

Form No.J.(2)
Item No.4

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON:17.10.2023

DELIVERED ON:17.10.2023

CORAM:

**THE HON'BLE CHIEF JUSTICE T.S. SIVAGNAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**M.A.T. 2068 of 2023
With
IA No. CAN 1 of 2023**

**National Jute Manufacturers Corporation Limited & Anr.
Vs.
Sushil Kumar Thard & Anr.**

Appearance:-

**Mr. Aniruddha Chatterjee
Mr. Rahul Karmakar
Mr. Surya Prasad Chattopadhyay
Mr. Sourav Guchhait**

.....for the Appellants

**Mr. Utpal Bose
Mr. Suddhasatwa Banerjee
Mr. Pushan Kar
Mr. Sagnik Majumder
Mr. Aryapurva Banerjee**

.....for the Respondents

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNAM, C.J.)

1. This intra-Court appeal by the National Jute Manufacturers Corporation Limited is directed against the order passed by the learned Single Bench

dated 27th September, 2023 in W.P.A. 4751 of 2023. In the said writ petition, the respondent has prayed for issuance of a writ of mandamus to direct the appellants to command the respondents to quash an order of withholding pre-deposit earnest money submitted by the writ petitioner in an e-auction floated by the appellants and the writ petitioner sought for consequential refund of the earnest money.

2. The undisputed facts are that the respondent/writ petitioner participated in an e-auction called for by the appellants and paid a pre-bid earnest money deposit of Rs.2,20,00,000.00. The appellants by a communication dated 14th February, 2023 informed the writ petitioner that the bid submitted by the writ petitioner pursuant to the said e-auction has been accepted by the appellants and in terms of the conditions of e-auction, the writ petitioner was requested to make the payment of Rs.10,60,28,278/- by 21st February, 2023 to the bank account of the appellants. On receipt of the said communication, the appellants had made a representation seeking certain clarifications. On going through the said representation dated 20th February, 2023, the writ petitioner would contend that upon complete inspection made in site visits and verbal communications, it was unclear which assets are to be sold and the ones that are required to be retained from what has been mentioned in paragraphs 1 to 6 of the said representation dated 20th February, 2023.
3. A reply given by the appellants, in our view, did not address the clarifications sought for but directed the writ petitioner to comply with the instructions issued in the communication dated 14th February, 2023 on the

ground that already an inspection was conducted by the writ petitioner on 7th February, 2023 at the concerned jute mill.

4. On receipt of the said communication, once again the writ petitioner sought for another clarification on 21st February, 2023. There was no response to the said communication, which prompted the writ petitioner to file the writ petition, which has been allowed by issuing certain directions.
5. It is not in dispute that no formal order has been passed by the appellants forfeiting the pre-bid earnest money deposit of Rs.2,20,00,000.00. When we turned back to the relevant conditions of the e-auction with particular reference to the remittance of the pre-bid and forfeiture thereof, we find that the language adopted is very clear and lucid.
6. Clause 2.0 of the said terms and conditions of the e-auction says remittance of pre-bid earnest money deposit should be done strictly as per the process, which has been detailed in the tender document. It is not in dispute that the respondent/writ petitioner has complied with the same and has remitted the pre-bid earnest money deposit as per the procedure. The said clause also states that the pre-bid amount will be liable for forfeiture for any failure of the successful bidder to fulfil any of the terms and conditions of the e-auction. No interest is payable on this pre-bid e-auction earnest money deposit. Thus, the special terms and conditions do not state that the pre-bid amount will be forfeited but the expression used is that the pre-bid amount will be liable for forfeiture. If that is the terminology adopted, it goes without saying that there is a discretion vested with the appellants to take a decision as to whether the pre-bid amount was liable for forfeiture or not. If such discretion was vested with the

appellants in terms of the special terms and conditions, it goes without saying that the bidder, who seeks to exit from the e-auction should be heard in the matter as to whether the pre-bid was liable for forfeiture or not. Admittedly, that stage has not come, neither such a decision was taken.

