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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 2828 of 2007**

R.P. Bhojanwala S/o Late Shri O.M. Bhojanwala, Aged about 55 years,
R/o Jhumritelaiya, District Koderma, (Jharkhand)

---- Petitioner**versus**

1. State of Chhattisgarh, through Secretary, Public Health & Engineering Department, D.K.S. Bhawan, Raipur (C.G.)
2. Executive Engineer, Public Health & Engineering Department, Jashpur Division, District Jashpur (C.G.)
3. Laxmi Borewells, Devi Ganj Road, Ambikapur, District- Surguja (C.G.)
4. Shiv Borewells, Ganjpara, Behind State Bank, Durg (C.G.)
5. Bajrang Agrawal, Ram Niwas Talkies Chowk, Raigarh (C.G.)
6. Shankeshwar Driller, New Bus Stand, Jeevan Bima Road, Raipur (C.G.)
7. Hydro Drills & Co., Bhawani Transport, Telghani Naka, Raipur (C.G.)
8. Satpuda Drillers, 30, Vallabh Nagar, Paanch Pedi Chowk, Raipur (C.G.)
9. Bansal Borewell, Agrasen Road, Punjab Oil Mill Gali, Raipur (C.G.)

---- Respondents**and****Writ Petition (C) No. 2829 of 2007**

R.P. Bhojanwala S/o Late Shri O.M. Bhojanwala, Aged about 55 years,
R/o Jhumritelaiya, District Koderma, (Jharkhand)

---- Petitioner**versus**

1. State of Chhattisgarh, through Secretary, Public Health & Engineering Department, D.K.S. Bhawan, Raipur (C.G.)
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9. Bansal Borewell, Agrasen Road, Punjab Oil Mill Gali, Raipur (C.G.)

---- Respondents

For Petitioner	:	Shri B.P. Sharma and Shri M.L. Sakat, Advocates.
For State/Respondents No.1 & 2	:	Shri Yashwant Singh Thakur, Deputy Advocate General.

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

31/08/2016

1. The above-mentioned two writ petitions are being disposed of by this common judgment since the questions of law and facts involved therein are virtually identical.

2. The undisputed facts are that the Petitioner is an owner and manufacturer of drilling rigs. On 2.11.2006, Respondent No. 2 had invited tenders for drilling of 232 Tubewells in 10 blocks of District Jashpur. This is subject matter of Writ Petition (C) No. 2828 of 2007. Respondent No. 2 had also issued another tender on the same date for drilling of 1060 Tubewells in 10 blocks in District Jashpur. This is subject matter of Writ Petition (C) No. 2829 of 2007. Both tenders were opened on 30.12.2006. The Petitioner took part in both the tender processes and was found the lowest tenderer for 10 blocks in regard to subject-matter of Writ Petition (C) No. 2828 of 2007 and was also found the lowest tenderer for 5 blocks in regard to the subject-

matter of Writ Petition (C) No. 2829 of 2007. The claim of the Petitioner is that he was expecting that an agreement would be entered into with him by Respondent No.2 immediately and he would be given work of drilling of the Tubewells. He waited for 2 months for the said purpose. When no work was given to him, he sent a letter to Respondent No. 2 on 28.2.2007. Since this letter goes to the root of the matter, it would be relevant to refer to it (Annexure P-5). The relevant portion of the said letter reads thus:

“With reference to your NIT no.- 21 dt.- 02.11.2006; corrigendum no.- 01 dt.-20.11.2006 & corrigendum no.- 02 dt.- 08.12.2006 for construction of 150 mm dia drilled tube-wells, installation of handpump and construction of platform all complete job, I submitted tender for group nos.- 1A, 2A, 3A, 4A, 5A, 6A, 7A and 8A. The tender was opened in the office of S.E., P.H.E. Ambikapur Circle on 30.12.2006. In this regard I have to inform you that till today, the 28th February 2007, I have neither received any information regarding acceptance of tender nor any work order against the tender submitted. With regard to this tender all my drilling rig machines were kept idle since last 2 months and for which I have suffered heavy financial loss.

As per your knowledge and according to departmental norms, work of drilled tube-wells can be executed only till 15th June and thereafter the rig machines remain idle for 4 months due to rainy season. Now only a few months remain for me to run the rig machines and make up for the heavy financial losses already suffered. Hence I am not in position to keep my drilling rig machines idle any further and suffer further losses. Therefore, now I have undertaken works in other areas and engaged all my DTH machines for the remaining period of time that is till rainy season. Hence, I would not be in position to execute the work under your division till June 15, 2007.”

