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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 13th October, 2025*+ **CS(COMM) 16/2016**

M/S SIMPLEX INFRASTRUCTURES LTDPlaintiff
Through: Mr. Aayush Agarwala and Mr. Saurav
Dutta, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIADefendant
Through: Mr. A.P. Singh, Ms. Shrinkhla Tiwari
and Ms. Varnit Vashistha, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT**JYOTI SINGH, J.**

1. This suit is instituted by the Plaintiff for a declaration that Defendant/National Highways Authority of India ('NHAI') has not suffered any damages beyond the pre-Bid processing charges of Rs. 77,000/- given by the Plaintiff at the time of submitting pre-Bid documents and is not entitled to forfeit the Bid security amount of Rs. 8.14 crores. Plaintiff also seeks recovery of sum of Rs. 10,36,34,027/- with *pendete lite* and future interest @ 12% per annum.

2. To the extent relevant, the facts are that NHAI invited Bids for 4-Laning of Koilwar to Bhojpur from Km 137.375 of NH-30 to Km 27.370 of NH-84 in Bihar under NHDP Phase-III on EPC mode. NHAI adopted a single stage two-tier system for selection of the bidder. Eligibility and



qualification of the bidder was first examined based on the technical Bids and only those bidders, who qualified in the technical Bids were invited for opening of financial Bids. It was stipulated in Clause 1.2.1 of Request for Proposal ('RFP') that bidders must satisfy themselves that they were qualified to bid and should give an undertaking to this effect in the form at Appendix-IA. It was also mentioned therein that Appendix-IA was incorporated as per guidelines issued by the Government of India and NHAI shall be entitled to disqualify any bidder in accordance with the guidelines at any stage of the Bidding process.

3. It is stated that Clause 2.1.18 provided that any entity barred by Central/State Government was not eligible to submit the Bid if the bar subsisted on the Bid Due Date, either individually or as member of a Joint Venture. Clause 2.1.19 stipulated that the bidder should, in the last three years, have neither failed to perform any contract nor expelled from any project or contract by any public entity. Clause 2.1.19.1 required the bidder to unequivocally disclose details of all ongoing projects along with updated stage of litigation, if any, against NHAI/Government(s). Details of blacklisting, if any, under any contract with NHAI/Government was required to be furnished as per Clause 2.1.19.2. Clause 2.1.19.3 reiterated that NHAI reserved the right to reject an otherwise eligible bidder on the basis of information provided under Clause 2.1.19 and the decision of NHAI on this aspect would be final. Clause 2.6.2 gave power to NHAI not only to reject the Bids but also appropriate Bid Security if: (a) at any time, a material misrepresentation was made or uncovered; or (b) the bidder did not provide supplemental information sought by NHAI for Bid evaluation within the time specified.



4. It is brought forth in the plaint that in respect of 'Bid Security', Clause 2.20 provided that bidder shall furnish as part of its Bid, a Bid Security in form of Bank Guarantee ('BG') issued by a Nationalized or a Scheduled Bank in favour of NHAI, as referred to in Clauses 2.1.6 and 2.1.7, with validity period not less than 180 days from Bid Due Date. Clause 2.20.4 entitled NHAI to forfeit and appropriate the Bid Security as damages *inter alia* on happening of any of the events specified in Clause 2.20.5. It was provided that the bidder, by submitting the Bid, shall be deemed to have acknowledged and confirmed that NHAI will suffer loss and damage on account of withdrawal of the Bid or for any other default by the bidder during the period of Bid validity. Forfeiture of Bid Security was envisaged under conditions laid down in sub-Clauses (a) to (e) and sub-Clause (b) specifically dealt with corrupt/fraudulent/coercive/undesirable/restrictive practices by the bidder.

5. It is averred that being one of the interested participants, Plaintiff deposited Bid Security in the form of BG for an amount of Rs. 8.14 crores issued by Bank of Baroda and submitted the technical Bid on 18.07.2015. On 21.07.2015, NHAI opened the Bids and on 22.07.2015, Plaintiff was invited for oral discussion to seek some clarifications for evaluating technical qualifications of the Plaintiff, since NHAI learnt that Plaintiff had been debarred by Chief Engineer, PWD, Assam for two years vide letter dated 27.04.2015 due to poor performance in executing the work of laning in State of Assam and vide letter dated 25.08.2014, DG MAP had imposed a ban on the Plaintiff upto 31.12.2015, owing to its involvement in unauthorized subletting of the awarded work. Plaintiff had in fact not furnished this information in the affidavit under Appendix-IA of RFP and



had filled 'NIL' in the declaration.

6. Plaintiff responded to the letter seeking clarification and stated that Gauhati High Court had stayed the debarment of the Plaintiff vide order dated 15.07.2015 and insofar as the ban imposed by DG MAP was concerned, the same was restricted to participating in tenders issued by the said authority and in fact a letter had been circulated to other Departments to not ban the Plaintiff from other tenders. In this light, the declaration 'NIL' furnished by the Plaintiff was not incorrect. The response was considered by NHAI and the Competent Authority came to a conclusion that Plaintiff was guilty of fraudulent practice as per Clauses 4.3(b) and 2.6.2 of RFP and exercising power under Clauses 2.6.2 and 2.20.5, NHAI decided to forfeit the Bid Security of Rs. 8.14 crores and intimation to this effect was sent to the Plaintiff vide letter dated 29.07.2015. Plaintiff's Bid was accordingly declared ineligible under Clauses 2.1.8 and 2.1.19 of RFP.

7. Plaintiff filed W.P.(C) 7335/2015 in this Court on 31.07.2015 seeking stay on encashment of the BG furnished as Bid Security, which was disposed of on 07.10.2015 directing NHAI to take a decision afresh with respect to the forfeiture of the Bid Security on or before 30.11.2015 and if it was decided to persist in the decision, the same would be communicated with reasons to the Petitioner or else the BG will be released/discharged by the said date. It was further directed that if NHAI persisted in its claim, Plaintiff shall be entitled to contest the same by instituting a suit or taking recourse to arbitration, as the case may be. Interim order staying the encashment of BG was extended till 31.01.2016 with a direction to the Plaintiff to keep the same alive till 28.02.2016. The question whether Plaintiff was entitled to stay on encashment beyond 15.01.2016 was to be



decided by the fora invoked by the Petitioner and if there was no stay against encashment post 15.01.2016, NHAI would be entitled to invoke the BG and realise the same, subject to any pending proceeding.

8. It is stated that on 17.11.2015, NHAI once again decided that the Bid Security was liable to be forfeited as Plaintiff had engaged in fraudulent practices by misrepresenting/providing incomplete facts and Plaintiff was called upon to deposit the Bid Security amount. This led to the Plaintiff filing the present suit on 19.12.2015 and on 11.01.2016, Court granted *ex parte* injunction restraining NHAI from invoking the BG, which NHAI claimed was never received by it and NHAI encashed the Bid Security on 25.01.2016. On 30.01.2016, Plaintiff filed a contempt petition alleging wrongful encashment and on 02.02.2016, NHAI was directed to deposit the BG with the Registrar of this Court. On an application filed by the Plaintiff for withdrawal of the money, Court vacated the stay on 11.08.2016 and directed release of Rs. 8.14 crores along with accrued interest in favour of NHAI. Challenge to this order by the Plaintiff was unsuccessful and the appeal being FAO(OS)(COMM.) 65/2016 was dismissed on 09.05.2017. On 03.08.2017, Plaintiff filed an application under Order VI Rule 17 CPC to amend the plaint, which was allowed on 20.04.2018 and the relief of recovery of Rs. 10,36,34,027/- was added.

