A VILLAYATI RAM MITTAL (PVT.) LTD.

v.

UNION OF INDIA & ANR.

(SLP (C) No. 12144 of 2009)

SEPTEMBER 21, 2010

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[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

CONTRACT:

C *Tender – Forfeiture of earnest money – Tender for construction work – Tender notice – Clause stipulating forfeiture of earnest money on revocation of offer – Tenderer whose bid was found lowest, sending a letter to employer making correction of a figure in its tender – Correction treated as revocation of offer and earnest money forfeited by* D *employer – Held: When earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come* E *through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer – The facts, in the instant case, clearly establish that the tenderer was not willing to stand by its original offer for the work and was willing to do the work only at the revised bid – The High Court was thus* F *right in coming to the conclusion that the tenderer had revoked its offer for the work – It was, thus, a case where on account of failure on the part of the tenderer to stand by its offer, the transaction or the contract did not come through and, therefore, the employers were entitled to forfeit the earnest* G *money furnished by the tenderer in terms of Clause 6 of the Notice.*

***Contract** – Earnest money – Connotation of.*

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Words and Phrases – *'Earnest money' – Connotation of.*

Shri Hanuman Cotton Mills & Ors. v. Tata Air Craft Limited **1970 (3) SCR 127 = (1969) 3 SCC 522;** *H.U.D.A. & Anr. v. Kewal Krishan Goel & Ors. etc.* **1996 (2) Suppl. SCR 587 = (1996) 4 SCC 249, relied on.**

Chiranjit Singh v. Har Swarup **AIR 1926 PC 1;** *Summer and Leivesley v. John Brown & Co.* **25 Times LR 745, referred to.**

Case Law Reference:

1970 (3) SCR 127	**relied on**	**Para 7**
1996 (2) Suppl. SCR 587	**relied on**	**Para 7**
AIR 1926 PC 1	**relied on**	**Para 7**
25 Times LR 745	**relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 12144 of 2009.

From the Judgment & Order dated 15.10.2008 of the High Court of Delhi at New Delhi in WP (C) No. 14998 of 2004.

Ambrish Kumar, Dhruv Mahta, Pankaj Bhagat, Dr. Sushil Balwada for the Petitioners.

P.P. Malhotra ASG, Purnima, Rajeev Sharma, Anil Katiyar, B. Krishna Prasad for the Respondents.

The Order of the court was delivered by

O R D E R

A. K. PATNAIK, J. 1. This Special Leave Petition under Article 136 of the Constitution of India has been filed against

A the judgment dated 15.10.2008 of the Division Bench of the High Court of Delhi in Writ Petition (C) No.14998 of 2004.

2. The relevant facts very briefly are that the petitioner is a private limited company carrying on *inter alia* the business of construction. In April 2004, respondent No.2 published a notice B inviting tenders for construction of married accommodation at Shankar Vihar-II, Pocket, Delhi Cantonment, at an estimated cost of Rs.40 crores (for short "the Notice"). Clause 6 of the Notice stipulated that the tenderer shall furnish earnest money of Rs.40 lacs in the form of FDR from a nationalized bank C drawn in favour of the Director General, Married Accommodation Project, Kashmir House, Rajaji Marg, New Delhi. Clause 6 also stipulated that if the firm revokes its offer during the validity period, the earnest money furnished by the firm shall be forfeited. In response to the Notice, the petitioner D submitted its offer along with earnest money of Rs.40 lacs. When the tenders were opened on 05.05.2004, the offer of the petitioner was found to be the lowest at Rs.32 crores for the work. On 06.05.2004, however, the petitioner sent a letter to the respondent No.2 making a correction of a figure in its tender E to read as Rs.32,76,000/- instead of Rs.23,76,000/-. As a result of this correction, the offer of the petitioner for the work increased from Rs.32 crores to Rs.41 crores. Respondent No.2 treated this correction made by the petitioner in its tender as revocation of its offer and forfeited the earnest money of Rs.40 F lacs furnished by the petitioner.

3. Aggrieved, the petitioner filed Writ Petition (C) No.14998 of 2004 under Article 226 of the Constitution before the High Court of Delhi, but by the impugned judgment the High Court dismissed the Writ Petition after holding that the G correction of the bid made by the petitioner amounted to revocation of its original offer and hence the respondent No.2 was entitled to forfeit the earnest money furnished by the petitioner in terms of Clause 6 of the Notice.

