

A NATIONAL HIGHWAY AUTHORITY OF INDIA

v.

M/S. GANGA ENTERPRISES AND ANR.

AUGUST 28, 2003

B [S.N. VARIAVA AND H.K. SEMA, JJ.]

*Contract:*

*Tender—Forfeiture of bid security—Bidders required to furnish bid security and performance security—Bid security to be forfeited if bidder withdrew his bid during period of bid validity—Respondent gave his bid/offer and furnished bank guarantee for bid security—Later, when he came to be highest bidder, withdrew his bid before expiry of period of bid validity—Appellant encashed the bank guarantee—Writ petition by respondent for refund of amount allowed by High Court—Held, 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 Contract Act—The 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 Contract Act—Such earnest/security is given and taken to ensure that a contract comes into existence—In government contracts, such a term is always included in order to ensure that only a genuine party makes a bid.*

*Contract—Contract of guarantee—Tender—Bid security by way of bank guarantee—Forfeiture of on withdrawal of bid during period of bid validity—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 existence or non-existence of an underlying contract become irrelevant when the invocation is in terms of the bank guarantee—The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced—The bank guarantee was enforced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 the guarantee was rightly invoked, there was no question of directing refund—Bank guarantee—Courts' power to interfere with.*

*Constitution of India, 1950:*

*Articles 226 and 299—Contractual disputes—Writ petition—Maintainability of—Tender—Forfeiture of bid security—Writ petition for refund of amount allowed by High Court—Held, disputes relating to contracts cannot be agitated under Article 226—The dispute in this case was regarding the terms of offer—It was thus a contractual dispute in respect of which a writ court was not the proper forum.*

*Kerala State Electricity Board v. Kurien E. Kalathil, [2000] 6 SCC 293; State of U.P. v. Bridge & Roof Co. (India) Ltd., [1996] 6 SCC 22 and B.D.A. v. Ajai Pal Singh, [1989] 2 SCC 116, relied on.*

*Verigamto Naveen v. Government of A.P., [2001] 8 SCC 344 and Har minder Singh Arora v. Union of India, [1986] 3 SCC 247, held inapplicable.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4123 of 1999.

From the Judgment and Order dated 30.10.98 of the Delhi High Court in C.W.P. No. 739 of 1998.

Mukul Rohatgi, Raju Ramachandran, Additional Solicitor Generals, Dushyant Dave, Sanjeev Sachdeva and Ms. Priya Puri, Mrs. Niranjana Singh, Mrs. Anil Katiyar, Lakshmi Raman Singh, Kamal Mohan Gupta, Mrs. Rita Choudhary, Manish Kumar and Sunil Kumar Jain for the appearing parties.

A The following Order of the Court was delivered :

This appeal is against the Judgement of the High Court of Delhi dated 30th October, 1998.

B Briefly stated, the facts are as follows :

C The Appellant issued a tender notice calling for tenders for collection of toll on a portion of the highway running through Rajasthan. The last date of submission of bid was 31st July, 1997. It was also provided that toll plazas would be got completed by the authority and handed over to the selected enterprise. There was two types of securities to be furnished, one being a bid security in an amount of Rs. 50 lakhs (Rupees fifty lakhs only). The other was a performance security by way of a bank guarantee of Rs. 2 Crores (Rupees Two crores only). Clauses 7.1 to 8 deal with bid security. They read as under :-

D *"7. Bid Security.*

E 7.1. The bidder shall furnish, as a part of his bid, a Bid Security in an amount of Rs. 50 Lakhs (Rupees Fifty Lakhs only), or an equivalent amount in a freely convertible currency. The Bid Security shall, at the bidder's opinion, be in the form of a Bank Draf, or Guarantee from a Bank located in India. The Bank Guarantee shall be in the Form of Bank Guarantee for Bid Security included herein, valid of 150 days after the last date for submission of the bid.

F 7.2. A bid not accompanied by an acceptable bid security shall be rejected by National Highways Authority of India as non-responsive.

G 7.3. The Bid Security of unsuccessful bidders will be returned by National Highways Authority of India as promptly as possible but not later than 30 days after the expiration of the period of bid validity.

H 7.4. The Bid Security of the successful bidder will be returned

by National Highways Authority of India soon after the bidder has furnished the required Performance Security. A

7.5. The Bid Security may be forfeited :

- (a) if the bidder withdraws his bid during the period of bid validity; or B
- (b) in case the successful bidder fails within the specified period to
  - (i) furnish the required Performance Security; and C
  - (ii) sign the Agreement. C

8. *Bid Validity.*

Bid shall remain valid for a period of 120 days after the last date of bid submission.” D

Thus, it is to be seen that the bid security of Rs. 50 lakhs was not for performance of the contract. It was in essence an 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. E

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 a “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 H

A 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 the 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  
 B accepted. Of course, this did not mean that a completed contract in respect of the work of toll collection had come into existence.