9. On 03.02.2023, Court settled the following issues:-

“a. Whether the defendant was not entitled to forfeit the amount of bid security submitted by the plaintiff, or any part thereof? OPP

b. If so, what is the extent of the actual damages suffered by the defendant in the present case? OPD

c. Whether the defendant was not entitled to invoke the bank guarantee under Clauses 2.20.5 and 2.6.2 of the Request for Proposal? OPP

d. Whether the order of the defendant dated 17.11.2015 is unlawful and



un-enforceable? OPP

e. Whether the plaintiff is entitled to a decree for the sum of ₹10,36,34,027/- or any part thereof? OPP

f. Whether the plaintiff is entitled to pendente lite interest @ 12% per annum or at any other rate? OPP

g. Whether the plaintiff is entitled to a further interest @ 12% per annum or any other rate? OPP

h. Any other relief.

i. Costs.”

10. Parties decided not to lead oral evidence and their counsels made statements before the Court that suit be decided on the basis of pleadings and documents filed. Accordingly, the suit was listed for final arguments.

11. Counsel for the Plaintiff urged that NHAI was liable to refund a sum of Rs. 8.14 crores appropriated by it by way of encashing the BG furnished in its favour by the Plaintiff since NHAI had not suffered any loss or damage and retention of the money was illegal and amounted to unjust enrichment. It is settled law that to claim damages, party must prove that it has suffered loss by wrongful acts/omissions of the other party. A specific issue was settled by the Court on 03.02.2023 i.e., ‘*if so, what is the extent of the actual damages suffered by the Defendant in the present case? OPD*’. This order was never challenged by NHAI and instead of proving the damage/loss, if any, by leading evidence, it chose to give up its right to lead evidence and argue the case basis the pleadings and documents on record. *Sans* evidence, NHAI cannot be permitted to retain the Bid Security amount of Rs. 8.14 crores.

12. It was contended that even assuming that the clause pertaining to forfeiture of Bid Security was in the nature of Liquidated Damages, the same cannot be enforced in the absence of proof that damage or loss was



suffered. This position of law is no longer *res integra*. In ***Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC 136***, the Supreme Court held that where it is possible to prove actual damage or loss, such proof cannot be dispensed with. Section 74 of the Indian Contract Act, 1872 ('Contract Act') will apply to cases of forfeiture of earnest money under a contract unless it takes place under the terms and conditions of a public auction before an agreement is reached. Reliance was also placed on the judgments of this Court in ***National Highways Authority of India v. M.G. Contractors P. Ltd-Arvind Techno Engineers P. Ltd. (JV), O.M.P.(COMM.) 356/2023*** decided on 09.07.2025 and ***R.B. Enterprises v. Union of India, 2023 SCC OnLine Del 8321***, to urge that proof of loss is a *sine qua non* for a claim of damages.

13. Reliance was placed on the decision in ***Simplex Infrastructures Limited v. National Highways Authority of India & Anr., 2017 SCC OnLine Del 7397***, where the Division Bench of this Court was dealing with the same issue between the same parties and it was held that stipulation by way of penalty in a contract has to be enforced in terms of Section 74 of Contract Act and Courts will have to determine whether any damage has been suffered by the party claiming damages. In the said case also, the Bid was not accepted at the threshold due to non-disclosure of the fact of debarment and Court held that forfeiture of pre-Bid Security of the Petitioner in its entirety was unjust, unwarranted and aimed at unjust enrichment of NHAI. It was also held that misrepresentation or suppression or disclosure of incomplete fact would not be considered a fraudulent practice in isolation, unless it is resorted to influence the bidding process. Technical Bid was not accepted at the first stage itself on receipt of



information that PWD, Assam had debarred the Petitioner for two years and there was thus no occasion for the Petitioner to have influenced the bidding process. It was observed that non-disclosure of debarment would not be a fraudulent practice as defined under the RFP, since Petitioner as a matter of fact did not know of the debarment when the technical Bid was submitted and thus forfeiture of the entire Bid Security was penal in nature. Sum of Rs.75,000/- taken by NHAI for evaluating and processing the Bid was held to be adequate since no further loss was caused to NHAI.

14. Without prejudice to the aforesaid, it was contended that even otherwise, Plaintiff has not indulged in any fraudulent practice or made any kind of misrepresentation to NHAI while bidding. Order of debarment of the Joint Venture was not in operation on the date of submission of the Bid since the Gauhati High Court had stayed the same vide order dated 15.07.2015 and the ban imposed by DG MAP was restricted to tenders of DG MAP tenders only and was not a general or a blanket debarment order applicable to all Departments of the Government or Public Sector Undertakings etc. As for the termination order issued by NHAI in relation to another project executed at NH-54 and NH-44 in Assam, the same was clearly unilateral and is a subject matter of challenge in a pending arbitration. For all these reasons, it was urged that NHAI has illegally encashed the BG of Bid Security and misappropriated the money and Plaintiff is thus entitled to a decree of refund along with interest @ 12% from 25.01.2016, i.e., the date of wrongful encashment of the BG. Plaintiff is also entitled to future interest @ 12% per annum till actual realisation considering the RFP was a commercial transaction between the parties.

15. *Per contra*, learned counsel for NHAI contended that it was clearly



provided in the RFP that Appendix-IA to the RFP was based on Government guidelines and any violation would entitle NHAI to disqualify the bidder at any stage of the bidding process. Clause 2.1.18 provided that any entity barred by Central/State Government was not eligible to submit the Bid if the bar subsisted on the Bid Due Date which was 10.07.2015. Clearly, on the said date, Plaintiff was under a debarment order passed by Chief Engineer, PWD, Assam on 27.04.2015 for two years as also a ban imposed on 25.08.2014 by DG MAP for a period upto 31.12.2015.

16. Clause 2.1.19 unequivocally required bidders to disclose details of updated stages of litigation etc., against NHAI/Governments and it goes without saying that furnishing correct and complete information in format prescribed in Appendix-IA was a mandate and any deviation had consequences mentioned in Clause 2.1.19.3 and Clauses 2.6.2 and 2.6.3 which gave power to NHAI to forfeit and appropriate the Bid Security/earnest money.

