of the decisions cited above, the following principles emerge regarding “earnest”:

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, ‘earnest’ is given to bind the contract.

(3) It is part of the purchase price when that transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.”

10.11. The said judgment addressed the issue regarding the forfeiture of EMD as follows:

“31. The learned Attorney-General has pointed out that the decisions referred to in the above quotation do not lay down that the test of reasonableness applies to an earnest deposit and its forfeiture. He has also pointed out that this Court, in the above decision, did not agree with the view of the High Court that the

14 (1969) 3 SCC 522



deposit, the recovery of which was sued for by the plaintiff therein, was earnest money. The learned Attorney-General also referred us to various decisions, wherein, according to him, though the amounts deposited by way of earnest were fairly large in proportion to the total price fixed under the contract, nevertheless the forfeiture of those amounts were not interfered with by the Courts. But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. **As mentioned earlier, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law. Nor have they raised any contention that the amount of deposit is so unreasonable and therefore forfeiture of the entire amount is not justified. The decision in *Maula Bux* case had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being forfeited.** Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which were under consideration, were paid as earnest money. It is under, those circumstances that this Court proceeded to consider the applicability of Section 74 of the Contract Act.”

(Emphasis supplied)

10.12. Furthermore, in *Sathish Batra v. Sudhir Rawal*¹⁵, it is stated as follows, and it is useful to extract paragraph No.15:

“15. The law is, therefore, clear that to justify the forfeiture of advance money being part of “earnest money” the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other

15 (2013) 1 SCC 345



WEB COPY



W.P.No.4794 of 2025

words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.”

(Emphasis supplied)

10.13. The Hon'ble Supreme Court of India has thoroughly examined the entire issue in the case of ***Kailash Nath Associates*** (cited supra), and it is essential to extract paragraph No.37, which reads as follows:

“37. And finally in *ONGC Ltd. v. Saw Pipes Ltd.*²⁵, it was held : (SCC pp. 740-43, paras 64 & 67-68)

"64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Contract Act and the ratio laid down in *Fateh Chand* case¹⁹, SCR at p. 526 wherein it is specifically held that jurisdiction of the court toward compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties



knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.....

* * *

67.In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussions, it can be held that:

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

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

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage



suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

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

10.14. Finally, the question of awarding compensation under Section 74 was summarized in paragraph No.43, which states the following:

“43.On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. 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. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. 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.

43.3. 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.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.



43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded

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."

(Emphasis supplied)

10.15. Subsequently, the Hon'ble Supreme Court of India once again considered the issue in *Authorised Officer, Central Bank of India Vs. Shanmugavelu*¹⁶. It is essential to extract the relevant passages found in paragraph Nos. 53, 54, 81, 82, 83, and 90, which read as follows:-

"53. Damages can be awarded only for the loss directly suffered on account of the breach and not for any remote or indirect loss sustained by reason of the breach of contract. The general rule is that where two parties enter into a contract and one of them commits breach, the other party will be entitled to receive as damages in respect of such breach of contract, such sum as may fairly and reasonably be considered arising naturally, that is according to the the performance of other contract(s) by the party complaining of the breach, on the performance of the contract in

16 (2024) 6 SCC 641



WEB COPY



W.P.No.4794 of 2025

dispute by the party in breach, had been communicated to the party in breach, and thus known to both parties at the time of entering into the contract, then the damages for the breach of the contract in dispute, may include the compensation for the loss suffered in regard to such other dependent contracts. But, on the other hand, if the special circumstances were not made known to the party breaking the contract, the party breaking the contract, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally and directly and not any remote or unknown loss or damage.

54. What would be a "penalty" under Section 74 of the 1872 Act was explained by this Court in *K.P. Subbarama Sastri v. K.S. Raghavan* as under : (SCC pp. 427-28, para 5)

"5. ... '6. The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promiser so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty."

