* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 09 March 2022**
Judgment pronounced on: 31 March 2022

\+ W.P.(C) 8779/2019, CM APPLs. 36308/2019 & 44738/2019
THE INDIAN HOTELS COMPANY LTD. ..... Petitioner

Through: Mr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Sanjeev Sandhvani, Sr. Adv. with Ms. Gunjan Sinha, Adv.

Versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr. Vikram Jetly, CGSC for R-1.
Mr. Saurabh Sharma, Adv. for R-2.
Mr. Saket Sikri, Adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. The writ petitioner has approached this Court aggrieved by the action of the second respondent in forfeiting the bid security which was submitted by it in the course of a process for award of contract initiated by that respondent. The challenge essentially is to the communication of 18 March 2019 & 28 May 2019 pursuant to which the second respondent apprised the petitioner of its decision to forfeit the bid security which had been submitted.

2. The second respondent had invited **Requests For Proposal**[1] for selection of developer cum operators of a proposed five-star hotel at the International Exhibition Cum Convention Center [IECC] at Pragati Maidan, New Delhi. The proposals were invited on terms which are set forth in the RFP which stands placed as Annexure P-6. The RFP was published on 06 December 2018.

3. A process of pre-bid queries was initiated soon thereafter and on 20 December 2018 while addressing queries raised by a prospective bidder, the second respondent, while responding to that query, apprised all bidders that no refund of bid security would be permitted in case the bidder chose to withdraw from further participation after opening of technical bids. It becomes relevant to note that in terms of the provisions of the RFP, the bid security was prescribed to be Rs. 20 Crores. The relevant clause of the RFP dealing with Bid Security is extracted hereinbelow: -

> "3.3 **RFP Fee and Bid Security**
>
> (a) As a part of the Proposal the interested Bidders will have to pay a non-refundable amount of INR 1,00,000 (Rupees one lakh only) plus Goods & Services Tax @ 18% (Eighteen Percent) as non-refundable processing fee ("**RFP Fee**") for the RFP through e- bidding portal's electronic payment gateway, details of which are provided in **Annexure 7**.
>
> (b) The Bidder shall be required to submit bid security amounting to INR 20,00,00,000 (Rupees twenty crore only) through e-payment via e-bidding portal's electronic payment gateway ("**Bid**

[1] RFP

Security") at the time of RFP submission. Proposals received without specified bid security will be summarily rejected.

(c) Leasing authority will not be liable to pay any interest on the bid security. Bid security of unsuccessful bidders shall returned, without any interest within two months of signing the lease deed with the successful bidder or when the selection process cancelled by leasing authority. The bid security of the successful bidder will be returned after signing of lease deed or special purpose company as applicable and after receipt of performance guarantee."

4. The response as tendered by the second respondent with respect to the aforenoted query is extracted hereinbelow: -

S.No.	Clause Refer in the RFP	As per RFP	Query	Reply
12.	Section 3, Clause 3.3 (c)	Leasing authority will not be liable to pay any interest on the bid security. Bid security of unsuccessful bidders shall be returned, without any interest within two months of signing the lease deed with the successful bidder or when the selection process cancelled by leasing authority. The bid security of the successful bidder will be returned after signing of lease deed or	i) The Bid Security of INR 20 crores should be refunded to any unsuccessful bidder within 7 working days from the declaration of the Successful Bidder. The RFP may be suitably amended incorporating this change. ii) <u>The RFP should allow refund of the said Bid Security of</u>	Agreed- Bid Security of INR 20 crores shall be refunded to unsuccessful bidders within 7 working days from the declaration of the Successful Bidder.

		special purpose company as applicable and after receipt of performance guarantee.	INR 20 Crores to the entity submitting the same in case it wishes to withdraw from further participation, i.e., in the second stage of the bidding process. This refund should be made within 7 working days of the entity (bidder) informing the authority of its intention to not participate further in the bidding process. .	Not agreed. The bid security will be forfeited in case the bidder withdraws from further participation after opening of technical bids during the period of validity.

5. During that process, the second respondent also clarified that the bidding process does not envisage a minimum number of bidders. This is evident from its reply to Query no.27 which is extracted hereinbelow: -

S.No.	**Clause Refer in the RFP**	**As per RFP**	**Query**	**Reply**
27.	NA		There is no mention of whether there are any Minimum number of Bidders and the process to be followed if Bids are not received from such Minimum number of Bidders. The same	Not agreed. Shall remain as per RFP.

			may be clarified and mentioned in the RFP accordingly.	

6. After completion of the aforesaid process, the second respondent issued two corrigenda dated 08 January 2019 and 14 January 2019. However, the responses which are noticed above were not introduced either by way of an addendum or a clarification in the RFP. The petitioner proceeded to submit its technical bid in January 2019. It becomes pertinent to note that as per the terms of the RFP, the e-bidding process was divided into two stages with the first being the submission of technical bids. The successful bidder was to be identified in an e-auction which was proposed. Clause 2.2(g) stipulated that only the technically qualified bidders would be eligible for participation in the second stage of the bidding process which contemplated the submission of financial bids. Clause (g) specifically provided that no physical bids would be permitted to be submitted or considered and that all financial bids would have to be submitted on the e-bidding platform. The RFP further prescribed the Pre-set Reserve Price in Clause 7.3(b)(ii) to be Rs. 611.30 Crores.

7. After the petitioner was found to be eligible and had passed the stage of examination of technical bids, the second respondent initiated the process of e-bidding. Initially the e-bidding was fixed for 24 January 2019. However, since the same was communicated to interested parties vide an email of 22 January 2019 and the petitioner raised the issue of an extremely

short notice having been given, it was postponed and rescheduled for 18 February 2019. By a communication of 11 February 2019, the petitioner disclosed its relationship with another qualified bidder. The relationship of the petitioner with the other qualified bidder was set forth in its communications of 11 February 2019, 15 February 2019 and 18 February 2019. On 21 February 2019, the respondents apprised the petitioner that its apprehensions were misplaced and that they did not, despite the disclosure made, consider it to be ineligible or disqualified from participating in the bidding process. The petitioner, thereafter, raised the same issue yet again in terms of its communication of 25 February 2019 and further indicated that it would be participating in the bidding process under coercion and protest. The second respondent by its letter of 26 February 2019 apprised the petitioner to withdraw the aforesaid communication. However, the petitioner did not withdraw the letter and indicated that it would be participating in the e-auction process.