17. It was argued that it is undisputed between the parties that Plaintiff had declared 'NIL' in the concerned column in Appendix-IA and there was non-disclosure of the debarment orders. On direction of this Court in W.P.(C) 7335/2015, NHAI reconsidered its decision and after carefully looking into the representation made by the Plaintiff and adhering to the observations of the Court, NHAI came to a conclusion that Plaintiff was guilty of fraudulent practices as defined in Clause 4.3(b) of Section 4 of RFP. The ban imposed by DG MAP on the bidder was valid upto 31.12.2015 and therefore the answer in Point 2 of Clause 6 of Annexure I *'Updated details of stage of litigation, if so, against the Authority/Governments on all the on-going projects of the bidder or any of its Joint*



Venture Member', should have been 'Yes'. As regards the debarment order by PWD Assam, Plaintiff stated in its reply that the same was stayed by Gauhati High Court on 15.07.2015, but this overlooks the fact that the order was very much in operation on the Bid Due Date i.e., 10.07.2015 and ought to have been disclosed by the Plaintiff, as per the terms of RFP.

18. NHAH contended that forfeiture of Rs. 8.14 crores was valid and in accordance with law inasmuch as terms of RFP provided for forfeiture of the Bid Security in case of material misrepresentation and it was clearly spelt out therein that forfeiture could be done even after entering into a contract, if fraudulent practices were detected. The Supreme Court in ***National Thermal Power Corporation Limited v. Ashok Kumar Singh and Others, (2015) 4 SCC 252***, held that forfeiture of earnest money does not infringe any statutory right under the Contract Act for earnest/security is given and taken in such cases only to ensure that a contract comes into existence. Absence of any term stipulating forfeiture of earnest money may lead to situations, where even those who do not have the capacity or intention of entering into a contract, venture into the bidding process, sometimes even for extraneous reasons. Purpose of such a clause is to see that only genuine Bids are received. In the present case, plain reading of Clause 1.2.4 shows that entire Bid Security was refundable in 150 days, not only in case of bidders who were not selected but even in case of bidders who were selected, on submission of performance security by the successful bidder. Thus, it is clear that the Bid Security was real earnest for entering into the agreement and not an advance of any kind for future performance of the contract. In ***Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345***, the Supreme Court observed that earnest money is paid or given 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 and therefore the seller was entitled to forfeit the entire deposit. In several judgments, Courts have upheld forfeiture of entire Bid Security if the same is towards performance of the contract and not by way of advance payment, particularly, if the cause of forfeiture is a fraudulent conduct. In fact, Courts have consistently taken a strict stance in cases of fraudulent conduct or concealment of facts by bidders. In ***Diwan Chand Goyal v. National Capital Region Transport Corporation and Another, 2020 SCC OnLine Del 2916***, this Court has observed that in any bidding process, a bidder is expected to submit genuine and correct documents and make correct claims and there can be no justification whatsoever for misrepresenting facts and that when the position is reverse, forfeiture of Bid Security is justified.

19. It was argued that it is true that while settling issues on 03.02.2023, Court had settled issues whether Plaintiff was entitled to a decree of refund of Bid Security and what was the extent of the actual damages suffered by NHAI, however, it is a matter of judicial record that Plaintiff opted not to lead evidence and thus failed to discharge the onus to prove that there was no concealment/misrepresentation of facts and/or that the genuine pre-estimate of 1% of estimated cost of Rs. 814 crores was unreasonable in any manner.

20. It was contended that reliance of the Plaintiff on the judgments of this Court in ***M.G. Contractors (supra)*** and ***R.B. Enterprises (supra)*** is misplaced. In ***M.G. Contractors (supra)***, the claim was with regard to estimated profit earned and there was no clause for pre-estimated damages. Moreover, the conduct of the contractor in the said case was not even



alleged as fraudulent. In *R.B. Enterprises (supra)*, the case was with regard to Liquidated Damages for delay in supply of rice and Court held that entire EMD could not be forfeited without proving loss since the case was admittedly not covered in the exceptional cases, where it is impossible to quantify the loss. Present is the case, which falls in the exception as illustrated in the decision of the Supreme Court in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*, where it is impossible to assess compensation.

21. Heard learned counsels for the parties and examined their rival submissions.

22. The short point that arises for consideration in this suit is whether NHAI was justified in forfeiting the Bid Security in the sum of Rs.8.14 crores and/or whether Plaintiff is entitled to refund of this amount with interest.

23. NHAI invited Bids for four Laning of NH-30 to NH-84 from Km 137.375 to Km 27.370 in the State of Bihar under NHDP Phase III on EPC mode. In the two-way Bid process, NHAI first invited technical Bids to ascertain eligibility and qualifications prescribed in the RFP. Only those bidders who qualified were to be called for financial Bid opening. It was provided in the RFP that Appendix-IA was incorporated based on guidelines issued by Government of India and any violation thereof would entitle NHAI to disqualify the bidder at any stage of the bidding process. Clause 2.1.18 provided that any entity barred by Central/State Government was not eligible to bid if the bar subsisted on the Bid Due Date, which was 10.07.2015. Clause 2.1.19.1 required the bidder to provide details of all ongoing projects along with updated stage of litigation, if any, against



NHAI/Government(s). Clause 2.6.2 empowered NHAI to reject any Bid and appropriate the Bid Security if *inter alia* it was found that a material misrepresentation was made by the bidder or the same was uncovered. Misrepresentation was to lead to disqualification of the bidder. Clause 2.20.5 provided that Bid Security shall be forfeited and appropriated by NHAI as damages payable for *inter alia* time, cost and effort of NHAI, without prejudice to any other right or remedy under conditions enumerated in sub-Clauses (a) to (e) and Clause (b), included cases of fraudulent practices etc. Sub-Clause (b) of Section 4.3 of RFP defined “fraudulent practice” to mean misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts to influence the bidding process.

24. Indisputably, Plaintiff was put under a ban by DG MAP on 25.08.2014 upto 31.12.2015. On 27.04.2015, Plaintiff was debarred by Chief Engineer, PWD, Assam for two years due to poor performance in the execution of two laning work in the State of Assam. The Bid Due Date was 10.07.2015 and when the Plaintiff submitted its Bid on 17.07.2015 it did not disclose the ban/debarment orders. Due to concealment of material facts, the Bid of the Plaintiff was rejected on 29.07.2015. After taking recourse to filing a writ petition, Plaintiff filed the present suit and as a matter of record, the parties agreed not to lead evidence after the issues were settled and made a statement that arguments will be made basis the pleadings and documents on record. As a consequence, neither party has led oral evidence.

25. There is no denying the fact that the Bid conditions required the Plaintiff to disclose whether it had been barred by any Central/State Government or any entity controlled by it from participating in any project and whether the bar subsisted as on the ‘*Bid Due Date*’. Equally admitted is



the fact that the ban/debarment imposed on the Plaintiff on 25.08.2014 and 27.04.2015 respectively, subsisted on 10.07.2015 which was the Bid Due Date. Therefore, no fault can be found with the action of NHAI in invoking its power to reject the Bid for omission to place on record the material fact as also to forfeit the Bid Security/Earnest money in terms of the bid conditions, well known to the Plaintiff. In *National Thermal Power (supra)*, the Supreme Court held that forfeiture of earnest money does not infringe any statutory right under the Contract Act, as the earnest money is taken to ensure that contract comes into existence and only genuine Bids are received. Absence of such forfeiture clauses may lead to situations where persons not intending to enter into a contract or those who have no capacity to enter into a contract may participate in the bidding process for extraneous reasons.