C It is an admitted position that 120 days would have come to an end of 28th November, 1997. In August the technical bids were opened. In September the financial bids were opened, wherein it was found that the Respondent was the highest bidder.

D On 20th November, 1997 the Respondent withdrew his bid *i.e.* he withdrew his bid before the expiry of 120 days. On 21st November, 1997, the Appellants accepted the offer of the Respondent. However, as the Respondent had withdrawn his bid the performance guarantee was not furnished and the Agreement was not entered into. The Appellants thus encashed the bank guarantee for Rs. 50 lakhs.

E The Respondent then filed a Writ Petition in the High Court, for refund of the amount. On the pleadings before it, the High Court raised two questions *viz.* (a) whether the forfeiture of security deposit is 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  
 F petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then  
 G chose not to answer question (b). 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 State Electricity Board v. Kurien E. Kalathil* reported in [2000] 6 SCC 293, *State of U.P. v. Bridge & Roof Co. (India) Ltd.* reported in (1996) 6 SCC 22 and *B.D.A. v. Ajai Pal Singh* reported in (1989) 2 SCC 116. 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. Dave however relied upon the cases  
 H of *Veriganto Naveen v. Government of A.P.* reported in [2001] 8 SCC 344

and *Harminster Singh Arora v. Union of India* reported in [1986] 3 SCC 247. 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 the Petition should have been dismissed. A

By the impugned Judgment the Writ Petition has been allowed. The High Court holds that the offer was withdrawn before it was accepted and thus no completed contract had come into existence. The High Court holds that in law it is always open to a party to withdraw its offer before its acceptance. To this proposition there can be no quarrel. We therefore did not permit Mr. Dave to cite authorities for the proposition that an offer can be withdrawn before it is accepted. B C

The Court, however, then goes on to hold as under :

“The statutory right having been so exercised, the fetter imposed by the clause to the contrary in the tender documents and the bank guarantee could not override the provisions of the Indian Contract Act. Any clause in so far as it is contrary of comes in conflict with the provisions of the Indian Contract Act is inoperative and void and cannot be enforced. To have an enforceable contract there must be an offer and unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance. Until the offer is accepted unconditionally it creates no legal right and the bid can be withdrawn at any time. Once it is held that there is no completed contract between the parties no further question can arise. There can be no breach of contract. There is no statutory rule or an act whenunder the security deposit in the form of a bank guarantee could be claimed by the respondent No. 2. The position may, however, be different if there is a statutory rule having force of law precluding withdrawal of a bid before its acceptance. The petitioner was entitled to withdraw the bid because the prohibition against withdrawal does not have the force of law and there was no consideration to bind him down to the condition. In the present case there was no acceptance by respondent No. 2 on the date of withdrawal of the bid by the petitioner. In the circumstances the invocation and encashment of the bank guarantee is illegal and void and is liable to be set aside.” D E F G H

**A** 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.

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 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 become 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. A B

Mr. Dave submitted that the Respondent had no option but to withdraw his offer as the Appellants had not completed the toll plazas. He pointed out that the period of the contract was to be from 1st October, 1997 to 30th September, 1999. He submitted that even though the contract, if accepted, was to commence from 1st October 1997, the Appellants had not accepted the offer till 20th November, 1997 and thus Respondent had to withdraw his offer. He submitted that it has come on record that the toll plazas were not completed till March, 1998. He submitted that the Respondent was forced to withdraw his offer because of the inaction/negligence on the part of the Appellant. He submitted that under these circumstances Respondent should not be penalized by forfeiture of his deposit. We are unable to accept this submission. The Bid security was given to meet a specific contingency viz. non-withdrawal of the offer within 120 days. The contingency having arisen, Appellants were entitled to forfeit. It may only be mentioned that in the proposed Agreement there is a clause which provides that if there is a delay on the part of the Appellants, which results in delay in the work of collection of toll, the amount payable by the Respondent would be reduced *pro-rata*. Thus by reason of the delay Respondent would not have suffered. Also Respondent was well aware that 120 days would end on 28th November, 1997. Thus the Respondent was aware when he gave his offer, that acceptance could be delayed till 28th November, 1997. Thus non-acceptance till 20th November, 1997 was not a ground would justify action of Respondent in withdrawing his offer. C D E F G

In this view of the matter, the impugned Judgment is set aside. The Appeal is accordingly allowed. The Writ Petition of the Respondents shall stand dismissed. There will be no order as to costs.

R.P.

Appeal allowed.