

(1999) 04 RAJ CK 0032

Rajasthan High Court

Case No: Civil Writ Petition No"s. 1353, 2241 and 2363 of 1988

Chetanram Ramgopal

APPELLANT

Vs

Chief Engineer, PWD, Rajasthan
and Others

RESPONDENT

Date of Decision: April 16, 1999

Acts Referred:

- Constitution of India, 1950 - Article 14, 19(1), 226

Citation: AIR 1999 Raj 315 : (1999) 3 RLW 1644 : (2000) 1 WLC 137 : (1999) 1 WLN 355

Hon'ble Judges: Bhagwati Prasad, J

Bench: Single Bench

Advocate: L.R. Mehta and R. Mehta, for the Appellant; Lalit Kawadia, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Bhagwati Prasad, J.

These three writ petitions involve identical questions of law and, therefore, they are being decided by a common order.

2. These three writ petitions relate to different tenders. The amount and dates are different. Except these the controversy involved is same. For determination of the controversy involved in these cases, the facts as given out in S. B. Civil Writ Petition No. 2363 of ; 988 are being considered.

3. The petitioner firm was enlisted provisionally as "A" Class Contractors and such enlistment was renewed from time to time and finally by order [Annexure/4] dated 22-2-1984, it was enlisted permanently as "A" Class Contractors of the Public Works Department.

4. By this writ petition, petitioner has challenged the orders of respondents by virtue of which the respondents have removed the name of the petitioner firm from the

above list of "A" Class Contractors on the one hand and on the other hand, the respondents are realising the amount of Rs. 50,000/- of the Fixed Deposit Receipt lying with the City Branch of State Bank of India, Bikaner with interest accrued on account of forfeiture of the security because the petitioner firm has withdrawn its tender which was submitted by it on 6-11-1987 pursuant to the Notice Inviting Tender [hereinafter to be referred to as "NIT"] [Annexure/5]. It is relevant to mention here that in pursuance of the NIT [Annexure/ 5] various contractors inclusive of petitioner submitted their tenders which were opened on 6-11-1987 at 4.00 P.M. It is pertinent to note here that only those contractors had the opportunity to submit tenders who had been enlisted with the department. After making necessary scrutiny, a comparative statement for verification of the rates was prepared. It was found that the tender submitted by the petitioner, firm was the lowest and reasonable one. The Superintending Engineer, therefore, recommended for acceptance of the tender submitted by petitioner to the Chief Engineer vide letter dated 17-11-1987.

5. However, on coming to know about the fact that the Superintending Engineer has recommended for acceptance of the tender submitted by the petitioner, the petitioner firm sent the letter [Annexure/6] dated 26-11-1986 addressing jointly to the Chief Engineer [Roads], Jaipur; the Additional Chief Engineer, Bikaner and the Superintending Engineer, Circle-II, Bikaner with drawing the offer made by it in its Tender. The above letter Annexure/6 which was sent through registered post reached all the addressees thereof, before the tender was considered and accepted at the higher level. Thereafter, the petitioner was served with letter [Annexure/7] dated 28-12-1987 whereby he was informed that as per general conditions of the NIT for the instant work, the offers were valid for 90 days in case the tender is required to be sanctioned by the Chief Engineer and 120 days in case the tender is required to be sanctioned by the Govt. Since the petitioner had backed out from its original offer within the validity period of the tender, the Chief Engineer has conveyed his decision that the earnest money equivalent to 2% of the estimated cost of the work amounting to Rs. 1,27,289/- be forfeited and recovered from the petitioner.

6. The petitioner vide its letter Annexure/10 dated 21-1-1988 submitted a partial reply to the letter Annexure/6 dated 26-11-1987 contending that it was fully competent to withdraw the tender before it was accepted in accordance with the provisions of the Indian Contract Act, 1872 [for short "the Act"]. It was also contended that according to clauses contained in NIT petitioner was not bound to keep its offer open. There cannot be any impediment to withdraw it during the period of validity mentioned therein. There was no consideration provided in NIT for binding the petitioner to keep its tender open for the entire period of validity. It was further submitted that the action of forfeiture of the earnest money to the tune of Rs. 1.56 laks was not lawful and deserved to be withdrawn.