26. The Supreme Court in *Satish Batra (supra)*, held that only the earnest money paid as pledge for due performance of the contract can be forfeited on account of buyer's default and in the same vein, earnest money can be doubled and paid back to the buyer if the contract falls through due to seller's default. An amount which is the nature of an advance cannot be forfeited unless it is a guarantee for due performance of the contract. It was further held that to justify forfeiture of advance money being part of earnest money, terms of the contract should be clear and explicit. In *Authorised Officer, Central Bank of India v. Shanmugavelu, (2024) 6 SCC 641*, the Supreme Court again distinguished between earnest and advance money. Examined in the backdrop of these judgments, it is clear from Clause 1.2.4 that the Bid Security was refundable not only in case of bidders who were not selected but also in case of those who were successful *albeit* on



submission of performance security. Clause 2.6.2 gave right to NHAI to reject a Bid for the reasons enumerated therein and appropriate the Bid Security. It is thus clear that the Bid Security was a real earnest for entering into the agreement and was not an advance for future performance of the contract. Clauses 2.20.4 and 2.20.5 evidence that Bid Security was a genuine pre-estimate of damages likely to be suffered by NHAI, more particularly, when conditions of RFP were violated or the conduct of the bidder was found to be fraudulent. Therefore, being in the nature of an earnest money, the Bid Security was liable to be forfeited if the circumstances so required and beyond a doubt the terms of RFP were explicit in this regard.

27. The Supreme Court in ***National Highways Authority of India v. Ganga Enterprises and Another, (2003) 7 SCC 410***, has held that if a party by its own conduct precludes the coming into existence of a contract, it cannot be given advantage or benefit of its own wrong by not allowing forfeiture. In Government contracts particularly, such a term is always included to ensure that only a genuine party makes a Bid. Relevant passage of the judgement is as follows:-

“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.”

28. Plaintiff asserts that the order of debarment by PWD, Assam was not in operation on the date of submission of the Bid since the Gauhati High Court had stayed its operation on 15.07.2015 and thus there was no misrepresentation. Insofar as the ban imposed by DG MAP is concerned the argument was that the ban was restricted to tenders of DG MAP and was not applicable to other departments/entities. As for the termination order by the NHAI in relation to the project of NH-44 in Assam, it was urged that this was unilateral termination, validity of which is under challenge in an arbitration. On careful consideration of all facts and terms of RFP, in my view, there is no merit in these arguments. The specific information that Plaintiff was required to furnish at the time of bidding was whether the bidder/constituent of joint venture had been debarred by Central/State Government or any entity controlled by it from participating in any project and if the answer was ‘Yes’, further information required to be disclosed was whether the debarment subsisted on the Bid Due Date. Clearly, on the Bid Due Date i.e., 10.07.2015, Plaintiff was undergoing debarment by PWD, Assam and DG MAP and there was no stay order. Therefore, there was concealment of material facts, which had a bearing on the bidding process inasmuch as had this information been furnished, Plaintiff may not have qualified the technical Bid round as also if the information was not



discovered by NHAI on time perhaps the contract may have been awarded to the Plaintiff on being successful in the financial bid. Terms of RFP in no uncertain terms informed the bidders that in case of any misrepresentation, the Bid Security was liable to be forfeited and appropriated by NHAI. Terms of the RFP have to be read and construed by their plain meaning and so read, it is not open to the Plaintiff to take the defence of a stay order in one case and contend that the DG MAP debarment order was restricted in nature, in the other case.

29. The only other argument of the Plaintiff is that *sans* any proof of loss, it was not open to NHAI to forfeit and appropriate the Bid Security/earnest money. First and foremost, it is relevant to note that Clause 2.20.5 of RFP provided that Bid Security shall be forfeited and appropriated by NHAI as damages payable to it *inter alia* if bidder engages in any fraudulent or undesirable practice. Clause 2.6.3 of RFP provided that in case the bidder is found to be disqualified during the process of evaluation, NHAI shall be entitled to forfeit and appropriate the Bid Security as damages. As noted above the Bid Security in the present case is in the nature of earnest money and was liable to be forfeited on misrepresentation/concealment of material facts. In such an event, the forfeiture did not infringe any statutory right under the Contract Act and did not require proof of loss from NHAI.

30. In this context, I may allude to the judgment of the Supreme Court in ***K.R. Suresh v. R. Poornima and Others, 2025 SCC OnLine SC 1014***. In the said case, the dispute arose before the Trial Court from a claim of specific performance of agreement to sell in respect of the suit property, executed by Defendants No.1 to 4 in favour of the Plaintiff. The agreement incorporated a clause providing for forfeiture of money paid in advance by



the buyer. Defendants No.1 to 4 terminated the ATS and forfeited the advance paid by the Plaintiff, going by the express covenant of the ATS. Trial Court held that the advance money was a security for due performance of the ATS and was rightly forfeited. Division Bench of the High Court dismissed the appeal and affirmed the judgment and decree of the Trial Court on all issues, including forfeiture. The legal nodus before the Supreme Court was whether the forfeiture was legal. Referring to the observation with regard to the distinction between ‘advance’ and ‘earnest money’ in the judgments of the Supreme Court in **Satish Batra (supra)** and **Central Bank of India (supra)** and a few others, the Supreme Court held that the intention of the parties and surrounding circumstances led to an inference that inclusion of forfeiture clause in the ATS was intended to bind the contracting parties and ensure due performance of the contract. Taking note of Section 74 of the Contract Act, it was observed that in the case of **Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49**, the Supreme Court held that Section 74 will apply to every covenant involving a penalty but insofar as forfeiture of earnest money was concerned, Section 74 will not apply. It was further observed that to the same effect was the decision of the Supreme Court in **Maula Bux v. Union of India, (1969) 2 SCC 554**, where it was held that forfeiture of earnest money was not deemed as penal and Section 74 will only apply where forfeiture is in the nature of penalty. Referring to the judgment in **Kailash Nath (supra)**, it was observed that a different view was taken therein holding that Section 74 applies to forfeiture of earnest money deposit and proof of actual damage or loss is a *sine qua non* for invoking the said Section. However, having so observed it was concluded that where the clause for forfeiture of earnest money is not penal



in the ordinary sense, Section 74 will be inapplicable. The Supreme Court then examined the relevant clause in the ATS and finding the same to be in the nature of an earnest money deposit, held that Section 74 would not apply and that the forfeiture clause was fair and equitable since it imposed liabilities on the purchaser and the seller both, depending on which party was in default. Relevant passages from the judgment in **K.R Suresh (supra)** are as follows:-

“26. In view of the order dated 20.03.2023 passed by this Court, we are limiting our consideration in this matter solely to the issue of refund of earnest money.

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29. At the cost of repetition, we deem it necessary to state that there existed an explicit forfeiture clause in the ATS, which stipulated that the advance money paid would stand forfeited in the event of default by the buyer in fulfilling the terms of the contract. Similarly, in case of default on part of the seller, the advance money was to be doubled and paid back to the buyer. Pursuant to the aforesaid forfeiture clause, the respondent nos. 1-4 herein forfeited the advance money on account of the default by the appellant in paying the balance sale consideration of Rs. 35,50,000/- within the stipulated four-month period.