55. The SARFAESI Rules, more particularly Rule 9 was first examined by this Court in *Rakesh Birani v. Prem Narain Sehgal*, wherein the entire auction process under Rule 9 was explained. The relevant observations read as under : (SCC p. 546, paras 8-9)

"8. In order to comprehend the rival submissions, it is necessary to ponder as to intendment of Rule 9 of the 2002 Rules which deals with the time of sale, issues of sale certificate and delivery of possession, etc. Public notice of sale is to be published in the newspaper and only after thirty days thereafter, the sale of immovable property can take place. Under Rule 9(2) of the 2002 Rules, the sale is required to be confirmed in favour of the purchaser who has offered the highest sale price to the authorised officer and shall be subject to confirmation by the secured creditor.



The proviso makes it clear that sale under the said Rule would be confirmed if the amount offered and the whole price is not less than the reserved price as specified in Rule 9(5). It is apparent that Rule 9(1) does not deal with the confirmation by the authorised officer. It only provides confirmation by the secured creditor.

9. Rule 9(3) makes it clear that on every sale of immovable property, the purchaser on the same day or not later than next working day, has to make a deposit of twenty-five per cent of the amount of the sale price, which is inclusive of earnest money deposited if any. Rule 9(4) makes it clear that balance amount of the purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of "confirmation of sale of the immovable property" or such extended period as may be agreed upon in writing between the purchaser and the secured creditor. Thus, Rule 9(2) makes it clear that after confirmation by the secured creditor the amount has to be deposited. Rule 9(3) also makes it clear that period of fifteen days has to be computed from the date of confirmation."

.....

.....

81. Even otherwise, what is discernible from the abovereferred decisions of *Fateh Chand*, *Maula Bux* and *Satish Batra* is that there lies a difference between forfeiture of any amount and forfeiture of earnest money with the former being a penal clause and the latter a general forfeiture clause. A clause providing for forfeiture of an amount could fundamentally be in the nature of a penalty clause or a forfeiture clause in the strict sense or even both, and the same has to be determined in the facts of every case keeping in mind the nature of contract and the nature of consequence envisaged by it.

82. **Ordinarily, a forfeiture clause in the strict sense will not be a penal clause, if its consequence is intended not as a sanction for breach of obligation but rather as security for performance of the obligation.** This is why *Fateh Chand* *Maula Bux* and *Satish Batra* held that forfeiture of earnest money deposit is not a penal clause, as the deposit of earnest money is intended to signify assent of the purchaser to the contract, and its forfeiture is envisaged as a deterrent to ensure performance of the obligation.

83. We are conscious of the fact that in *Maula Bux* this Court observed that the deposit of a sum by the purchaser as security for guaranteeing due performance was held as a penalty.



However, a close reading would reveal that the reason why this Court held the said deposit as a penal clause was because the said amount was paid over and above the earnest money deposit already paid by the purchaser in the said case and more importantly the said sum was not liable to be adjusted against the total consideration. Hence, this Court held the same to be a penalty rather than earnest money. The relevant observation read as under : (SCC p. 558, para 4)

"4. ... In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part-payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money."

.....

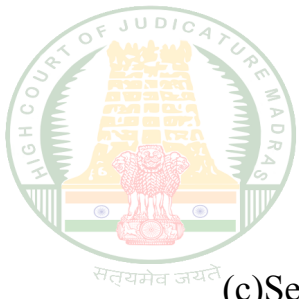
.....

90. Therefore, it is clear that the forfeiture can be justified if the terms of the contract are clear and explicit. If it is found that the earnest money was paid in accordance with the terms of the tender for the due performance of the contract by the promisee, the same can be forfeited in case of non-performance by him or her."