7. Petitioner also sent another letter [Annexure/11] dated 21-1-1988 stating inter alia that the withdrawal of the tender by petitioner was perfectly lawful and the forfeiture of the earnest money was totally illegal. It was contended that the Department had no right to raise any demand against the petitioner for the sum mentioned therein. It was also contended that the forfeiture is ,in the nature of penalty due for which the Department/Government cannot appropriate, any of the other amounts of the petitioner lying with it. It was also submitted that any attempt on the part of the Department to withdraw the petitioner's outstanding bills/dues under other contracts including the standing security deposit of Rs. 50,000/- deposited towards its enlistment as "A" Class Contractor of the Department, would be wholly illegal and would be contested in the Court of law.

8. According to the petitioner, the respondent Chief Engineer without considering the aforementioned replies of the petitioner informed the Additional Chief Engineer of the region vide letter [Annexure/12] dated 9-2-1988 stating erroneously that various construction works were allotted to the petitioner firm but it has refused to execute the same and, therefore, a sum of Rs. 1,74,579.15 p. were to be recovered from it. It was also stated that the petitioner should not be allowed to participate in the tenders of the department in future.

9. On coming to know about the above letter [Annexure/12], the petitioner served a letter [An-nexure/13] dated 29-2-1988 on the Chief Engineer averring therein that the construction work in question, for which it had submitted its tender dated 6-11-1987 could not be said to haw been allotted to it in law because the petitioner had withdrawn it before it was accepted by the Department vide its letter dated 26-11-1987.

10. Thereafter, the Chief Engineer vide letter [Annexure/14] dated 29-2-1988 called upon the petitioner to deposit the amount equivalent to 2% of the estimated amount of the work on account of forfeiture of the earnest money at the earliest on the ground that the petitioner had backed out and withdrawn its offer within the prescribed validity period.

11. In the meanwhile, the Chief Engineervide letter [Annexure/15] dated 17-3-1988 informed the Executive Engineer that the petitioner firm be not allowed to participate in tenders in any construction work in future and endorsed a copy of the same to the petitioner. Thereafter, the Chief Engineer removed the name of the petitioner firm from the approved list of "A" Class Contractors of the Department. It was also directed that the petitioner should not be allowed to submit tenders in future because its name from the list of approved "A" Class contractors had been removed by reason of its failure to produce solvency certificate and undertaking in compliance of the Govt. order dated 24-4-1986.

12. According to the petitioner, the respondent Department has also proceeded to recover the payment against FDRs which were pledged with it as security for getting

the petitioner enlisted as "A" Class Contractor. The petitioner firm has assailed this action of the respondent Department on the ground that it has no right to remove the name of the petitioner from the list of "A" Class Contractors in the manner in which it has done.

13. It has been contended by the petitioner that mere withdrawal from a tender could not have been a ground for removing the name of the petitioner from the list of "A" Class contractors. As a matter of fact, by this illegal action of respondent Department, the petitioner has been deprived of its fundamental right to carry on its business with the Department. It was also contended by the petitioner that it is entitled to withdraw its tender/offer before it was accepted by the respondents and by merely providing a clause in the NIT [Annexure/5] imposing condition to the effect that the tender shall remain valid for 90 days in case of the tenders to be sanctioned by the Chief Engineer and 120 days in the case of the tenders to be sanctioned by the Govt., could not take away the legal right of the petitioner to withdraw its tender/offer before it was accepted. As a matter of fact, by submission of the tender, the petitioner has merely made an offer and like all other offers, it was subject to the ordinary incident of law, namely, that until it was accepted, it was open to petitioner to withdraw it.

14. It was also contended by the petitioner that Clause No. 11 of the NIT was not made known to it when he had submitted its tender and, therefore, it was not binding on it. It was further contended that the said clause was a condition without consideration and hence it was not enforceable. According to petitioner, the clause/conditions/terms incorporated in the NIT had no statutory basis and therefore, they could not have any binding force on the petitioner.