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31. Here, we consider it apposite to refer to the meanings of the said terms. The word “advance” means money in whole or in part, forming the consideration of an agreement paid before the same is completely payable. On the other hand, the word “earnest” stands for a sum of money given for the purpose of binding a contract, which is forfeited if the contract does not go off and adjusted in price if the contract goes through. [See: P Ramanatha Aiyar in “Advanced Law Lexicon”, 7th Edn.]

32. The principles governing the scope of “earnest money” were succinctly explained in the case of Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., (1969) 3 SCC 522, reproduced as under:

“21. 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.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, “earnest” is given to bind the contract.



(3) It is part of the purchase price when that transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(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.’”

(Emphasis supplied)

33. In the case of *Videocon Properties Ltd. v. Bhalchandra Laboratories*, (2004) 3 SCC 711, while assessing the difference between “advance” and “earnest”, this Court took the view that the words used in the agreement alone cannot be determinative of the true nature of the amount advanced. Instead, the intention of the parties and the surrounding circumstances serve as more apt indicators. Further, the Court observed that earnest money fulfils a dual purpose : first, it operates as part-payment of the purchase price and; secondly, as security for the performance of the contractual obligations. Thus, its true character and purpose can only be canvassed on a close reading of the agreement, and the relevant contextual factors. The relevant observations are reproduced hereinbelow:

“14. [...] Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as ‘a deposit or earnest money’ may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part-payment of the purchase money and security for the performances of the contract by the party concerned, who paid it.”

(Emphasis supplied)

34. In *Satish Batra v. Sudhir Rawal*, (2013) 1 SCC 345, this Court emphatically held that it is only the “earnest money”, paid as a pledge for the due performance of the contract, that can be forfeited by the seller on account of the buyer's default. In the same vein, earnest money can also be doubled and paid back to the buyer if the contract falls through due to the seller's default. An amount which is in nature of an “advance” or serves as part-payment of the purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. The Court further held that despite the existence of an outright forfeiture clause, it shall not apply if the amount stipulated in the contract is found to be only in the nature of part-payment of the purchase price. Consequently, the forfeiture of



“advance money” as part of earnest money can only be justified if the terms of the contract are clear and explicit to that effect. The relevant observations are reproduced hereinbelow:

“6. [...] In *Chiranjit Singh v. Har Swarup*, [(1926) 23 LW 172 : AIR 1926 PC 1] it has been held that (LW p. 174) the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. [...]

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10. In *DDA v. Grihsthapana Coop. Group Housing Society Ltd.*, [1995 Supp (1) SCC 751], this Court following the judgment of the Privy Council in *Har Swarup* [(1926) 23 LW 172 : AIR 1926 PC 1] and *Shree Hanuman Cotton Mills*, [(1969) 3 SCC 522], held that the forfeiture of the earnest money was legal. In *V. Lakshmanan v. B.R. Mangalagiri*, [1995 Supp (2) SCC 33] this Court held as follows :

(SCC p. 36, para 5)

“5. The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount.”

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15. The 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 double the amount, if it is so stipulated. It is 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.”

(Emphasis supplied)

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36. A three-Judge Bench of this Court, of which one of us (J.B. Pardiwala, J.) was a part, reiterated the distinction between “earnest” and



“advance” in *Central Bank of India v. Shanmugavelu*, (2024) 6 SCC 641, thus stating that “earnest” differs from “advance money”, though the former can be treated as part-payment of the sale consideration if the contractual terms are duly honoured. In other words, earnest money is adjusted against the total sale consideration if the contract goes through. The relevant observations are reproduced hereinbelow:

“84. The difference between an earnest or deposit and an advance part-payment of price is now well established in law. Earnest is something given by the promisee to the promisor to mark the conclusiveness of the contract. This is quite apart from the price. It may also avail as a part-payment if the contract goes through. But even so it would not lose its character as earnest, if in fact and in truth it was intended as mere evidence of the bargain. An advance is a part to be adjusted at the time of the final payment. If the promisee defaults to carry out the contract, he loses the earnest but may recover the part-payment leaving untouched the promisor's right to recover damages. [...]”

(Emphasis supplied)

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40. Having regard to the aforesaid authorities, the intention of the parties and the surrounding circumstances in the present case, it can be sufficiently inferred that the inclusion of the forfeiture clause in the ATS was intended to bind the contracting parties and ensure the due performance of the contract. This is particularly significant given the stipulated four-month period for completing the sale transaction and the primary object of executing the ATS, being the urgency of the respondent nos. 1-4 regarding the OTS, which was known to the appellant, as recorded by the Trial Court. The findings of the Trial Court, along with the impugned judgment affirming that time was of the essence, further substantiate the said intent.

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43. At this juncture, we deem it appropriate to take note of Section 74 of the Indian Contract Act, 1872 (for short, “**the 1872 Act**”). Section 74 of the 1872 Act deals with the compensation for loss or damage caused by a breach of the contract when a particular sum of liquidated damages or penalty is already set forth under the terms of the contract. It further provides that such compensation must be reasonable and it cannot, in any circumstance, exceed the amount stipulated in the contract. The same is extracted below:

“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.

[...]”

44. *A conjoint reading of Section 74 of the 1872 Act and the principles underlying forfeiture clauses was undertaken in the case of Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49. This Court held that Section 74 of the 1872 Act will apply to every covenant involving a penalty, whether it is for a future payment on breach of the contract or the forfeiture of a sum already paid. Ergo, a forfeiture clause in a contract would ordinarily fall within the ambit of the words “any other stipulation by way of penalty”. Further, it was held that supplying evidence of a loss incurred by the vendor on account of the breach of contract by the buyer would be mandatory to justify forfeiture, and only a reasonable amount, commensurate with such loss, can be forfeited. The relevant observations are extracted hereinbelow:*

“14. [...] The words “to be paid” which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression “if the contract contains any other stipulation by way of penalty” widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression ‘contract contains any other stipulation by way of penalty’ is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.

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16. *There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs. 25,000 consisting of Rs. 1039 paid as earnest money and Rs. 24,000 paid as part of the purchase price. The defendant has*



conceded that the plaintiff was entitled to forfeit the amount of Rs. 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. [...]

(Emphasis supplied)

45. *It is imperative to mention herein that in Fateh Chand (supra), this Court, while setting “earnest money” apart from a “penalty”, held that insofar as forfeiture of earnest money is concerned, Section 74 of the 1872 Act will not apply. The relevant observations are reproduced hereinbelow:*

“7. The Attorney General appearing on behalf of the defendant has not challenged the plaintiff’s right to forfeit Rs. 1000 which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000 out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney General that the amount of Rs. 24,000 was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1000 as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000 was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as “out of the sale price.” If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. [...]”