8. In the e-auction process which was conducted on 26 February 2019, a bid was submitted by the other technically qualified bidder equivalent to the pre-set reserve price. While the petitioner had also logged on to the e-auction portal, it did not submit a bid higher than the existing bid amount as was submitted by the other qualified bidder. The singular bid was not accepted and the second respondent proceeded to cancel the-auction process itself. The respondent is thereafter stated to have issued a fresh RFP on 05 March 2019. Since the bidding process in which the petitioner participated was ultimately shelved, a request was submitted to the second

respondent for refund of security. Responding to that request, the second respondent proceeded to issue the impugned communication of 18 March 2019. The petitioner moved the second respondent seeking recall of its decision and for refund of the bid security amount. However, this request too was not acceded to and the petitioner apprised of the same by means of the communication of 28 May 2019. It is, thereafter, that the present writ petition came to be preferred before this Court. It may additionally be noted that the bid security of the other bidder M/s Lulu International Shopping Mall Pvt. Ltd. was subsequently refunded.

9. In order to appreciate the challenge which is raised, it would be pertinent to extract the relevant parts of the e-bidding process which were set out in the RFP hereinbelow: -

"ANNEXURE - 7: TECHNICAL DETAILS WITH RESPECT TO ELECTRONIC BIDDING A DEDICATED E-BIDDING PORTAL HAS BEEN CREATED BY
https://www.mstcecommerce.com/auctionhome/nbcc/index.isp

Submission of Bids

6. The first step towards submitting the bid is Accept Terms &Conditions on the left side. Click on Accept Terms & Conditions and fill the form given therein. Conditions with agree have to be necessarily agreed, while in the conditions with empty remarks field bidder can give their comments.

7. After the Accept Terms & Conditions are saved, click on attach documents on the top.

8. Once the bidder selects from above, they will be required to upload documents for the said event, A list of previously uploaded files will be visible at the bottom of the screen. To revise a document please select the same from the dropdown and upload the new document. Bidders can

upload one document against each selection, document can be of any size. Only PDF documents can be uploaded.

9. After the documents have been uploaded, the bidder can proceed to saving the Eligibility Terms & Conditions and Price Offer fields. To fill Accept Eligibility Terms & Conditions form click on Accept Eligibility Terms &Conditions against any line item and fill the form therein.

10. Once Eligibility Terms & Conditions terms are saved, proceed with submitting the Price Offer, here the bidder has to input the Price Offer as per the RFP terms and conditions.

11. After the documents have been uploaded click on the final submit to finally submit the bid. In case of any amendments after final submit click on delete bid button to delete the Eligibility Terms & Conditions and price bids and resubmit the same. **The Bidder should also note that a Bid will be considered as submitted if and only if the Bidder has made such submission through the "Final Submission" button. Only such Bids will be opened which have been finally submitted. It is further clarified that saving of Technical Bid and the Price Offer without final submission will be treated as non-submission of bid e-Auction.**

12. The bidders who qualify for e-auction as per rules stipulated in the RFP document will be intimated about their qualification for electronic auction through email. It shall be the sole responsibility of the Bidder to regularly check its email. The Leasing Authority will not be responsible for non-receipt of email by the Bidder and its consequences.

13. E-auction is the process of inviting binding Price Offer from qualified bidders through internet for the purpose of determination of the Preferred Bidder. During this process, the qualified bidder will be able to submit its Price Offer as many times it wishes. The qualified bidder will remain anonymous to other qualified bidders qualified bidders participating in the electronic auction process as well as to the Leasing Authority. The qualified bidders will be able to see the prevailing highest Price Offer, but the name of the highest qualified bidder at any point of time will not be displayed. The qualified bidder shall have to put its Price Offer above the displayed highest bid become the highest qualified bidder. The electronic auction process will have a scheduled start and close time which will be displayed on screen. A qualified bidder will be able to put its Price Offer after the start of bid time and till the close time of

electronic auction. The current server time (IST) will also be displayed on the screen. In the event a bid is received during the last 8 (eight) minutes before the scheduled close time of electronic auction, the close time of electronic auction will be automatically extended by 8 (eight) minutes from the last received bid time to give equal opportunity to all other qualified bidders. This process of auto extension will continue till there is a period of 8 (eight) minutes during which no Price Offer are received.

14. For example, assuming that the initial scheduled close time for a particular electronic auction is 1.00 pm and a Price Offer is received at 12.55 pm, the scheduled close time shall be revised to 1.03 pm. Again, if a Price Offer is received at 1.01 pm, the scheduled close time shall be revised to 1.09 pm and so on. In the event that there is no further Price Offer received till 1.09 pm, the electronic auction will close at 1.09 pm. The revised close time will be displayed on screen and the qualified bidders should keep refreshing its webpage to get the latest information."

10. Assailing the action of the respondents, Dr. Singhvi, learned Senior Counsel appearing for the petitioner, has addressed the following principal submissions. It was firstly contended that the RFP as framed and drawn by the second respondent nowhere contemplated a forfeiture of bid security on a failure on the part of an interested bidder to submit a financial bid higher than that which may have been submitted by a competitor. Dr. Singhvi, would submit that the RFP also did not mandate the submission of a bid higher than the pre-estimated reserve price which was prescribed. In view of the above, it was submitted that the forfeiture of the bid security was clearly *de hors* the provisions of the RFP and thus clearly illegal and arbitrary. It was then submitted that the submission of a bid in an auction is essentially a commercial decision and it would be wholly incorrect for the respondent to assume that all successful bidders must necessarily submit a bid higher than that which may have been submitted by another competing

bidder. According to Dr. Singhvi, the submission of a financial bid must necessarily be recognized as being a decision which must be left to the commercial wisdom of the bidder and no principle in law places a bidder under a compulsory obligation to advance forward in the bidding process or to submit a bid higher than that submitted by a competing bidder notwithstanding its own understanding and assessment of the financial viability of proceeding further.