7. Mr. Chatterjee, learned counsel would vehemently contend that the learned Single Bench has virtually set aside the terms and conditions of tender with particular reference to clause 2.0. On a cumulative reading of the reasoning given by the learned Single Bench in the impugned order, we are unable to accept the said submission as the learned Single Bench has interpreted the clause and has come to a conclusion as to what would be the appropriate meaning to be given to the words, which are contained in the said clause. In paragraph 16 of the impugned order, the learned Single Bench has recorded the following finding:

“16. In any event, the forfeiture clause states that the earnest money will be “liable for forfeiture” as opposed to “shall be forfeited”. The Webster’s Seventh New Collegiate Dictionary, Chambers Twentieth Century Dictionary, Shorter Oxford English Dictionary 3rd Edition, have all construed the word liable to mean merely permissive or directory; equivalent to “may”. In Collins v. Collins and Dove; 1947(1) All England Reports 793, the Probate, Divorce and Admiralty Division interpreted the words “liable to pay” as being subject to the conclusion of and to the extent of any discretionary order passed by the Court. In The State v. Amru Tulsi Ram; AIR 1957 Punjab 55, the Court likewise interpreted the word “liable” to mean

“exposed to a certain contingency or casualty, more or less probable, in other words, a future possibility or probability, happening of which may or may not actually occur”.

8. In our considered view, the interpretation given by the learned Single Bench for the words used in the forfeiture clause viz. "*liable for forfeiture*" as to "*shall be forfeited*" is just and proper and has to be accepted.
9. Admittedly, the writ petitioner was not informed by the appellants that the appellants are likely to forfeit the pre-bid earnest money deposit for certain reasons. On going through the representations given by the writ petitioner dated 20th February, 2023 and 21st February, 2023, we find that the writ petitioner was not running away from his obligation but appears to have expressed certain genuine difficulties, more particularly, the safety operations of the labour, who will be employed for the purpose of dismantling. Admittedly, the entire structure is in a dilapidated condition and the appellants have also pointed out about the various clauses in the general terms and conditions viz. clause 7.4 as well as clause 11.7 and sought for clarifications.
10. The representation dated 21st February, 2023 also mentions about how there can be no access, which is possible for 3 Long Cranes (40 feet boom) etc. Therefore, the appellants could have adopted a reasonable approach to examine as to the difficulty expressed by the writ petitioner rather than to send a cryptic reply dated 21st February, 2023 advising the writ petitioner to follow the instructions contained in the communication dated 14th February, 2023.
11. Reverting back to the contention of Mr. Chatterjee that the forfeiture clause has been quashed by the learned Single Bench, we find that no such specific finding has been recorded and the learned writ court was conscious of the limitations in exercise of jurisdiction and precisely for that reason,

the learned Single Bench has interpreted the clause and has come to a conclusion that the manner in which the clause has been implemented would be in deviation of the principles of equality, fair play and natural justice. We support such conclusion of the learned Single Bench by observing that if the clause uses the expression “liable for forfeiture”, then it goes without saying that there is a discretion vested with the tender inviting authority. If the tender inviting authority has discretion to effect forfeiture, then the bidder is entitled to be informed as to why and for what reason, the tender inviting authority is of the opinion that the pre-bid earnest money deposit was liable for forfeiture. No such step has been taken by the appellants/organisation in the case on hand. Therefore, we are of the considered view that the learned Single Bench was fully justified in allowing the writ petition and issuing the impugned direction and the appellants have not made out any case for interference with the impugned order.

12. Consequently, the appeal fails and is accordingly dismissed.
13. The time for compliance of the directions issued by the learned Single Bench is extended by a period of 21 days from date.
14. No costs.
15. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNAM)
CHIEF JUSTICE

I agree,

(HIRANMAY BHATTACHARYYA, J.)

PG/KS AR(Ct.)