(Emphasis supplied)

46. *To the same effect is the decision of this Court in Maula Bux v. Union of India, (1969) 2 SCC 554, wherein it was held that forfeiture of earnest money is not deemed as penal and that Section 74 of the 1872 Act will only apply where the forfeiture is in the nature of a penalty. The relevant observations are extracted hereunder:*

“5. Forfeiture of earnest money under a contract for sale of property — movable or immovable — If the amount is reasonable, it does not fall within Section 74. That has been decided in several cases



: *Chiranjit Singh v. Har Swarup* [*Chiranjit Singh v. Har Swarup*, 1925 SCC OnLine PC 63 : (1926) 23 LW 172] ; *Roshan Lal v. Delhi Cloth & General Mills Co. Ltd.* [*Roshan Lal v. Delhi Cloth & General Mills Co. Ltd.*, 1910 SCC OnLine All 98 : ILR (1911) 33 All 166] ; *Mohd. Habib-Ullah v. Mohd. Shafi* [*Mohd. Habib-Ullah v. Mohd. Shafi*, 1919 SCC OnLine All 87 : ILR (1919) 41 All 324] ; *Bishan Chand v. Radha Kishan Das* [*Bishan Chand v. Radha Kishan Das*, 1897 SCC OnLine All 52 : ILR (1897) 19 All 489 : 1897 Awn 123]. These cases are easily explained, for forfeiture of 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.”

(Emphasis supplied)

47. In *Shanmugavelu* (supra), this Court emphasized upon the fundamental difference between the forfeiture of “earnest money” and forfeiture of “any other amount”, wherein the former constitutes a general forfeiture clause, while the latter qualifies as a penal clause. A clause for forfeiture of earnest money thus, only intended as a deterrent to ensure due performance of the contractual obligations, will not be deemed penal in the ordinary sense. The relevant observations are reproduced hereunder:

“81. Even otherwise, what is discernible from the abovereferred decisions of *Fateh Chand* [*Fateh Chand v. Balkishan Dass*, 1963 SCC OnLine SC 49 : AIR 1963 SC 1405], *Maula Bux* [*Maula Bux v. Union of India*, (1969) 2 SCC 554] and *Satish Batra* [*Satish Batra v. Sudhir Rawal*, (2013) 1 SCC 345 : (2013) 1 SCC (Civ) 483] is that there lies a difference between forfeiture of any amount and forfeiture of earnest money with the former being a penal clause and the latter a general forfeiture clause. A clause providing for forfeiture of an amount could fundamentally be in the nature of a penalty clause or a forfeiture clause in the strict sense or even both, and the same has to be determined in the facts of every case keeping in mind the nature of contract and the nature of consequence envisaged by it.

82. Ordinarily, a forfeiture clause in the strict sense will not be a penal clause, if its consequence is intended not as a sanction for breach of obligation but rather as security for performance of the obligation. This is why *Fateh Chand* [*Fateh Chand v. Balkishan Dass*, 1963 SCC OnLine SC 49 : AIR 1963 SC 1405] *Maula Bux* [*Maula Bux v. Union of India*, (1969) 2 SCC 554] and *Satish Batra* [*Satish Batra v. Sudhir Rawal*, (2013) 1 SCC 345 : (2013) 1 SCC



(Civ) 483] held that forfeiture of earnest money deposit is not a penal clause, as the deposit of earnest money is intended to signify assent of the purchaser to the contract, and its forfeiture is envisaged as a deterrent to ensure performance of the obligation.”

(Emphasis supplied)

48. A different view was taken by this Court in *Kailash Nath Associates v. DDA*, (2015) 4 SCC 136, wherein it held that Section 74 of the 1872 Act applies to the forfeiture of earnest money deposit. It further held that proof of actual damage or loss is a *sine qua non* for invoking the said section and thereby, only a reasonable amount will be permissible for forfeiture upon the breach of contract. The relevant observations are reproduced hereinbelow:

“43. [...]

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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.

43.5. 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. [...]”

(Emphasis supplied)

49. This Court expounded on the question of loss in *Lakshmanan v. B.R. Mangalagiri*, 1995 Supp (2) SCC 33, holding that when the contract falls through due to the default on part of the appellant-purchaser, and the resulting loss suffered by the respondent-vendors exceeds the amount forfeited under the contract, the forfeiture cannot, by any measure, be seen as unjustified. The relevant observations are extracted below:

“5. The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the



default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount. In this case even otherwise, we find that the respondents had suffered damages, firstly for one year they were prevented from enjoying the property and the appellant had cut off 150 fruit-bearing coconut trees and sugarcane crop was destroyed for levelling the land apart from cutting down other trees. Pending the appeal, the respondents sought for and were granted permission by the court for sale of the property. Pursuant thereto, they sold the land for which they could not secure even the amount under contract and the loss they suffered would be around Rs. 70,000. Under those circumstances, their forfeiting the sum of Rs. 50,000 cannot be said to be unjustified. The appeal is accordingly dismissed with costs.”

(Emphasis supplied)

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51. On a conspectus of the aforementioned authorities, it is evident that a clause for the forfeiture of earnest money is not penal in the ordinary sense, rendering Section 74 of the 1872 Act, inapplicable. In the present case, the stipulated amount under the ATS was in the nature of an earnest money deposit and thus, Section 74 of the 1872 Act cannot apply to the same. Further, the forfeiture clause was fair and equitable rather than one-sided and unconscionable, as it imposed liabilities on both the appellant-purchaser and respondent-sellers, wherein the seller was obligated to pay twice the advance amount paid by the buyer in case of his default.”

31. Further, the Supreme Court in **Central Bank of India (supra)**, held as follows:-

“53. Damages can be awarded only for the loss directly suffered on account of the breach and not for any remote or indirect loss sustained by reason of the breach of contract. The general rule is that where two parties enter into a contract and one of them commits breach, the other party will be entitled to receive as damages in respect of such breach of contract, such sum as may fairly and reasonably be considered arising naturally, that is according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If any special circumstances about the dependency of the performance of other contract(s) by the party complaining of the breach, on the performance of the contract in dispute by the party in breach, had been communicated to the party in breach, and thus known to both parties at the time of entering into the contract, then



the damages for the breach of the contract in dispute, may include the compensation for the loss suffered in regard to such other dependent contracts. But, on the other hand, if the special circumstances were not made known to the party breaking the contract, the party breaking the contract, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally and directly and not any remote or unknown loss or damage.

54. *What would be a “penalty” under Section 74 of the 1872 Act was explained by this Court in K.P. Subbarama Sastri v. K.S. Raghavan as under : (SCC pp. 427-28, para 5)*

“5. ... ‘6. The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promiser so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty.’”

55. *The SARFAESI Rules, more particularly Rule 9 was first examined by this Court in Rakesh Birani v. Prem Narain Sehgal, wherein the entire auction process under Rule 9 was explained. The relevant observations read as under : (SCC p. 546, paras 8-9)*

“8. In order to comprehend the rival submissions, it is necessary to ponder as to intendment of Rule 9 of the 2002 Rules which deals with the time of sale, issues of sale certificate and delivery of possession, etc. Public notice of sale is to be published in the newspaper and only after thirty days thereafter, the sale of immovable property can take place. Under Rule 9(2) of the 2002 Rules, the sale is required to be confirmed in favour of the purchaser who has offered the highest sale price to the authorised officer and shall be subject to confirmation by the secured creditor. The proviso makes it clear that sale under the said Rule would be confirmed if the amount offered and the whole price is not less than the reserved price as specified in Rule 9(5). It is apparent that Rule 9(1) does not deal with the confirmation by the authorised officer. It only provides confirmation by the secured creditor.