11. It was submitted that the clarification which was proffered by the second respondent during the process of pre-bid queries cannot possibly be viewed as a term which was binding upon the bidders especially when no such provision stood incorporated in the RFP itself. It was argued that in the absence of a specific clause entitling the second respondent to forfeit the bid security on account of "non-improvement" of a quoted financial bid, the action of the respondents is clearly rendered arbitrary and ultra vires. In support of the aforesaid submission, learned Senior Counsel placed reliance upon the decision of the Supreme Court in **Union of India v. Vertex Broadcasting Co. Private Ltd. & Ors.**[2] and more particularly to the observations as entered in paragraphs 9 and 10 of the report which read thus:

> "9. We have already taken the view that the Union had departed from the terms of NIT and had incorporated new/additional terms and conditions in LOI and the draft licence agreements which were finalised by the Union after exchange of correspondence with the licensees. The precise

[2] (2015) 16 SCC 198

content of the departures made has also been set out above. Inherent in the said finding would be a further determination of the unjustifiability of the action of the Union in forfeiting the licence fee. The Union could not have departed from the terms of NIT unilaterally and on the refusal of the licensees to accept such modified terms and act in terms of LOIs granted to them the Union could not have resorted to the forfeiture as made. This is irrespective of the question of the existence of any enabling provision in NIT for forfeiture of the licence fee.

10. Coming to the aforesaid question of availability of a power to order forfeiture, a reading of the relevant clauses i.e. Clauses 8(*f*), 10(*d*) and 12 extracted above would go to show that the Union had not protected/empowered itself to forfeit the licence fee. The forfeiture contemplated by the aforesaid clauses are altogether in different contexts and situations. In the absence of any such power, the forfeiture that has taken place in this case will have to be adjudged as null and void."

12. Additionally, and to buttress the submissions aforenoted, Dr. Singhvi further placed reliance upon the following observations as made by the Supreme Court in **Suresh Kumar Wadhwa v. State of M.P. & Ors.**[3] which are reproduced hereinbelow: -

"33. The learned counsel for the respondent State, however, argued that it was not necessary for the State to specify the condition relating to forfeiture and four additional terms/conditions in the public notice because they were already part of RBC, which is applicable to the nazul lands in question.

34. We find no merit in this submission for more than one reason. First, the public notice inviting bids did not even contain a term that all the provisions of RBC will be applicable to the-auction proceedings and second, the relevant clauses of RBC which, according to the State, were to govern the-auction proceedings ought to have been quoted in verbatim in the public notice itself. It was, however, not done.

[3] (2017) 16 SCC 757

35. In our considered opinion, the object behind publishing all material term(s) is/are threefold. First, such term(s) is/are made known to the contracting parties/bidders; second, parties/bidders become aware of their rights, obligations, liabilities qua each other and also of the consequences in the event of their non-compliances; and third, it empowers the State to enforce any such term against the bidder in the event of any breach committed by the bidder and lastly, when there are express terms in the contract/public notice then parties are bound by the terms and their rights are, accordingly, determined in the light of such terms in accordance with law.

36. When we read the facts and law laid down by this Court in Maula Bux v. Union of India [Maula Bux v. Union of India, (1969) 2 SCC 554] and Shree Hanuman Cotton Mills v. Tata Air Craft Ltd. [Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., (1969) 3 SCC 522] , we find that there was a specific clause of forfeiture in the contract in both the cases. Such clause empowered one party to forfeit the earnest money/security deposit in the event of non-performance of the terms of the contract. It is in the light of such facts, their Lordships examined the question of forfeiture in the context of Section 74 of the Contract Act. Such is not the case here.

37. Our reasoning is supported by a recent decision of this Court in Union of India v. Vertex Broadcasting Co. (P) Ltd. [Union of India v. Vertex Broadcasting Co. (P) Ltd., (2015) 16 SCC 198 : (2016) 3 SCC (Civ) 657] wherein their Lordships held inter alia that in the absence of any power in the contract to forfeit the licence money deposited by the licensee, the action of the Union to forfeit the licence fees is held illegal. This is what was held: (SCC p. 203, para 10)

> "10. Coming to the aforesaid question of availability of a power to order forfeiture, a reading of the relevant clauses i.e. Clauses 8(f), 10(d) and 12 extracted above would go to show that the Union had not protected/empowered itself to forfeit the licence fee. The forfeiture contemplated by the aforesaid clauses are altogether in different contexts and situations. In the absence of any such power, the forfeiture that has taken place in this case will have to be adjudged as null and void."

> 40. In the light of the foregoing discussion, we are of the considered opinion that the appellant did not commit any breach of the term(s) and condition(s) of the notice inviting bids and on the other hand, it was the respondents who committed breaches. In these circumstances, the State had no right to forfeit the security amount and instead it should have been returned when demanded by the appellant."

13. Proceeding further, Dr. Singhvi submitted that the forfeiture of bid security in the facts of the present case would clearly amount to a penal action and in fact an attempt by a public body to unjustly enrich itself. According to Dr. Singhvi, the forfeiture of bid security would have to necessarily meet the tests of manifest arbitrariness and in case where one finds that the decision is wholly arbitrary, unjust or unfair, the same would be liable to be quashed by the Court. In support of the aforesaid submission, Dr. Singhvi has drawn the attention of the Court to the principles enunciated by the Division Bench of this Court in **Simplex Infrastructures Limited Vs. National Highways Authority of India and Ors.**[4] where the Court proceeded to hold thus: -

> "11. What has been stressed upon by the petitioner is that without affording any opportunity to the petitioner of being heard and without taking into account the fact that the order of debarment in the first instance was not known to the petitioner when the technical bid was submitted and that such order of debarment was under temporary suspension by the order of High Court of Guwahati, the order of forfeiture of the bid amount was absolutely unjustified, arbitrary and unsustainable in the eyes of law. It was also argued that no loss was suffered by the respondent No. 1 as the bid of the petitioner was rejected at the threshold and that the petitioner was agreeable for forfeiture of an

[4] MANU/DE/0623/2017

amount of Rs. 30,000/- towards tender document fee and Rs. 1295/- towards tender processing fee.

12. Reference was made to Lanco Infratech Ltd. v. National Highways Authority of India & Anr, MANU/DE/0331/2016 and Ashoka Buildcon Limited & Anr v. National Highways Authority of India & Ors. [W.P(C) No. 76/2015 in which judgment was delivered on 06.03.2017].