3. By the aforementioned letter, the Petitioner informed Respondent No.2 that though the tender had been opened on 30.12.2006, till 28.2.2007 he had neither received any information regarding acceptance of his tender nor any work order had been allotted to him against the tender submitted by him. He further claimed that his drilling rig machines were kept idle for the last two months and, therefore, he suffered heavy financial loss on this count. He further claimed that left with no other option, he had undertaken works in other areas and had engaged his drilling rig machines for execution of those works and, therefore, he was not in a position to execute the work of Respondent No.2 till 15th June, 2007 because the work of drilling of tubewells could be done by 15th June only, i.e., before the start of the rainy season. He further claimed that since the work according to the tender submitted by him was not allotted to him, he suffered huge financial loss.
4. After receipt of the letter of the Petitioner, Respondent No.2, in his response, sent a letter to the Petitioner on 7.3.2007 asking him to enter into an agreement within 10 days of issuance of the letter dated 7.3.2007 for execution of works. When the Petitioner did not turn-up, Respondent No.2 again wrote a letter to him on 30.3.2007. Even after the letter dated 30.3.2007, when the Petitioner did not enter into an agreement with Respondent No.2 as sought for by him, he forfeited the earnest money deposited by the Petitioner in case of his both the tenders vide order dated 10/11.4.2007 (Annexure P-8) and also informed him vide the same order that he would be blacklisted for

participating in other tenders of the Department.

5. Shri B.P. Sharma, Learned Counsel appearing for the Petitioner has made two-fold submission. His first submission is that the Petitioner is a businessman. He waited for two months for response of Respondent No.2 for intimation of awarding of contract and execution of an agreement after finding him the lowest tenderer in both the cases. But, during the said two months, Respondent No.2 did not award him any contract and his drilling rig machines alongwith staff remained idle during the said period and resultantly he suffered huge financial loss. Faced with this situation, the Petitioner had no option but to engage his machines and staff at other sites. Learned Counsel further submits that the action of Respondent No.2 in forfeiting the earnest money of the Petitioner is totally illegal. In his second submission, Learned Counsel relying upon provisions of Sections 73 and 74 of the Contract Act, 1872 (henceforth 'the Act'), urged that Respondent No.2 could not impose a penalty more than the actual loss suffered by it.
6. On the other hand, Shri Yashwant Singh Thakur, Learned Deputy Advocate General appearing for Respondents No.1 and 2 submits that since the Petitioner did not enter into any agreement with Respondent No.2, fresh tenders were floated by him and it took three months more time to award contract to some other persons. The stand of Learned Counsel is that after the tenders were opened, the bids of the tenderers were scrutinised and after shortlisting the lowest

bids, the same were sent to various officers for approval and, therefore, delay occurred in entering into an agreement with the Petitioner. However, reliance has been placed by the Learned Counsel on Condition No.6.13 of the tender document, which stipulates that validity of a submitted tender/shortlisted bid shall be 120 days. He further submits that before completion of the period of 120 days, the Petitioner could not withdraw his tenders/bids.

7. In rejoinder, Shri B.P. Sharma, Learned Counsel appearing for the Petitioner submits that Respondents No.1 and 2 themselves have issued a circular dated 5.11.2004 (Annexure P-4), wherein it is clearly mentioned that the tender process shall be completed within 30 days of the first publication of the tender.
8. We shall first take-up the argument advanced as to whether the tender could be withdrawn before 120 days. Condition No.6.13 of the tender document reads as follows:

“Tender shall be valid for 120 days.”

9. Condition No.6.13 of the tender document is a specific condition and the Petitioner had submitted tenders with open eyes. He knew that his tenders will be valid for 120 days. Reliance has now been placed by Learned Counsel for the Petitioner on circular dated 5.11.2004 issued by the Public Health and Engineering Department, Government of Chhattisgarh, wherein general directions have been issued that the tender process should be completed within 30 days of

the publication of the tender. We are clearly of the view that the Petitioner, who is a contractor and had submitted the tenders with open eyes, cannot now rely on circular dated 5.11.2004. In case he wanted to do so, he should have clearly informed the authorities that the tenders submitted by him would be valid for 30 days only and not for 120 days. Having not done so, he has waived this defence. Even otherwise, we are of the view that when there is a specific condition enumerated in the tender document, the same shall override the general directions issued by the concerned department. The law in this regard is well settled that the specific/special conditions override the general conditions and, therefore, if there was any general condition that the tender process should be completed within 30 days, in view of the special condition enumerated in the tender document that the tender shall remain valid for 120 days, this ground will not be available to the Petitioner.