15. The respondent Department has contested the writ petition and submitted a detailed reply contending that the questions involved in the petition are the questions relating to enforceability of the contract and hence, the writ petition is not maintainable. The petitioner was required to fulfil all the conditions of the contract for which he had agreed. When he has chosen to withdraw the offer made by him then forfeiture of the earnest money was perfectly just, legal and valid. It was also contended that when tenders are withdrawn then as per the conditions of the NIT, the Department is entitled to forfeit the earnest money. It was submitted that the name of the petitioner was removed from the list of "A" Class contractors on account of non-compliance of the requirements of Govt. Order No. F. 2/27/PW-21/D-552 dated 24-4-1988 regarding furnishing of solvency certificate and undertaking. This action was taken after giving sufficient time to the firm for compliance of the requirements. According to the respondents, they are empowered to frame the Rules for conducting the departmental business and accordingly the special condition can be imposed. In the present case, condition of 120 days is there and thus, the petitioner cannot revoke the proposal before the expiry of 120 days.

16. It was also contended that Section 5 of the Act is not applicable when special condition is imposed under the contract and thus, the petitioner has no right to revoke the proposal and as such, the forfeiture of earnest money was quite legal.

17. It is relevant to mention here that apart from the oral submissions, written submissions were also submitted by both the learned counsel.

18. Learned counsel appearing for the petitioner contended that the case of petitioner is, governed by the provisions of Section 5 of the Act, which specifically provides that proposer of a contract cannot bind himself to keep his offer open for any definite time and that any words of promise to that effect can operate only for the benefit of the proposer and the same only shows that after the lapse of specified period, proposal will stand revoked and there cannot be acceptance thereof. The condition to keep the offer open can be binding only when it is made by a distinct contract made for a distinct consideration. The reason for it is that an undertaking to keep the offer open for a certain time is a promise without consideration and such a promise is unenforceable. He has further contended that the law will not enforce and will also not permit enforcement of a promise unless it was given for value, not necessarily for an adequate value but for something which the law can deem of some value and the parties treat as such by making it a subject of bargain.

19. According to the learned counsel, the NIT [Ex. 5] is only an invitation to make offer and the tender given by the petitioner pursuant to such notice is an offer. The condition contained in the notice inviting tender to the effect that the same will remain valid for 90/120 days only means that it can be accepted after the said period. Such a condition does not even amount to a promise to keep the offer open for specified period. Such a condition is inoperative in law and it is only one sided declaration and the same cannot adversely affect the tenderer's right under general law to withdraw tender before its acceptance.

20. The learned counsel contended that Section 2(d) of the Act defines "consideration". Hon"ble Supreme Court in [Chidambaraier and Others Vs. P.S. Renga Iyer and Others](#), examined the said definition and compared the same with the English law. The apex court also noticed that according to English law a valuable consideration in the sense of law may consists either in some right, interest, forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. The learned counsel has placed reliance on the definition of consideration as quoted by various authors of contract law. He has submitted that Frederic Pollock has defined "consideration" as "an act" or forbearance of the one parry or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable.

21. It has been contended by the learned counsel appearing for the petitioner that in the present case, the special condition to keep the tender open for 120 days is a promise on the part of the offerer or tenderer and therefore, he is the promisor. He

has challenged this condition firstly on the ground that the said condition has not been inserted at the desire or with the consent of promisor and, therefore, the question of consideration enforced unilaterally does not arise. He has next contended that correspondingly, there is no price or quid pro quo of the said promise. No right or interest is accrued to the promisor and there is also no forbearance, detriment or loss suffered by the Govt. or the responsibility undertaken by it. The promisee i.e. the Govt. has not given any benefit to the promisor on account of such condition and has also not suffered any detriment. There is nothing in return given or suffered by the Govt. for the promise in the form of condition. There is thus, no consideration for the aforesaid condition and hence there is no promise against the promise and no right accrues in favour of the offerer. On the contrary, NIX contains a clause that the Govt. reserves the right to reject tender without assigning any reason. Thus, there is complete freedom on its part to reject the tender. In this view of the matter, the condition is invalid and clause of forfeiture of earnest money would be unenforceable. On account of withdrawal of offer before it was accepted, no contract came into existence in the present case.