13. In Lanco Infratech Ltd. (Supra) a Bench of this Court had the occasion to deal with a similar clause in the RFP regarding forfeiture and it was held that the power to forfeit the bid was not compulsorily to be invoked and a reasonable exercise of that power was warranted. In the aforesaid case, the forfeiture was of 5% of the bid security on the ground of the bid being non responsive. However, the bid of the petitioner, in that case, was held to be responsive and forfeiture was found to have been effected without any quantification of the damage suffered. The Division Bench but did not have the occasion to examine the enforceability of the forfeiture clause especially in view of the provisions of Section 74 of the Indian Contract Act, 1872."

14. The imperative requirement of a clause for forfeiture being specifically found in the offer document was also highlighted by a learned Judge of this Court in **M.C. Luthra v. Ashok Kumar Khanna,**[5] in the following terms: -

"6.

xxxx xxxx xxxx

41. 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 the double the amount, if it is so stipulated. It is

[5] 2018 SCC OnLine Del 7462

> 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 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.
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> 42. In view of the legal proposition as discussed above, in facts and circumstances of the case while I have already held that both the parties cannot be held guilty for non-compliance of terms of agreement, therefore, defendant to my mind is also not entitled for forfeiture of entire earnest amount. In peculiar facts and circumstances of the case while I decide the issue no. 1 that defendant has discharged all his liabilities, therefore, plaintiff is not entitled for double of the amount as claimed. Therefore, plaintiff to my mind is entitled for recovery of only Rs. 9 lacs admittedly paid by him to defendant as earnest money however, plaintiff is entitled for such recovery of amount with interest @12 % from the date of filing of the suit till realization. Above said issues are being accordingly decided." (underlining added)"

15. It was then contended that the forfeiture of bid security can only find sanction in a situation where it is established that an actual loss had in fact been suffered. Proceeding along these lines, Dr. Singhvi submitted that even if actual loss had not been established, it would still be incumbent upon the respondents to prove that the bid security would represent a genuine pre-estimate of loss that may have been caused. Reliance in this respect was laid upon the following passages as appearing in the decision of the Supreme Court in **Kailash Nath Associates v. DDA & Anr.**[6] which read thus**:**

> "32. By an amendment made in 1899, the section was amended to read:
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> "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

[6] (2015) 4 SCC 136

contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

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

33. Section 74 occurs in Chapter 6 of the Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

34. In *Fateh Chand* v. *Balkishan Dass* [*Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] , this Court held: (SCR pp. 526-27 & 530 : AIR pp. 1410-12, paras 8, 10 and 15)

> "The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce

> it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty….
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> ***
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> Section 74 of the Contract Act deals with the measure of damages in two classes of cases (*i*) where the contract names a sum to be paid in case of breach and (*ii*) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of 'actual loss or damages'; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.
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> ***
>
> 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 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 pre-determining 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."

35. Similarly, in *Maula Bux* v. *Union of India* [*Maula Bux* v. *Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] , it was held: (SCR pp. 933-34 : SCC pp. 559-60, paras 5-7)

> "Forfeiture of earnest money under a contract for sale of property — movable or immovable—if the amount is reasonable, does not fall within Section 74. That has been decided in several cases: *Chiranjit Singh* v. *Har Swarup* [AIR 1926 PC 1 : (1926) 23 LW 172] , *Roshan Lal* v. *Delhi Cloth and General Mills Co. Ltd.* [ILR (1911) 33 All 166] , *Mohd. Habibullah* v. *Mohd. Shafi* [ILR (1919) 41 All 324] , *Bishan Chand* v. *Radha Kishan Das* [ILR (1897) 19 All 489] . These cases are easily explained, for forfeiture of a 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.

Counsel for the Union, however, urged that in the present case Rs 10,000 in respect of the potato contract and Rs 8500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the contract Act), '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'. It is true that 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, and 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 contract. But the expression 'whether or not actual damage or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver 'regularly and fully' the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."

36. In *Shree Hanuman Cotton Mills* v. *Tata Air Craft Ltd.* [*Shree Hanuman Cotton Mills* v. *Tata Air Craft Ltd.*, (1969) 3 SCC 522 : (1970)

3 SCR 127] , it was held: (SCR pp. 139 and 142 : SCC pp. 531 and 533-34, paras 21 and 28-29)

> "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.
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> (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
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> (3) It is part of the purchase price when the transaction is carried out.
>
> (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
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> (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.

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The learned Attorney General very strongly urged that the pleas covered by the second contention of the appellant had never been raised in the pleadings nor in the contentions urged before the High Court. The question of the quantum of earnest deposit which was forfeited being unreasonable or the forfeiture being by way of penalty, were never raised by the appellants. The Attorney General also pointed out that as noted by the High Court the appellants led no evidence at all and, after abandoning the various pleas taken in the plaint, the only question pressed before the High Court was that the deposit was not by way of earnest and hence the amount could not be forfeited. Unless the appellants had pleaded and established that there was unreasonableness attached to the amount required to be deposited under the contract or that the clause regarding forfeiture amounted to a stipulation by way of a penalty, the respondents had no opportunity to satisfy the Court that no question of unreasonableness or the stipulation being by way of penalty arises. He further urged that the question of unreasonableness or otherwise

regarding earnest money does not at all arise when it is forfeited according to the terms of the contract.

In our opinion the learned Attorney General is well founded in his contention that the appellants raised no such contentions covered by the second point, noted above. It is therefore unnecessary for us to go into the question as to whether the amount deposited by the appellants, in this case, by way of earnest and forfeited as such, can be considered to be reasonable or not. We express no opinion on the question as to whether the element of unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the respondents would have had an opportunity of meeting such a claim."

37. And finally in *ONGC Ltd.* v. *Saw Pipes Ltd.* [(2003) 5 SCC 705] , 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 case* [*Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] , SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award 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.…

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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 it is genuine pre-estimate by the parties as the measure of reasonable compensation."

38. It will be seen that when it comes to forfeiture of earnest money, in *Fateh Chand case* [*Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] , the counsel for the appellant conceded on facts that Rs 1000 deposited as earnest money could be forfeited. (*See* SCR at pp. 525 and 531.)