H 4. Learned counsel for the petitioner submitted that the

High Court failed to appreciate that the tender of the petitioner was initially defective in as much as the earnest money, which was furnished by the petitioner, was not in accordance with Clause 6 of the Notice. He explained that Clause 6 of the Notice provided that the earnest money was to be in the form of FDR from a nationalized bank, but the FDR of Rs.40 lacs furnished by the petitioner was from UTI Bank, which was not a nationalized bank. He further submitted that the petitioner had to make the correction in the figure so as to read as Rs.32,76,000/- instead of Rs.23,76,000/- because a mistake had been committed by the petitioner while calculating the figure and, therefore, soon after the tender was opened on 05.05.2004 the petitioner submitted the letter dated 06.05.2004 to the respondent No.2 correcting the aforesaid mistake in the calculation of the figure. He submitted that the respondent No.2 ought not to have treated the letter dated 06.05.2004 as revocation of the offer of the petitioner. Learned counsel for the petitioner further submitted that in any case the entire Notice was recalled and a fresh Notice was issued by respondent No.2 inviting tenders at a revised estimated cost. According to learned counsel for the petitioner, since the tender process in respect of which the petitioner had furnished the earnest money was cancelled, respondent No.2 should have refunded the earnest money to the petitioner.

5. Learned counsel for the respondents, on the other hand, supported the impugned judgment of the High Court and relied on the counter affidavit filed on behalf of the respondents in the High Court as well as in this Court.

6. We find that Clause 6 of the Notice clearly stipulated that "if any firm revokes its offer during the validity period, its earnest money shall be forfeited". Hence, the question that arose before the High Court for decision was whether the petitioner by revising one of the figures in its tender from Rs.23,76,000/- to Rs.32,76,000/- revoked its offer and the High Court has taken the view in the impugned judgment that as a

A consequence of the change in the figures, the offer of the petitioner for the work was enhanced from Rs.32 crores to Rs.41 crores and, therefore, the original offer of Rs.32 crores for the work stood revoked. In para 12 of the counter affidavit filed in reply to the Writ Petition in the High Court the B respondents have stated that after receiving the letter dated 06.05.2004 of the petitioner correcting the figures in its tender, the respondents sent letters to the petitioner giving opportunity to the petitioner to withdraw its letter dated 06.05.2004 on or before 04.06.2004 and yet the petitioner did not withdraw its C letter dated 06.05.2004. These facts clearly establish that the petitioner was not willing to stand by its original offer of Rs.32 crores for the work and was willing to do the work only at the revised bid of Rs.41 crores. The High Court was thus right in coming to the conclusion that the petitioner had revoked its offer D of Rs.32 crores for the work.

7. The legal principles relating to "Earnest Money' are well settled. In *Chiranjit Singh* v. *Har Swarup* [AIR 1926 PC 1], the Judicial Committee of the Privy Council held:

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

F These observations of the Judicial Committee have been quoted in the judgment of this Court in *Shri Hanuman Cotton Mills & Ors.* v. *Tata Air Craft Limited* [(1969) 3 SCC 522] in which the principles relating to earnest money have been laid down.

G 8. Similarly, in *H.U.D.A. & Anr.* v. *Kewal Krishan Goel & Ors.,etc.* [(1996) 4 SCC 249], this Court quoted the following observations of Hamilton, J. in *Summer and Leivesley* v. *John Brown & Co.* [25 Times LR 745] with regard to the meaning of 'earnest' :

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"'Earnest' ... meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited." A B

9. It is thus clear that when earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer. C

10. In facts of the present case, the respondents have stated in their reply to the Writ Petition before the High Court that as a consequence of the failure of the petitioner to stand by its offer dated 05.05.2004 the tender for the work had to be re-invited by the respondent No.2 on revised costs of the construction and in the circumstances, the respondent No.2 had to forfeit the earnest money of the petitioner. This was thus a case where on account of failure on the part of the petitioner to stand by its offer, the transaction or the contract did not come through and therefore the respondents were entitled to forfeit the earnest money furnished by the petitioner in terms of Clause 6 of the Notice. D E F

11. For these reasons, we are not inclined to interfere with the impugned judgment of the High Court and we accordingly dismiss the Special Leave Petition with no order as to costs.

R.P. SLP dismissed.