9. Rule 9(3) makes it clear that on every sale of immovable property, the purchaser on the same day or not later than next working day, has



to make a deposit of twenty-five per cent of the amount of the sale price, which is inclusive of earnest money deposited if any. Rule 9(4) makes it clear that balance amount of the purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of “confirmation of sale of the immovable property” or such extended period as may be agreed upon in writing between the purchaser and the secured creditor. Thus, Rule 9(2) makes it clear that after confirmation by the secured creditor the amount has to be deposited. Rule 9(3) also makes it clear that period of fifteen days has to be computed from the date of confirmation.”

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81. Even otherwise, what is discernible from the abovereferred decisions of Fateh Chand, Maula Bux and Satish Batra is that there lies a difference between forfeiture of any amount and forfeiture of earnest money with the former being a penal clause and the latter a general forfeiture clause. A clause providing for forfeiture of an amount could fundamentally be in the nature of a penalty clause or a forfeiture clause in the strict sense or even both, and the same has to be determined in the facts of every case keeping in mind the nature of contract and the nature of consequence envisaged by it.

82. Ordinarily, a forfeiture clause in the strict sense will not be a penal clause, if its consequence is intended not as a sanction for breach of obligation but rather as security for performance of the obligation. This is why Fateh Chand, Maula Bux and Satish Batra held that forfeiture of earnest money deposit is not a penal clause, as the deposit of earnest money is intended to signify assent of the purchaser to the contract, and its forfeiture is envisaged as a deterrent to ensure performance of the obligation.

83. We are conscious of the fact that in Maula Bux this Court observed that the deposit of a sum by the purchaser as security for guaranteeing due performance was held as a penalty. However, a close reading would reveal that the reason why this Court held the said deposit as a penal clause was because the said amount was paid over and above the earnest money deposit already paid by the purchaser in the said case and more importantly the said sum was not liable to be adjusted against the total consideration. Hence, this Court held the same to be a penalty rather than earnest money. The relevant observation read as under : (SCC p. 558, para 4)

“4. ... In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part-payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for



guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money.”

(emphasis supplied)

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90. Therefore, it is clear that the forfeiture can be justified if the terms of the contract are clear and explicit. If it is found that the earnest money was paid in accordance with the terms of the tender for the due performance of the contract by the promisee, the same can be forfeited in case of non-performance by him or her.”

32. In this context, I may also allude to the judgment of the Madras High Court in ***M/s P.S.T Engineering Construction v. HSCC (India) Limited and Others*** in W.P. No. 4794/2025 decided on 16.04.2025, where a similar issue came up for consideration with respect to forfeiture of EMD owing to non-disclosure of pending litigation as also the applicability of Section 74 of the Contract Act. The Court held that Section 74 would not apply and the entire EMD amount as agreed between the parties was rightly forfeited as the clause was solely for ensuring performance of the contract so that only genuine parties bid in the tender. It was further held that even assuming that the forfeiture served two purposes i.e., one for the performance of the contract and the other as penalty for concealing material fact, reasonable compensation under Section 73 could still be allowed. Court analysed that the total value of the contract was Rs.318.40 crores while the forfeited amount was 1.03% of the same as per the EMD clause and therefore, it was only a reasonable and minimal sum requiring no interference by the Court. These observations are fully applicable in the instant case. Forfeiture of the Bid Security was to ensure that genuine bidders submit their Bids and the contract comes into existence. Concealment of material facts was a serious issue entailing forfeiture of Bid Security and the amount forfeited, as per the



RFP clause was only 1% of the value of the contract and cannot be held as unconscionable and/or unreasonable.

33. Significantly, in a recent judgment in ***Desh Raj and Others v. Rohtash Singh, (2023) 3 SCC 714***, the Supreme Court has held that where the contractual terms clearly provide the factum of the pre-estimate amount being in the nature of earnest money, the onus to prove that the same is penal in nature squarely lies on the party seeking refund of the same and failure to discharge such burden would treat any pre-estimated amount as a genuine pre-estimate of loss. Relevant passages are as follows:-

“41. In our considered opinion, Section 74 of the Contract Act primarily pertains to the grant of compensation or damages when a contract has been broken and the amount of such compensation or damages payable in the event of breach of the contract, is stipulated in the contract itself. In other words, all pre-estimated amounts which are specified to be paid on account of breach by any party under a contract are covered by Section 74 of the Contract Act as noted by this Court in Kailash Nath Associates v. DDA. In Fateh Chand, the Constitution Bench ruled that Section 74 dispenses with proof of “actual loss or damage” and attracts intervention by courts where the pre-estimated amount is “penal” in nature.

42. We may at this juncture also note the following observations made by this Court in ONGC Ltd. v. Saw Pipes Ltd.: (ONGC case, SCC pp. 740-41, para 64)

“64. ... 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. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach.”

(emphasis supplied)



43. Hence, in a scenario where the contractual terms clearly provide the factum of the pre-estimated amount being in the nature of “earnest money”, the onus to prove that the same was “penal” in nature squarely lies on the party seeking refund of the same. Failure to discharge such burden would treat any pre-estimated amount stipulated in the contract as a “genuine pre-estimate of loss”.

44. The respondent in the instant case has neither pleaded for refund of the earnest money nor has he claimed any damages or penalty from the appellants. From the perusal of the records, it is conspicuous that the respondent never raised any concern that the pre-estimated amount was “penal” in nature and instead his sole objective was to gain titular rights over the property concerned on the strength of the sale agreements.

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46. Furthermore, we deem it appropriate to hold that the forfeiture was justified and within the confines of reasonable compensation as per Section 74 of the Contract Act in light of the fact that during the entirety of proceedings — firstly the nature of forfeiture was never contested by the respondent and secondly, the respondent never prayed for the refund of earnest money. Consequently, the judgments rendered by the courts below deserve to be set aside and the suit is liable to be dismissed. Ordered accordingly.”

34. In the present case, Plaintiff has only made a vague asseveration that forfeiture of Bid Security is penal in nature, but has led no evidence to substantiate the same. Plaintiff consciously gave up its right to lead oral evidence despite knowing that an issue had been settled as to whether it was entitled to refund of the forfeited amount and the onus was on the Plaintiff.