39.*Shree Hanuman Cotton Mills* [*Shree Hanuman Cotton Mills* v. *Tata Air Craft Ltd.*, (1969) 3 SCC 522 : (1970) 3 SCR 127] which was so heavily relied on by the Division Bench again was a case where the appellants conceded that they committed breach of contract. Further, the respondents also pleaded that the appellants had to pay them a sum of Rs 42,499 for loss and damage sustained by them. (See SCR at p. 132). This being the fact situation, only two questions were argued before the Supreme Court: (*1*) that the amount paid by the plaintiff is not earnest money; and (*2*) that forfeiture of earnest money can be legal only if the amount is considered reasonable (SCR at p. 133). Both questions were answered against the appellant. In deciding Question (2) against the appellant, this Court held: (SCC p. 534, para 31 : SCR p. 143)

> "… 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* [*Maula Bux* v. *Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] 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."

40. From the above, it is clear that this Court held that *Maula Bux case* [*Maula Bux* v. *Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] was not, on facts, a case that related to earnest money.

Consequently, the observation in *Maula Bux* [*Maula Bux* v. *Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of five Judges in *Fateh Chand case* [*Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] is that *all stipulations* naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English common law by enacting a *uniform principle* that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in *Fateh Chand case* [*Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

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, 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."

16. Dr. Singhvi has further drawn the attention of the Court to a tabulated statement of expenses incurred by the second respondent and which stands

placed as Annexure P-6 to the writ petition. From that tabulated statement and which in turn was based upon the disclosures obtained by the petitioners by invoking the Right to Information Act, 2005, Dr. Singhvi contended that it is manifest that no loss at all was caused to the respondents.

17. Refuting the aforesaid submissions, Mr. Saurabh Sharma, learned counsel for the second respondent, addressed the following submissions. It was firstly contended that the response as proffered by the said respondent during the pre-bid query process clearly placed all intending bidders on notice of the pre-bid security being liable to be forfeited in case any one of them chose to withdraw after qualifying the process of scrutiny of technical bids. Learned counsel submits that undisputedly and although the petitioner did log on to the e-bidding portal, it failed to submit a bid higher than that existing and this act would clearly amount to it withdrawing from the bidding process. Much emphasis was laid on the stature of the petitioner being one of the leading hoteliers of the country and its failure to submit a bid higher than the pre-estimated reserve price.

18. Learned counsel would contend that the petitioner had clearly expressed its reluctance to proceed in the biding process as would be evident from its communications addressed to the second respondent disclosing its relationship with the other successful bidder and that it is this fact alone which appears to have influenced its decision not to submit a bid. Learned counsel argues that the petioner failed to act upon the explicit

assurance offered by the second respondent which had clearly expressed its decision that it would not stand disqualified or be rendered ineligible notwithstanding its disclosed relationship with the other successful bidder. According to learned counsel, the facts leading up to the commencement of the bidding process would clearly establish that the petitioner chose to withdraw from the bidding process without justifiable cause and was only seeking an excuse to wriggle out from its obligation to proceed further. According to learned counsel, the action of the petitioner forced the second respondent to cancel the entire-auction process and thus clearly justifying the forfeiture of bid security.

19. Learned counsel further urged that the forfeiture of bid security would be in consonance with the well settled principles as propounded by the Supreme Court in **State of Haryana v. Malik Traders**[7] where upon a consideration of the provisions made in the Contract Act, it was held as follows:-

> "14. The High Court in that case formulated two questions viz.:
>
> (*a*) whether the forfeiture of security deposit was without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and
>
> (*b*) whether the writ petition was maintainable in a claim arising out of a breach of contract. Without considering Question (*b*), the High Court allowed the writ petition on the ground that the offer was withdrawn before it was accepted and thus no completed contract had come into existence. The High Court observed that in law a party could always

[7] (2011) 13 SCC 200

withdraw its offer before acceptance. Therefore, it held that the invocation and encashment of the bank guarantee was illegal and void and was liable to be set aside. The appellant then approached the Supreme Court.

15**.** Allowing the appeal, this Court held as follows: (*National Highways Authority of India case* [(2003) 7 SCC 410] , SCC p. 416, para 9)

> "*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 Contract Act, 1872. 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. 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."
>
> We respectfully agree with the above view of this Court."

20. It becomes pertinent to note that the decision in **Malik Traders** itself proceeds on the basis of the judgment of the Supreme Court in **National Highways Authority of India v. Ganga Enterprises,**[8] where the following pertinent observations came to be made: -

> "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.
>
> 10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and

[8] (2003) 7 SCC 410

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

21. It is these rival submissions which fall for determination. From the recordal of submissions addressed on behalf of the respondents, it transpires that the action of forfeiture is premised on the perception of the second respondent that a failure on the part of the petitioner to submit a price offer higher than the prevailing bid amounted to a withdrawal from the-auction process. The power to forfeit the bid security is founded and asserted to flow from the clarification proffered by the second respondent during the course of addressing the pre bid queries which were received.

22. The validity of the impugned action of forfeiture of bid security in the present petition has two facets- firstly whether the second respondent had the jurisdiction and authority to forfeit the bid security in terms of the provisions made in the RFP and the pre bid queries which were addressed

and secondly whether the forfeiture was justified in the facts of the present case. While proceeding to deal with the jurisdictional challenge first, the Court notes that the RFP made the following provisions for forfeiture of bid security:-

"5. SECTION 5- PAYMENT TERMS

5.4 In case the Bidder(s) fails to deposit payment as per point 1 within the timeframe given above, the Bid Security of the Bidder will be forfeited and the bidder may be debarred upto 5 (five) years from participation in any future bidding/tendering/RFP process of Leasing Authority and Tendering Authority.

5.5 In case a Bidder(s) deposit the payment as per point 1 above within the time period given but fails to deposit payment as per point 1 within, the timeframe given above, the Bid Security and the payment of the Bidder(s) as per point 1 received earlier will be forfeited and the Bidder may be debarred upto 5 (five) years from participation in any future bidding/tendering/RFP process of Leasing Authority or Tendering Authority.