10. We now come to the issue as to whether the State has authority to forfeit the earnest money or not. In the instant cases, no agreement was entered into between the parties. But, the tender itself provides a clause that if the tenderer violates any of the conditions mentioned in the tender document, the earnest money of the tenderer can be forfeited. The purpose of getting the earnest money furnished is to ensure that the party whose tender is accepted performs his part of the contract.

11. Section 73 of the Act deals with compensation for loss or damages

caused on account of breach of a contract. We are of the view that Section 73 of the Act would not apply in cases like the present and what would govern the instant cases is Section 74 of the Act. The clause of forfeiture is in the nature of penalty and this aspect is dealt under Section 74 of the Act, which reads as follows:

“74. Compensation for breach of contract where penalty stipulated for.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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

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

12. Section 74 of the Act clearly provides that when there is breach of a contract and if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. However, compensation cannot, in any event, exceed the provided maximum penalty.

13. Shri B.P. Sharma, Learned Counsel for the Petitioner placed before us two authorities, namely, **Haji Abdul Sattar v. M.P. State Minor Forest Produce (Trading and Development Cooperative Marketing Federation) Limited, Bhopal, Miscellaneous Petition No.514 of 1988 decided by a Division Bench of High Court of Madhya Pradesh on 2.5.1988 [AIR 1989 MP 7]** and **Krishnaveni Constructions v. Executive Engineer, Panchayat Raj, Darsi, Writ Petition No.10489 of 1993 decided by High Court of Andhra Pradesh on 20.4.1995 [AIR 1995 AP 362]**. These two authorities deal with Section 73 of the Act and there can be no quarrel, with the law laid down therein. However these cases are not applicable to this case because we are dealing with a penal clause covered by Section 74 of the Act.

14. Shri B.P. Sharma, Learned Counsel for the Petitioner very fairly placed before us a judgment of the Apex Court in **Krishan Lal v. Food Corporation of India, (2012) 4 SCC 786**, wherein the Apex Court dealing with Section 74 of the Act held as follows:

“13. Withdrawal of the offer was tantamount to refusal to undertake the contract, hence a breach of the terms of the contract, and shall attract the penal provisions contained in the same is also not in question.

14. It was argued on behalf of the appellant that even the widest and most favourable interpretation of the above terms would not entitle the respondent Corporation to forfeit any amount besides the security deposit and recover any damages, losses or costs that may be suffered or incurred by the respondent Corporation in getting the contracted work executed through some other agency. Such being the position, the respondent Corporation could at best forfeit the sum of Rs 3,09,500 towards security deposit and a sum of Rs 2,17,274 which the respondent Corporation claimed to have incurred towards extra

expenditure in getting the work executed at the risk and cost of the appellant.

19. Equally untenable is the alternative argument that since the amount of Rs 10 lakhs had been deposited pursuant to the order passed by the High Court the same was liable to be forfeited in toto in the event of any breach of the agreement between the parties. The deposit was, no doubt, made pursuant to the direction of the High Court but the said direction did not go further to say that in case the appellant committed a breach of the agreement executed between the parties, any such breach would result in the forfeiture of the entire amount of Rs.10 lakhs. A closer reading of the order passed by the High Court leaves no manner of doubt that the amount was deposited but was refundable in case the contract was not allotted and was adjustable towards security if the appellant succeeded in emerging as the successful tenderer. In the event of adjustment of the amount towards security the breach of the contract would have led to the forfeiture of the security amount alone and not the entire amount deposited by the appellant.

20. Even so, the terms of the contract provided for execution of the contracted work through another agency at the risk and cost of the appellant. It is not in dispute that the respondent Corporation had engaged an alternative agency for getting the work executed. It is also not in dispute that an extra amount was incurred by the respondent Corporation in that regard. If that be so, the amount lying with the respondent Corporation could be utilised for recovery of the loss. The respondent Corporation could therefore make a claim for recovery of the extra expenditure, incurred by it. We must mention, in fairness to Mr Jha, that the respondent Corporation's right to forfeit the security amount or to recover the extra expenditure incurred in getting the work executed from alternative agency was not disputed by him.