22. Learned counsel appearing for the petitioner further contended that the condition in the NIT that the petitioner has to keep the tender open, was not supported by any consideration, as such it has no validity in the eye of law. Because, this condition is without consideration. He has also contended that the submission of the respondents that giving of tender by the petitioner on the basis of condition amounted to promise which is consideration and the petitioner was bound by such promise is wrong and untenable. The giving of tenders even on the assumed knowledge/acceptance of the condition cannot by itself constitute consideration or a binding promise. The enlistment of the petitioner as "A" Class contractor has also nothing to do with the question as to whether the condition No. 11 is supported by consideration or not.

23. Learned counsel contended that the law regarding revocation of offer has been dealt with in the following manner in Cheshire and Fifoot's Law of Contract 10th Edition [page-50]:

"It has been established ever since the case of *Payne v. Cave* in 1789 that revocation is possible and effective at any time before acceptance up to this moment ex hypothesis no legal obligation exists. Nor, as the law stands, is it relevant that the offeror has declared himself ready to keep the offer open for a given period. Such an intimation is but part and parcel of the original offer, which must stand or fail as a whole. The offerer may, of course bind himself, by a separate or specific contract, to keep the offer open, but the offeree, if such is his allegation must prove all the elements of a valid contract including assent and consideration. In *Routledge v. Grant* the defendant offered on 18 March to buy the plaintiffs house for a certain sum, a definite answer to be given within six weeks from the date". Best CJ held that

the defendant could withdraw it at any moment before acceptance, even though the time limit had not expired. The plaintiff could only have held the defendant to his offer throughout the period, if he had bought the option by a separate and binding contract."

24. Learned counsel further contended that Chitty on Contract [25 Edition] has also dealt with subject of revocation of an offer in para 88, which is reproduced hereunder :

"88. General rule. The general rule is that an offer may be revoked at any time until it is accepted. The rule applies even though the offerer has promised to keep the offer open for a certain time, for such a promise is unsupported by consideration and is therefore, not binding. Thus, in *Routledge v. Grant* the defendant offered to buy a house, giving the plaintiff six weeks for a definite answer, it was held that the defendant was free to withdraw at any time before acceptance even though the six weeks had not expired. Conversely, in *Dickinson v. Dodds*, the defendant offered to sell the house to the plaintiff and said that the offer was to be "left over till Friday". It was held that he could nevertheless withdraw before Friday."

25. Learned counsel contended that the position under Indian Contract Act is also same and the said English Law fully applies to the present case. It is thus clear that unless and until there is a separate and specific contract to keep the offer open wherein all elements of valid contract including assent and consideration are established, the condition to keep the offer open for specified period in the tender is not binding. The respondents are merely relying upon the condition. However, the said condition is not supported by any consideration.

26. Learned counsel therefore, contended that in the present case there is no dispute about the fact that the tender was revoked before its acceptance. It is also not in dispute that NIT conditions are non-statutory.

27. According to the learned counsel, the letter Annexure/4 shows that the petitioner was enlisted as permanent "A" Class Contractor vide order dated 22-2-1984. The Rules regarding enlistment of Contractors were revised vide order dated 24-4-1986 [Annexure/16]. The amended rules could not have been applied retrospectively. Hence the question of any failure to comply with the amended condition No. 10 did not arise. Further the petitioner was given tender Form and it submitted its tender on 6-11-1987 without asking for compliance of the amended condition dated 24-4-1986. Therefore, the petitioner's name could not have been removed from the approved list of "A" Class Contractor on the ground of the alleged non-compliance of amended condition.

28. Learned counsel for the petitioner contended that as a matter of fact, the removal of petitioner's name from the list of "A" Class Contractors and debarring it from taking any part in the tenders in future is evidently mala fide and the same has happened only on account of the revocation of the offer by the petitioner. The new

reason sought to be supplied by the respondents is apparently an after-thought and the same is also absolutely without any basis. The letter/ order Annexure/9 dated 11-1-1988 given by the Department shows that the withdrawal of offer was seriously viewed by the Department and on that account the department proposed to remove the petitioner's name from the approved list of contractors. In support of this contention, reliance has been placed on [Bhim Sain Vs. Union of India](#), The learned counsel, therefore, submitted that the order removing the petitioner's name from the list of approved contractors deserves to be set aside and its name deserves to be restored.