5.6 After receipt of 100% payment the Leasing Authority will give reasonable time to the Successful Bidder(s) for execution of the Lease Deed as per the terms of this RFP. The Successful Bidder will be required to arrange the requisite stamp papers (and other documents) and submit the complete documents to the Leasing Authority at least 1 (one) working day before the proposed date of execution of Lease Deed. In case the Successful Bidder is unable or unwilling to provide the requisite documents including Performance Guarantee or execute the same within the date stipulated by the Leasing Authority, the RFP process will stand annulled. In such case the Tendering Authority will forfeit the Bid Security and 25% (twenty five percent) of the total amount received from the bidder and the bidder may be debarred up to 5 (five) years from participation in any future bidding/ tendering/ RFP process of Leasing Authority or Tendering Authority/.

6. SECTION 6- SCOPE OF WORK

6.5 In case of delay more than 6 (six) months in completion of the parameters set out at serial nos. 1 to 3 above or delay of more than 12 (twelve) months in completion of the parameter set out at serial no. 4 above, the Leasing Authority shall be entitled to terminate the Lease Deed and take charge and possession of the Hotel Premises and the site of the Project on "as is where is

basis" and all rights of the Lessee with regard to the Hotel Premises, site, building, material, equipments etc. will stand cancelled with immediate effect and possession of the Hotel Premises will revert to the Leasing Authority with all rights of the Successful Bidder without any further act of the parties. After such termination, the Successful Bidder shall have no right or interest in respect of the Hotel Premises on any property thereon or any part thereof and Leasing Authority may, at its sole discretion re-tender the Hotel Premises or use it as per their internal policy/decision. In case of such termination, the Leasing Authority shall be entitled to charge a penalty at the rate of 18% (eighteen percent) per annum on the total amount paid by the Successful Bidder by the Successful Bidder subject to a minimum penalty of 50% (fifty per cent.) of the total amount paid by the Successful Bidder in addition to forfeiture of the Performance Guarantee and remaining amount paid by the Successful Bidder, after deduction of the penalty, shall be returned to the Successful Bidder without any interest thereon. The Leasing Authority may at its sole discretion on its own or through any agency may dismantle the site at the Hotel Premises and e-auction the material, equipment, building etc. therein. All proceeds of such sale will also be in favour of the Leasing Authority, without any rights of the Successful Bidder.

7. SECTION 7- BID PROCESS DETAILS

7.3 Submission of Proposals

(i) Each Bidder who intends to participate in the RFP process will be required to successfully complete the following on or prior to the last date for submission of online Bid:

xxx xxx xxx

C. In case the information provided by the Bidders or the documents submitted by them are found to incorrect or false at any state during the bidding process or subsequently their bid will stand annulled and the entire amount submitted by them till that point will be forfeited unconditionally.

7.4 Proposal evaluation

xxx xxx xxx

(f) The Bidder(s) and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Selection Process. Notwithstanding anything to the contrary contained in this RFP, the Tendering Authority will reject a Proposal without being liable in any manner whatsoever to the Bidder, if it determines that the Bidder has, directly or indirectly or through an agent, engaged in Corrupt Practice,

> Fraudulent Practice, Coercive Practice, Undesirable Practice Or Restrictive Practice (as per the meaning ascribed to the terms in Annexure 3 - Lease Deed and collectively the "Prohibited Practices") in respect of the Bidding Process. In such an event, the Tendering Authority will, without prejudice to its any other rights or remedies, forfeit and appropriate the Bid Security, as mutually agreed genuine pre-estimated compensation and damages payable to the Tendering Authority for, *inter alia*, time, cost and effort of the Tendering Authority, in regard to the RFP, including consideration and evaluation of such Bidder's Proposal.

23. As is evident from a reading of the aforesaid clauses, none of them envisaged a forfeiture of security for reasons which form the bedrock of the impugned action. The clauses extracted above far from justifying a forfeiture, do not appear to even contemplate that action on grounds which have weighed with the respondents. A forfeiture of bid security would undoubtedly have grave civil consequences and therefore must be strictly construed. In order for that punitive measure to be held to be justified, the RFP or any other similar offer document inviting bids must clearly and unambiguously specify the circumstances which would warrant and sanction forfeiture. This position in law cannot possibly be disputed in light of the principles enunciated by the Supreme Court in **Vertex Broadcasting** and reiterated in **Suresh Kumar Wadhwa**. As this Court reads the RFP and the relevant clauses extracted above, it is of the firm view that none of them stood attracted in the facts of the present case. The action of forfeiture when tested on the anvil of the provisions contained in the RFP would thus clearly appear to be *ultra vires*.

24. Regard must be had to the fact that the second respondent justifies the forfeiture not on the strength of any particular clause of the RFP but its

response as given in the course of answering pre bid queries which were raised. The submission of learned counsel in this respect was twofold. Learned counsel firstly urged that the clarification which was proffered placed parties on sufficient notice of its understanding of the terms of the offer and the situations where a forfeiture would be considered valid. Additionally, reliance was placed upon clauses 1 and 6 of the RFP to submit that the clarification that was given was sufficient to bind parties. While dealing with the second limb of the submission that was addressed on this score, it would be appropriate to advert to those clauses which are reproduced hereinbelow: -

> "1. This request for proposal and any other documents and information provided subsequently to the Bidders (defined hereinafter), whether verbally, documentary, or any other form, by or on behalf of Leasing Authority or Tendering Authority or any of their employees or consultants or advisers, is provided to Bidders on the terms and conditions set out in this RFP and such other terms and conditions subject to which such additional documents and information shall be provided, from time to time. In no circumstances shall the Tendering Authority or Leasing Authority, or its employees, officers, directors, advisors, consultants, contractors and/or agents incur any liability arising out of or in respect of the issue of this RFP, or the Bidding Process set out herein.
>
> 2. This RFP is, or neither an offer nor invitation by Leasing Authority / Tendering Authority or to the prospective Bidders or any other person and no agreement or transaction shall be deemed to be entered into, either oral or in writing, till the Definitive Documents (defined hereinafter) are executed. The purpose of this RFP is to provide interested parties with information that may be useful to them in the formulation of their Bids, to be submitted pursuant to this RFP. This RFP includes statements, which reflect various assumptions and assessments arrived at by Leasing Authority or Tendering Authority as the case maybe in relation to their business model The RFP, assumptions, assessments, statements contained herein and any clarifications,

amendments, additional information or addenda issued pursuant hereto are only to provide selective summaries of available information and do not purport to contain all the information that each Bidder may require for the purposes of making a decision for participation in this Bidding Process.