35. Plaintiff also urged that in another matter between the same parties *albeit* in the context of another tender, where one of the allegations against the Plaintiff was concealment of debarment by PWD, Assam, the Division Bench held that this was not a fraudulent conduct and also ruled in favour of the Plaintiff that the entire Bid Security could not be forfeited. Having carefully read the judgment, I am of the view that the said judgment is distinguishable on a very important fact noted in Paragraph 23 of the



judgment that Petitioner was not aware of the order of debarment when the technical bid was submitted and this was proved by the RTI reply to the query made by the Petitioner. In this context, it was held that the forfeiture of the entire Bid Security was penal in nature and unreasonable. In the present case, Plaintiff was well aware of the debarment orders on the Bid Due Date as also at the time of bidding. Even if there was a stay order in one case, Plaintiff was still required to disclose the debarment order and with that could have mentioned the order of the Court. A similar issue came before the High Court of Patna in ***REC-Power Development and Consultancy Limited v. North Bihar Power Distribution Co. Ltd. and Another***, 2022 SCC OnLine Pat 2932 and the Court held as follows:-

“32. Yet another aspect of the matter is that the petitioner was required to submit an affidavit along with its bid to the effect that it has not been blacklisted/debarred as on the date of the opening of the bid in terms of clause- 1.1.3(e) of the RFP, however, though the petitioner had filed an affidavit dated 01.04.2021 but in the same it had made a declaration that the petitioner has not been blacklisted/debarred by any Government department/Organization or any public limited company or any bilateral/multilateral funding agency or by the respondents and its subsidiary companies as on the date of bid opening, which is apparently false and not only amounts to the petitioner having made material misrepresentation but also amounts to non-disclosure of material facts regarding its blacklisting, which was/is a mandatory and essential information, required to be furnished to the respondents for the purposes of proper evaluation of the bid of the petitioner as also essential for eligibility of the petitioner as a bidder. A duty is obviously casted upon the petitioner to disclose the aforesaid information regarding its previous blacklisting, which is a very important detail for the respondents to take note of while considering and assessing the pre-bid qualification. The interpretation given by the petitioner to clause 1.1.3 (e) and 1.2.28 of the RFP to wriggle out the situation by stating that on account of the stay order granted by the Hon'ble High Court, the blacklisting order was not in force, hence, it was not obliged to furnish details regarding the said blacklisting order in the affidavit to be filed in terms of clause 1.1.3 (e) of the RFP, is not only devoid of any substance but has also resulted in non-disclosure and suppression of material facts regarding its blacklisting, thus the bid of the petitioner was/is liable to be rejected on this ground



alone, in terms of Clause 1.2.20 and 1.2.28 of the RFP. At this juncture, it would be apt to refer to the well settled law to the effect that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceeding stands vitiated if they are actuated by fraud, thus fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. Reference in this regard be had to a decision rendered by the Hon'ble Apex Court in the case of K.D. Sharma v. Steel Authority of India Ltd., reported in (2008) 12 SCC 481.

33. Thus on a cumulative consideration of the facts, as aforesaid, it is evidently clear that the petitioner has suppressed vital information, which is mandatory and essential information as per the RFP and was required to be submitted along with its bid, hence, this Court finds no reason to interfere with the email communication dated 02.09.2021, informing the petitioner that its bid has been found to be non-responsive.”

36. This Court in **Diwan Chand Goyal (supra)**, while dealing with a case where owing to a forged experience certificate submitted by the Petitioner it had been debarred from participating in future Bids for 5 years and Bid Security amount was forfeited, observed that whether or not the Petitioner gained an advantage by submission of the certificate was irrelevant as in any bidding process, every bidder is expected to submit genuine and correct documents. There can be no justification, whatsoever, for submission of any misrepresentative facts or fabricated documents and therefore, to that extent there can be no doubt that Petitioner had indulged in wrongdoing. Upholding the forfeiture of entire Bid Security *albeit* modifying and reducing the blacklisting period, the Court observed as follows:-

“36....Whether the Petitioner gained an advantage by submission of this certificate is irrelevant. In any bidding process, every bidder is expected to submit genuine and correct documents. There can be no justification whatsoever for the submission of any misrepresentative facts or fabricated/manipulated documents. To that extent there can be no doubt that the Petitioner has indulged in wrong doing. The definition of fraudulent practice in the would clearly cover submission of a forged certificate as such submission would be a misrepresentation to influence



bid/procurement process.

37. The question is what should be the consequence? While assessing any wrong doing and deciding upon the effect thereof, the issue of proportionality would have to be examined. NCRTC has taken the highest level punitive action as permitted under the bid under clause 3.1(d). The NCRTC has the power to impose the disqualification of banning for a period of five years, if there is any material misrepresentation. NCRTC can also forfeit and appropriate the bid security which is the amount mutually agreed to be pre-estimated damages and compensation. Thus, the NCRTC's stand is that it has taken action in terms of the bid document. The highest level of punitive action which could be taken under the bid document has been taken and the same has also been vehemently defended before this Court.

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46. Every party has a freedom to contract. In exercise of this freedom, the giver of work or a project is free to award or allot the work to any person as it deems appropriate. However, in order to attract the most advantageous terms from the best qualified entities as also to maintain transparency and level playing field to all, the process of tendering is adopted. The tender document contains all the requisite eligibility conditions and the documents that are required to be submitted by the prospective bidder. The prospective bidder is expected to only submit genuine and correct documents and make correct claims in a bid. In order to fully ensure that no bidder is able to submit incorrect or false documents or make any misrepresentations in the bids submitted, bidders are cautioned with specific consequences being provided in the bid in case it is found that they have indulged in any incorrect practice. If, after going through a bid and agreeing to not indulge in any fraudulent or corrupt practice, any party is found to have indulged in the same, such conduct ought not to be condoned. If the bidder has adopted an incorrect, immoral, fraudulent or corrupt practice, action ought to be taken. However, the action taken can be judged on the benchmark of proportionality.

47. In the present case, the bidder/Petitioner was to establish that it had experience in executing the similar works. Despite clarifications being asked, the bidder/Petitioner submitted experience documents relating to one project. In the bidder's/Petitioner's view point, the said one project was sufficient for it to qualify or satisfy the eligibility criteria. Along with its bid, the two certificates of DIMTS, which the bidder/Petitioner submitted dated 3rd May, 2018 and 20th September, 2019 were meant to act as evidence of fulfilment of the eligibility criteria. Thus, if only the first certificate was sufficient i.e. dated 3rd May, 2018, the second certificate dated 20th September, 2019 need not have been submitted. The fact that the bidder/Petitioner submitted certificate dated 20th September, 2019 shows



that it was conscious of the need for such a certificate to certify its performance as also the breakup of the various components of the projects, which it had allegedly executed. Thus, the submission of certificate dated 20th September, 2019 was neither superfluous nor an innocent act. It was a conscious and deliberate act on behalf of the bidder. The said certificate has later turned out to be forged. Submission of such certificate would clearly, in the opinion of this Court, constitute a fraudulent practice, which was meant to affect the bidding/procurement process. Thus, the facts of this case are completely distinguishable from S & P Infrastructure Developers Pvt. Ltd. (supra) judgment.”

37. Therefore, in light of the specific clauses of RFP providing for submission of the Bid Security as also its forfeiture in circumstances enumerated therein, the contention of the Plaintiff that the Bid Security was in the nature of a penalty and/or the same could not be forfeited in the absence of proof of loss by NHAI, is rejected being bereft of merit.

38. Accordingly, Plaintiff is not entitled to the relief sought and the suit is dismissed.

JYOTI SINGH, J

OCTOBER 13, 2025/YA