29. Learned counsel for the petitioners has placed reliance on a judgment in second appeal in Somasundaram Pillai v. Provincial Government of Madras, represented by Collector of South Arcot AIR 1947 Mad 366, wherein the Madras High Court held as under" (at page 367) :--

"To have an enforceable contract there must be an offer and an unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration."

30. Learned counsel for the petitioners has placed reliance on the judgment of the Andhra Pradesh High Court rendered in appeal in [Raghunandhan Reddy Vs. State of Hyderabad](#), wherein it has been observed as under (at page 112):--

"Only when an offer is accepted that the contract is concluded and binds the parties. It is equally well settled that before an offer is accepted, the offerer can withdraw his offer, but if the acceptance is conditional or is not final, then there is no concluded contract..... Condition in Clause 10 of Rule 10 of the Proclamation of Auction Sales regarding the power of the Excise Commissioner to suspend or cancel the auction within one month from the date of the approval of the auction by the auctioning officer is not a statutory condition. There is nothing in the Hyderabad Abkari Act (1316 F) which reserves such a power to the Excise Commissioner. Such a condition cannot be spelled out from Section 4 of the Act. Clause 10 must, therefore, be considered as relating to the formalities requisite for the conclusion of the contract and must be governed by the general law of contracts."

31. Another judgment relied upon by the learned counsel for the petitioners has been delivered by the Delhi High Court in a civil suit in the matter of [Suraj Besan and Rice Mills Vs. Food Corporation of India](#), wherein it has been held as under (at page 227) :--

"A person can withdraw or modify his offer or tender before communication of the acceptance is complete as against him that is before its acceptance is intimated to him. The Government by merely providing a clause to the contrary in the tender notice could not take away the legal rights of a person."

32. Learned counsel for the petitioners has further relied upon a decision of the Madhya Pradesh High Court rendered in the matter of [Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others](#), wherein it has been held as under (para 3) :

"A person who makes an offer is entitled to withdraw it before its acceptance is intimated to him."

33. Further reliance has been placed by the learned counsel for the petitioners is on the judgment delivered in the matter of [Sri Durga Saw Mill Vs. State of Orissa and Others](#), wherein the Orissa High Court has observed as under (at page 43);--

"Held that the price offered at the auction was nothing more than an offer and until the competent authority ratified the offer by acceptance, u/s 5 of the Contract Act, petitioner was entitled to withdraw the offer. The offer having been withdrawn, there was nothing to be ratified or accepted in order to give rise a valid contract."

34. Another case relied upon by the learned counsel for the petitioners is in the matter of [M/s. Krishnaveni Constructions Vs. The Executive Engineer, Panchayat Raj, Darsi and others](#), wherein the Andhra Pradesh High Court observed as under (at page 364) :--

"An offer made containing a promise not to revoke it and keep it open does not prevent the offerer from revoking the offer, for normally such a promise to keep the offer open is supported by consideration, the offerer is bound by the promise and cannot revoke the offer."

35. Another case relied upon by the learned counsel for the petitioners is in the matter of [Marwar Tent Factory Vs. Union of India and Another](#), wherein it has been held that the Government could not have taken itself to be an adjudicator and thus, ordered for realisation of penalty for breach of contract.

36. Learned counsel for the petitioners has further relied upon a Supreme Court decision in the matter of [Union of India \(UOI\) and Others Vs. Bhim Sen Walaiti Ram](#), wherein the Supreme Court observed as under (at page 2298) :--

"Under Clause 21 of Rule 5.34 the person to whom the shop has been sold is required to deposit one-sixth of total annual fee within seven days. But that sale is deemed to have been made in favour of the highest bidder only on the completion of the formalities before the conclusion of the sale and where one of the conditions of auction provides that final bid would be made subject to the confirmation of the Chief Commissioner then the contract of sale is not complete till the bid is so confirmed. Till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid and when the bid is so withdrawn before the confirmation of the Chief Commissioner the bidder will not liable for damages on account of any breach of contract or for shortfall on the resale. So where the highest bidder in an auction sale of a liquor shop did not deposit one-sixth of the purchase price within seven days of the auction whereupon the resale was ordered without

the bid having been confirmed by the Chief Commissioner then the essential pre-requisites of a completed sale being missing no liability could be imposed on the auction-purchaser for payment of the deficiency in the price on the resale."