3. This RFP may not be appropriate for all persons, and it is not possible for Leasing Authority / Tendering Authority, their employees or consultants or advisers to consider the objectives, techno-commercial expertise and particular needs of each Bidder who reads or uses this RFP. This RFP is subject to updating, expansion, revision and amendment at the sole discretion of the Leasing Authority and the Tendering Authority, without the requirement of prior notices to the Bidders or any other person. Each Bidder should, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments and information contained in this RFP and obtains independent advice from appropriate sources.

4. The information provided in this RFP to the Bidders is on a wide range of matters, some of which depends upon interpretation of law. The information given is not an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Leasing Authority and Tendering Authority accept no responsibility for the accuracy or otherwise for any interpretation or opinion on the law expressed herein.

5. Whilst the information in this RFP has been prepared in good faith, no reliance shall be placed

on any information or statements contained herein, the Leasing Authority or Tendering Authority, their employees, officers, directors, consultants advisors, contractors and its agents make no representation or warranty and shall have no liability to any person including any Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, reliability or completeness of the RFP and any assessment,

assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way in this selection process and it shall not be assumed that such information or statements will remain unchanged. The Leasing Authority and Tendering Authority also accept no liability of any nature whether resulting from negligence or otherwise caused or arising out of reliance of any Bidder upon the statements contained in this RFP.

6. The Leasing Authority or Tendering Authority may in their absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumption contained in this RFP but do not undertake to provide any Bidder with access to any additional information, or to update the information in this RFP or to correct any inaccuracies herein."

25. It would be pertinent to note that clauses 1 to 6 are placed in the Chapter titled **"Disclaimer"**. The Court fails to appreciate how clauses placed in a chapter dealing with a disclaimer could be read as sufficiently empowering the second respondent to forfeit bid security on the strength of a clarification which was offered in the course of responding to pre bid queries. A disclaimer is essentially aimed at ensuring that the author of the document inviting offers is not held responsible for any assumptions that an intending bidder may choose to make. It essentially places the intending bidder on notice of being obliged to exercise due diligence and caution while forming a decision to participate in the bidding process. A disclaimer essentially seeks to shield and insulate the entity inviting bids from any liabilities that may arise or accrue in the course of the bidding process. Clause 1 falling in this Chapter does just that and nothing more. Clause 2 merely placed the intending bidder on caution by specifically noting that the RFP only constitutes a summary of the available information on the

basis of which the bidder may form a decision to participate in the-auction process.

26. Clauses 3 and 6 conferred a power of the second respondent to add, amend or supplement the terms of the RFP at any time and at its sole discretion. It would be pertinent to recall that while the terms of the RFP were amended on two separate occasions prior to the commencement of the actual bidding process, no express stipulation of forfeiture on account of a purported withdrawal from the bidding process was inserted or introduced. The second respondent had been duly apprised of a doubt that one of the intending bidders harboured with respect to the issue of forfeiture and yet it chose not to either amend or supplement the RFP to provision for a forfeiture of bid security in case of withdrawal from the bidding process. In any case, this Court is of the firm opinion that it would be unwise to recognise a chapter dealing with disclaimers to be recognized as being the repository of the power to forfeit.

27. The Court is further of the firm opinion that a response furnished to queries by the second respondent cannot be placed on the same pedestal as a clause contained in the RFP. This since they would not ipso facto become part of the principal offer document. The answer to a query raised by an intending bidder cannot be construed as attaining the mantle of a substantive provision of the RFP. The queries do not instinctively acquire binding effect similar to a provision laid down in the original offer document. If a clause for forfeiture were to sustain, it was imperative for the second respondent to have duly amended the RFP. A response that may

have been proffered while attending to a query raised by an intending bidder, in any case, was not provisioned to amount to an amendment to the RFP itself. If the submission of the second respondent were to be accepted, it would tantamount to the RFP being held to be suitably amended, altered or supplemented based upon the responses that may be proffered during the pre-bid process. On a more fundamental plane, the Court notes that even the provisions contained in the chapter titled "Disclaimer" can neither be interpreted nor construed as providing for responses submitted to pre bid queries becoming substantive terms and conditions governing the bidding process. The provisions which were relied upon cannot possibly be interpreted as envisaging an answer to a query being deemed to have been incorporated or integrated into the RFP.

28. The Court thus comes to conclude that no provision of the RFP sanctioned forfeiture of bid security on a perceived withdrawal from the bidding process. The RFP in that sense was and remained significantly silent. For reasons aforenoted the Court also comes to the firm conclusion that the explanation or clarification which was offered by the second respondent while responding to queries during the pre-bid process would also not come to its aid nor would it clothe the respondent with the jurisdiction to forfeit bid security on that basis.

29. That then takes the Court to deal with the question of whether the action of the petitioner amounted to a withdrawal from the bidding process. To answer the issue that arises, it would be apposite to notice the procedure prescribed for the e-auction. However, before proceeding to do so, it would

be appropriate to briefly notice the concept of an e-bidding process. The e-auction portal essentially creates a virtual auction room where interested bidders submit their bids electronically. After registration on the platform, the interested bidders are required to upload requisite documentation as may be prescribed and submit their bids once the bidding window is opened. Each valid bid that is submitted is then evaluated and if found to be responsive in all other respects, the highest offer submitted comes to be identified. The virtual platform so created dispenses with the requirement of parties being physically present and enabling them to submit bids electronically. The e-auction process was elaborately spelt out in Annexure 7 to the RFP. For our purposes it would be relevant to note the provisions made in clauses 11 and 13 thereof.

30. In the present case, the RFP in clause 11 clearly provided that an interested bidder could submit multiple bids during the period when the e-auction window remained open. The portal was to display a scheduled start and close time during which period bids were to be submitted and registered. The bid was to be submitted with the interested party pressing the "Final Submission" button and thus registering its offer on the platform. While the identity of the interested bidders was to remain masked, any bidder who had logged on to the-auction platform could see the prevailing highest bid submitted and could submit an offer for an amount higher than that holding the field at the relevant time. This process of submission of bids and counter bids was envisaged to continue till the e-auction window finally came to a close at the designated time and hour. The highest offer

registered on the e-auction platform would thus be known at the close of the aforesaid process.