(Emphasis supplied)

10.16. Thus, upon considering the overview of the above rulings of the Hon'ble Supreme Court of India, it can be seen that:

- (a) the forfeiture of the EMD applies and relates only to the performance of the contract;
- (b) In cases of public auction where the terms are clear and explicit, it may be resorted to;



W.P.No.4794 of 2025

WEB COPY

(c)Section 74 of the Indian Contract Act, 1872 does not apply to such cases where the contract is not concluded, more so in public auction/tenders and shall apply if only the damages claimed is penal in nature whereby the reasonable quantum has to be determined;

(d)Whether the forfeiture is penal in nature must be determined by considering the nature of the contract and the consequences envisaged by it, based on the facts and circumstances of each case;

(e) The clauses regarding disclosure are designed to identify only genuine parties with the capacity to place a bid and these disclosure clauses also serve to ensure performance(*National Highways Authority of India cited supra*) and in such cases, the terms of the contract being clear and explicit, the forfeiture must be deemed justified.(paragraph No.90 of *the Central Bank of India's case* cited above).

10.17. Therefore, I hold that this is not a case where Section 74 would apply, and the entire EMD amount, as agreed upon by the parties, has to be forfeited. HSCC is entitled to this, as the clause is solely for ensuring the performance of the contract, meaning that only genuine parties bid in the tender.



W.P.No.4794 of 2025

WEB COPY

10.18. Aside from this, in this case, even assuming that the forfeiture in the current contract serves two purposes- one for the performance of the contract and the other as a penalty for concealing material facts- reasonable compensation, according to the principles in Section 73, can still be allowed, regardless of the stipulation in the contract subject to the maximum stipulated. In this instance, the total value of the contract is Rs. 318.40 Crores, while the forfeited EMD amounts to only Rs. 3,28,40,000/-. For reasons best known to the tender-floating authority, a meagre amount of just 1.03% is mandated as the EMD. It is not 10% or 15%. Considering that HSCC had to communicate with PST, gather details regarding the litigation independently, and the time taken to resolve the issue with the petitioner, as well as the potential risk it could have faced if the issue had emerged after further progress of the tender, the forfeited sum is minimal and entirely reasonable.

10.19. Considering the volume and capability of the bidders for the tender, their overall financial worthiness, and the business volume offered, the forfeited sum is minimal and inconsequential to the bidders' status, including PST. The



W.P.No.4794 of 2025

WEB COPY

instant contract was valued at Rs. 318.40 crores. In the pleadings, PST states that after obtaining an injunction against the show-cause notice issued for blacklisting, it was again awarded a contract by the Tamil Nadu Urban Habitat Board for the construction of 1760 EVS tenements. Therefore, considering the background and the present contract's volume, which is Rs. 318.40 crores, along with the nature of the transactions and the risks HSCC would have faced, I believe the quantum is reasonable and minimal. Consequently, no interference is called for with reference to quantum and the parties need not be relegated to Civil Court for determination of the quantum. This Court is now informed that, pending the Writ Petition, the bank guarantee has been invoked and the amount has been realised by HSCC.

K.The Result:

11. For all the aforementioned reasons and finding no merits, this Writ Petition is dismissed. No costs. Consequently, the related miscellaneous petitions are closed.

16.04.2025



W.P.No.4794 of 2025

Neutral Citation : Yes

WEB COPY
Jer

To

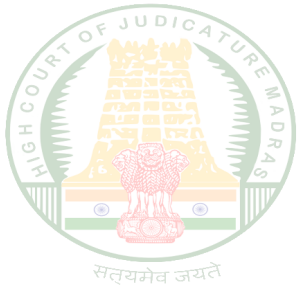
1.The Principal Secretary
Government of Maharashtra
Department of Medicine
Mantralaya
Mumbai, Maharashtra.

2.The Branch Manager
Indian Bank, MCB Namakkal Branch
1st Floor, No.31, Rangar Sannadhi Street
Namakkal Town, Tamil Nadu.

D.BHARATHA CHAKRAVARTHY, J.

Jer

W.P.No.4794 of 2025
and W.M.P.No. of 2024



WEB COPY



W.P.No.4794 of 2025

16.04.2025