37. Learned counsel has contended that since the petitioner had withdrawn the offer before the acceptance was communicated to it and it is entitled to withdraw the offer and, therefore, no penalty could be imposed on it.

38. Learned counsel for the petitioners has also contended that though it is a matter of contract, but the petitioner has a right to approach this Court by writ petition because the alternative remedy of suit would not bar his case as has been held by the Supreme Court in the case of [M.G. Abrol Vs. Shantilal Chhotalal and Co.](#),

"A remedy by way of an appeal against the order of confiscation and imposition of a large penalty under the Sea Customs Act is not an effective remedy, when no appeal can be filed unless the large penalty imposed upon the petitioner has first been deposited."

39. It has further been contended on behalf of the petitioners that the blacklisting of the petitioner was not a condition mentioned in NIT for the alleged default. Further the notice Annex. 12 given to him speaks of the ground of withdrawal of tender. Final order of withdrawal is on other ground i.e. non-observance of new condition. It is, thus, a colourable exercise of power. He has placed reliance on a decision of the Delhi High Court in the matter of [Bhim Sain Vs. Union of India](#), wherein it has been observed as under (para 14) :--

"Since a new condition not previously known to the tenderer could not be inserted, in effect with retrospective effect in the invitation of tender, blacklisting the tenderer for breach of the contract, which was not a term of the tender was not possible. Such a penalty being arbitrary it was set aside under Article 226."

40. Learned counsel for the respondent-State has contended, that the decision of the Delhi High Court in [Bhim Sain Vs. Union of India](#), has clearly laid down as under (at page 262):

"The next question which would arise for consideration is as to whether in the present case order which was passed was arbitrary or not. I have no manner of doubt that the impugned order was completely arbitrary. In the conditions contained in the invitation of tender it was specifically stated that in the event of default by the tenderers, the tenderers would be liable to forfeit 10 per cent of the security amount. No other liability could be fastened on the tenderers as per the terms and conditions thereof. The petitioner was not obliged to have extended the validity of his tender after 18th November, 1978."

41. Learned counsel has contended that though the Hon"ble Delhi High Court has struck down the blacklisting but as regards extension of validity it has upheld the stand of the respondent-State.

42. Learned counsel for the respondents has further relied upon a decision of the Madras High Court in the matter of [S. Balakrishnan Vs. State of Tamil Nadu and another](#), wherein it has been observed as under (para 2):--

"Where in respect of auction of certain contract by Govt. the petitioner an unemployed graduate felt aggrieved by the conditions of auction sale, especially condition about cash deposit of 50% of the bid amount immediately and full payment of bid amount before contract could be given, he could not get any relief by filing writ petition under Article 226 of the Constitution. It is open to the State to impose any conditions for conducting auction and High Court in writ jurisdiction cannot interfere in such matters. The argument that the petitioner is an unemployed graduate and he will not be able to take part in the auction because of these conditions, is not a ground to entertain a petition under Article 226. It is purely a matter of contract with the Government and it is for the contracting parties to decide about the conditions and only if the petitioner is able to satisfy the conditions, he can take part in the auction. The petitioner cannot compel the State to have certain conditions which will be advantageous to him."

43. Learned counsel has further relied upon a decision of the Hon"ble Supreme Court in [Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others](#), wherein it has been observed as under (at page 1263):--

"Held, that although the powers conferred on the High Court under Article 226 are very wide they could not take in within their sweep industrial dispute of the kind which the contention of the workmen sought to raise. The proper remedy which was available to the workmen to ventilate their grievances in respect of the said notices and circulars was to take recourse to Section 10 of the Industrial Disputes Act, or seek relief, if possible, under Ss. 74 and 75 of the Act."