31. Significantly, however, the platform did not grant an option to a bidder to match a prevailing price offer. Once a bidder had entered the virtual auction room and was able to view the prevailing offer, it had no option but to register a price offer higher than that recorded and displayed on the portal. This is manifest from a reading of clause 13 which prescribed that *"The qualified bidder shall have to put its Price Offer above the displayed highest bid to become the highest qualified bidder."* It is this stipulation and the structure of the bidding process which constitutes the genesis of the dispute *inter partes*. The consequential and ancillary question which arises is whether a bidder who failed to better the prevailing highest price offer could be said to have *"withdrawn"* from the-auction and thus faced the specter of forfeiture of bid security.

32. It would be pertinent to note that the submission of a bid in an auction process is essentially a commercial decision which the party is entitled to take based on its own assumption and judgment of what would constitute a fair bargain. A party while participating in a bidding process cannot be compelled by law to submit a bid which may be understood as being reasonable and fair. The offer is one which must necessarily be left to the judgment of the intending bidder. The only interdict which operates upon the exercise of this discretion is of the bidder not being permitted to submit an offer below the preset reserve price. The Court cannot discount a situation where more than one bidder in the-auction process submits an

offer which either equals the reserve price, may be marginally more than that price or even equivalent to that offered by another. However, the mere submission of an offer which equals the reserve price or a competing bid cannot be viewed as being contrary to the obligation which otherwise stands placed on a bidder. As was noticed hereinbefore, clause 13 placed the intending bidder under a compulsion to submit a bid which was higher than the one displayed on the portal at the relevant point in time. The bidder was not conferred an option to equal a price bid which had already been submitted and registered. If at that stage, a bidder chose not to increase the bid or better the existing or prevailing offer, that cannot be interpreted as amounting to a withdrawal from the-auction process. This is further evident from the response of the second respondent itself which held out that the bid security would be forfeited if the bidder were to withdraw from the-auction process after qualifying the technical evaluation process. It is thus evident that the second respondent itself understood and interpreted the forfeiture clause as being applicable only in a situation where an intending bidder chose not to participate in the financial bid process at all after it had been found to be technically responsive. It is in that limited sense that the expression "withdraw" is liable to be understood.

33. In the facts of the present case, it is admitted that the petitioner logged on to the portal during the financial bid submission process. The second respondent interprets its failure to better the existing bid as being an act of withdrawal. The aforesaid stance as struck is clearly unsustainable for more than one reason. Firstly, the e-auction process structurally did not

permit an intending bidder to submit an equivalent offer. It was essentially designed for the second bidder to necessarily and compulsorily submit a higher offer. It was this which constrained the petitioner from failing to register a bid. However, this act cannot be viewed as amounting to a withdrawal from the-auction process. Additionally, it may be noted that the second respondent itself clarified that bid security would stand forfeited only in case a bidder chose to exit the process after its bid had been found to be technically responsive. In the facts of the present case, it cannot be said that the action of the petitioner amounted to a withdrawal from the bidding process. In any case, the conclusion recorded by the Court on this score are marginalised in light of the primary finding that the RFP did not contemplate a forfeiture in an eventuality like the present and did not carry any express stipulation to the aforesaid effect. In addition, the Court also reiterates its earlier conclusion that the clarification which was issued by the second respondent did not become an integral part of the RFP so as to bind parties.

34. That takes the Court to consider the submission of Dr. Singhvi resting on the principles of manifest arbitrariness. Indubitably, Article 14 of our Constitution constitutes its heart and soul. It infuses meaning and guides our understanding of the scope and content of the various provisions contained in that foundational document. The earliest judgments of the Supreme Court explaining the ambit of this Article had propounded the concept of "discrimination" as being the anvil on which State action was to be judged. This led to the evolution of principles such as "reasonable

classification" and "intelligible criteria" to test whether an impugned action fell foul of the mandate of Article 14. The Supreme Court then proceeded to note that the aforenoted concepts may have constricted and stifled the contemplated breadth of this Article as envisioned by our founding fathers. As time progressed, Supreme Court evolved the principles of the rule of law and the abhorrence of arbitrary exercise of power. The aforesaid precepts however remained limited to a "procedural due process" review with State action being tested on the just and fair doctrine. These principles ultimately gave way to the Supreme Court adopting and extending the principles of substantive due process and manifest arbitrariness. All that may be noted today is that Courts are not confined to merely consider whether a fair procedure was followed but more fundamentally to adjudge whether the impugned action would stand the test of reasonableness and fair action in the substantive sense. Article 14 today has thus crossed the threshold and the rubicon of hesitance to judge whether the impugned action would withstand the test of good conscience and sense.

35. Viewed on the aforesaid pedestal the Court finds itself unable to uphold the action of the second respondent. Not only did it fail to place parties on notice of what would constitute a breach warranting forfeiture, it has also and more fundamentally failed to justify its action as being warranted by the acts of the petitioner. An authority which would constitute State cannot be permitted to unjustly enrich itself based on a perceived or assumed power to forfeit even though it be unfair or unjustified. The facts obtaining here constrain the Court to hold that the action of forfeiture was

clearly unjustified. The mere existence of power, even if it were assumed to inhere, would not justify the impugned action. This more so in light of the facts that have been presented by the petitioner based on the responses obtained under RTI. The respondents have abjectly failed to prove prejudice or loss. Their action cannot be sustained on the provisions contained in the RFP. The Court thus has no hesitation in recording that the action was not only clearly *ultra vires*, it is also manifestly arbitrary and thus cannot be sustained.

36. Having found in favour of the petitioner on the aforesaid grounds, the Court deems it unnecessary to rule on the submissions addressed in the light of Section 74 of the Contract Act. This more so in view of the observations appearing in paragraphs 41 and 43.7 of **Kailash Chand** which has explained that at the pre formation of contract stage, Section 74 of the Contract Act would not even apply.

37. Accordingly, and for all the aforesaid reasons, the writ petition is allowed. The impugned orders of 18 March 2019 & 28 May 2019 are hereby quashed. The respondents in consequence are hereby directed to refund the forfeited amount of Rs. 20 crores to the petitioner forthwith.

YASHWANT VARMA, J.

March 31, 2022/*neha*