22. In the result, we allow this appeal, set aside the order passed by the High Court and direct the respondent Corporation to refund the balance amount of Rs 4,73,226 to the appellant within a period of three months from today failing which the said amount shall start earning interest @ 10% p.a. from the date of expiry of the stipulated period of three months mentioned above. We are consciously making no order for payment of interest on the amount held refundable to the appellant, for we are of the opinion that the appellant had without any real intention to perform the work in question got the earlier contract terminated by a judicial order and put the Corporation through the unnecessary botheration and consequential prejudice of calling for fresh tenders. The appellant, it appears to us, was interested only in scoring a point over his rival for whatever reasons he had in view. The conduct of the appellant has, therefore, dissuaded us from directing payment of any interest to him on the amount that is held refundable.”

The facts of the case before the Apex Court are entirely different.

In the case before the Apex Court initially the contract for transportation and handling was awarded to some other person. The petitioner filed writ petition challenging the award of such contract and to show his bonafide offered to deposit a sum of Rs. 10 lakhs by way of security. The writ petition was allowed by the High Court and the tender awarded to third party was cancelled. The petitioner was directed to deposit Rs. 10 lakhs as offered by him. Fresh tenders were invited and the tender of the appellant before the Apex Court was accepted. After acceptance of the tender of the appellant, an agreement was entered into, and the security amount was assessed at Rs. 3,09,500/- but since the appellant had already deposited Rs. 10 lakhs, no security was taken. The appellant before the Apex Court did not perform the work and withdrew his offer. The Food Corporation of India forfeited the entire amount of Rs.10 lakhs. The Apex Court held that the formal security amount as per contract was limited to Rs. 3,09,500/- and therefore what could be forfeited was an amount of Rs. 3,09,500/- plus Rs. 2,17,274/- which was the loss caused to the Corporation. As far as present case is concerned, what has been ordered to be recovered is the amount of the security deposited only. Therefore, this judgment does not help the petitioner.

15. Coming to the facts of the present cases, we find that the total amount involved is barely Rs.3.5 Lakhs and fresh tenders were floated again and we can take judicial notice of this fact especially on

the basis of the averments made by the Petitioner himself, no tubewells were drilled after 15th June, 2007. This means that virtually the entire summer season passed away without drilling of any tubewell. This must have caused huge amount of loss and damage to the State and to the people of the locality for whom the tubewells had to be drilled to supply them drinking water. The Petitioner has asked us to exercise discretionary writ jurisdiction. In the facts and circumstances of the present cases that the amount forfeited, which was deposited by the Petitioner as earnest money, is a reasonable compensation for the loss caused to the State because of the following reasons:

1. Fresh tenders had been floated which took three months' time and during this delayed period the people of the concerned locality remained deprived of drinking water which they could have got if the tubewells had been drilled before start of monsoon.
2. The action of the Petitioner in withdrawing his tenders tantamounts to virtually saying that he will not perform the contract.
3. Another aspect, which can be taken into consideration, is that in the letter of the Petitioner dated 28.2.2007, he himself has stated that he has already engaged his drilling rig machines at some other site.

16. We could have been more sympathetic with the Petitioner if the Petitioner before engaging the machines at some other site would

have given a notice to Respondent No.2 intimating him about his intention to do so if work is not awarded to him. But, the Petitioner took a unilateral decision of engaging the drilling rig machines at some other site without prior intimation to Respondent No.2 and prevented the State with a *fait accompli*. Respondent No.2 had no option but to float fresh tenders because the Petitioner had completely diverted his machines and was not willing to execute the work of Respondent No.2.

17. In this view of the matter, the Petitioner is not entitled to any relief for recovery of the earnest money.

18. Lastly, coming to the issue of blacklisting of the Petitioner, we find that there is no clear-cut notice by the concerned Department of Public Health and Engineering that the Petitioner is blacklisted. In **Gorkha Security Services v. Government (NCT of Delhi), (2014) 9 SCC 105**, the Apex Court has very clearly held that before blacklisting any person, a clear-cut notice must be issued to him and in case he does not reply to the notice, he shall be blacklisted. Merely stating that in case the Petitioner does not enter into an agreement, action will be taken against him including blacklisting, does not amount to a notice within the meaning as stated in **Gorakha Security Services case** (supra). We, therefore, accept this portion of the argument of Shri B.P. Sharma, Learned Counsel for the Petitioner that blacklisting of the Petitioner was improper.

19. In view of the above discussion, the writ petitions are allowed in part.

The impugned order of Respondent No.2, so far as it relates to blacklisting of the Petitioner, is set aside. Rest of the prayers of the Petitioner made in the two writ petitions including the refund of the forfeited earnest money are rejected.

Sd/-

(Deepak Gupta)
Chief Justice

Sd/-

(P. Sam Koshy)
Judge