44. Thus, it has been contended that every dispute cannot be decided in a proceeding initiated under Article 226 of the Constitution more particularly a matter relating to the contracts. In the instant case civil suit will be a proper remedy. Reference in this connection may be made to the Supreme Court decisions in the matter of [U.P. Jal Nigam and Another Vs. Nareshwar Sahai Mathur and Another](#), [Veerappa Pillai Vs. Raman and Raman Ltd. and Others](#), [Scooters India and Others Vs. Vijai E.V. Eldred](#), [Tin Plate Co. of India Ltd. Vs. State of Bihar and Others](#), [Sheela Devi Vs. Jaspal Singh](#), and [Vikram Kumar Vs. State of Rajasthan and Others](#),

45. Learned counsel for the respondents has further contended that the question whether there was any consideration for keeping the tender open is a fact which has to be established by evidence. The petitioner is a contractor entitled to submit his tender with the department and has bound itself under the P.W. D. Manual. It is not open to any or every trader to come and submit his bid with the department. It is only the registered contractors of a particular class who can give their tenders. The registered contractors by getting a chance to deal with the department have a

exclusive privilege to deal with the respondents. It tantamounts to a sufficient consideration for binding the petitioner for keeping its tender open in terms of the conditions agreed by him in the contract. The stand of the department is supported by the observations of Cheshire quoted herein below that:

"The offerer may, of course, bind himself, by a separate or specific contract to keep the offer open but the offeree, if such is his allegation, must prove all the elements of a valid contract, including assent and consideration."

46. There is a clear, separate and binding contract on the listed contractors under the P.W.D. Manual Chapter XXXIII whereby such contractors are entitled to deal with the Government and such dealing tantamounts to a sufficient consideration because the consideration in such matters is not always required to be in cash. It can otherwise be an act of forbearance of one party or the promisee thereof as defined by Frederic Pollock (supra) while dealing with the definition, of "consideration". The forbearance of the petitioner in restricting his rights to cancel his contract and keep it open is a sufficient consideration and, therefore, the petitioner cannot maintain the present writ petition. In any case the question of consideration has to be gone into in detail and cannot be decided on the basis of affidavits in a writ petition.

47. I have considered the rival submissions and have also perused the record and written submissions submitted by the parties.

48. From the above discussion, two questions emerge for consideration in these cases. First relates to the consequences of withdrawal of the offer before acceptance and the other is the blacklisting of the petitioner in dealing with the State.

49. The general law of contract as contained in Section 5 of the Act preserves a right to the proposer for withdrawing its offer before being accepted as it reads as under :-

5. Revocation of proposals and acceptances.-- A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards,"

50. This general law has been held to be applicable in all cases except where there is a contract to the contrary. In the instant case, as contended by the respondent, a condition had been incorporated in NIT as under :-

"11. The tenders for work shall remain open for acceptance for the period as given below from the date of opening of tenders :

- | | | |
|-------|------------------|--------|
| (i) | for tenders | 45 |
| | to be | days |
| | accepted by | |
| | Executive | |
| | Engineer | |
| (ii) | for tenders | 60 |
| | to be | days |
| | accepted by | |
| | Superintending | |
| | Engineer | |
| (iii) | for tenders | 90 |
| | to be | days |
| | accepted by | |
| | Additional | |
| | Chief | |
| | Engineer/ | |
| | Chief | |
| | Engineer | |
| (iv) | for tenders | 120 |
| | to be | days." |
| | accepted by | |
| | Board/Government | |

51. Thus, it can be seen that there is a condition in NIT that the tenders for work shall remain open for acceptance for specified periods.

52. Learned counsel for the petitioners has impugned this condition on the ground that this condition is unsupportive of any consideration and, therefore, it cannot govern the relationship of the petitioners and the respondents and the general law i.e. Section 5 of the Act will govern the relationship. On first count it sounds that the petitioners may be correct but when viewed from the angle of the arguments of the learned counsel for the respondents that every trader has no right to deal with the Government and it is only the enlisted contractors, who can fill in the tenders and there is an exclusive privilege created in favour of the listed contractors to deal with the Government, and as it places their relationship in special category, a second thought becomes necessary.

53. In none of the cases relied upon by the learned counsel for the petitioners the question of listed contractors was considered. The Courts deciding that such a condition is hit by Section 5 of the Act had no occasion to deal with a case where the contractors were listed with the Government on the specified conditions.

54. In the instant case, the P.W.D. Manual has laid down certain conditions. This Court on the basis of affidavits is not in a position to conclude that there was no consideration and no contract other than the one which was to come into existence on the basis of tenders considered by the respondents.

55. A privilege conferred upon the petitioners by giving them a right to deal with the Government was a kind of consideration which deserves to be examined in detail after leading evidence on these questions. This writ petition could not be converted into a civil suit to examine the conflicting interest of the parties on this aspect of the matter.

56. The respondent-department, in not getting the work in question executed in time, has definitely suffered a loss because with the withdrawal of the tender by the petitioners the respondent-department would be required to issue fresh NIT. This would amount to loss of time and due to loss of time escalation of price also.

57. The term "consideration" has been commented upon in English decisions and one of such comments reads as under :--

"A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other."

58. Now, whether the loss suffered by the State Government was sufficient to be considered as a consideration is a point to be adjudicated upon in these cases and such adjudication is not possible in the present writ petitions. Thus, on the count of lack of consideration the dispute of the validity of the condition No. 11 quoted hereinabove in the NIT is not liable to be adjudicated, cursorily as has been canvassed by the learned counsel for the petitioners. The petitioners should establish in an appropriate forum that the condition No. 11 was without any consideration and, thus, is unenforceable against them.

59. It is also important that the conditions on which the petitioners were registered as contractors be also examined. It may constitute a separate and distinct contract under which the petitioners got a right to deal with the respondent-department. In the process suffered a detriment like condition No. 11 of NIT.

60. Another aspect is the question of responsibility of the contractor. When the contractor is registered with the department a responsibility is taken by him. This responsibility may result in an undertaking of the kind of condition No. 11 or a suffering of giving its right u/s 5 of the Act.

61. In view of the aforesaid discussion, the argument of the learned counsel for the petitioners that the question of alternative remedy should not be gone into is devoid of any force. In the instant case the matter requires adducing of evidence and thereafter the determination of the fact whether the loss suffered by the State on account of withdrawal of the petitioner is a sufficient consideration or for that

matter the right given to the petitioner to deal with the Government is a definite privilege conferred upon the petitioner and thus, tantamounts to consideration. In this view of the matter, it would have been appropriate for the petitioner to go to the civil Court to get this matter adjudicated. This Court is not inclined to adjudicate this matter in the present writ petitions.

62. When this Court is not inclined to interfere in the writ petition and the petitioner is required to face the Civil Court, obviously he will face the question of limitation. In this regard the civil Court will permit the petitioner to maintain the civil suit, if the same is filed within one month from today. This view is taken in conformity with the Supreme Court observations in [Danda Rajeshwari Vs. Bodavula Hanumayamma and others,](#)

63. This Court is aware of the proposition of law that after a long lapse of time the party should not be sent to the alternative forum and the writ petition should be decided on merits. In the instant case, the basic question regarding consideration in relation to Clause 11 of NIT cannot be adjudicated without both the parties having provided with opportunity to lead evidence. Hence, in this backdrop the petitioners are required to go to the civil Court.

64. Now, comes the question of blacklisting of the petitioners. Before the order of blacklisting is passed against the petitioner vide Annex. 15, a notice Annex. 12 was given to the petitioner. It was written in it that the petitioner has withdrawn from the tender. He would not be permitted to take part in the departmental transactions henceforth. Obviously it appears that Annex. 15 is actuated by Annex. 12. But the reason given in Annex. 15 is different than the one given in Annex. 12. Thus, the order of removing the petitioner's name from the list of A Class contractors is not the one which can be said to be after a sufficient and valid notice. The decision of the Delhi High Court in the matter of [Bhim Sain Vs. Union of India,](#) is a sufficient authority on the point and, therefore, the blacklisting of the petitioners deserves to be struck down. However, the department will have a right to issue a proper notice and proceed in accordance with law in that relation.

65. Consequently, the writ petitions are dismissed as regards the question of validity of condition No. 11 is concerned. In relation to the removal of the name of the petitioner from the list of A Class contractors it is observed that the order Annex. 15 removing the name of the petitioners from the list of A Class contractors is quashed with liberty to the department that if law permits that the respondent can enforce any condition against the petitioners then they will have the liberty to do so after issuing a proper notice to the petitioners.