

27<sup>th</sup> October, 2023

# CAN TERMINATION OF CONTRACT AWARDED UNDER A TENDER BE REVOKED/ WITHDRAWN?

## Introduction

1. A contract awarded under a tender is usually guided by the terms and conditions of the tender floated by the tendering authority.
2. Based on the terms of the tender, the successful bidder and the tendering authority enter into a contract.
3. The parties are simultaneously also bound by the Indian Contract Act, 1872 (ICA) in view of the contract/agreement/work order accepted between the parties.
4. The contract, in general and consideration therein must also be guided by the principles of natural justice. [*Hindustan Petroleum Corp. Ltd. vs. Super Highway Services (2010) 3 SCC 321 and Mahabir Auto Stores vs. Indian Oil Corporation (AIR 1990 SC 1031)*]
5. Non-performance or breach of contract may attract remedies like damages, injunctions, specific performance or termination of the contract.
6. The contract may however be terminated only for reasons mentioned in and in the manner prescribed under the contract.
7. Thus, where a legitimate reason exists and the manner of termination has been followed, the termination is said to be valid. However, a contract can only be terminated before the obligations under the same have not been completed.

## Termination as a remedy

1. When a party is aggrieved by any of the actions of the other party and where the terms of the tender and the contract provide for a manner of termination under certain circumstances, the party may terminate the contract, as per the agreed terms.

## Remedy against termination

When the termination is done either without reason and due compliance of procedure, the contract provide for a

party aggrieved by the termination may challenge such termination before a court of law, who may set aside the termination on a finding that the termination was improper or was beyond the terms of the tender/contract or was issued by an authority not prescribed to do so, etc. and also direct the party to pay damages on account of wrongful termination. [*State of Madhya Pradesh vs. M/s. Recondo Limited, Bhopal (1989 SCC OnLine MP 156)*]

## Revocation of termination

1. An ancillary issue that arises is whether a termination of a contract can be revoked/withdrawn.
2. Revocation of termination essentially means erasing the stage of termination and reverting back to the execution of the contract, as if the termination and ending of the contractual relationship never occurred between the parties.
3. The issue as to whether the termination can at all be withdrawn has been the constant bone of contention before the Hon'ble Courts. In *Harris and Russel Ltd. vs. Slingsby [1973] 3 All ER 31*, it was contended that termination notice could be withdrawn at any time before the expiry of the notice period mentioned in the termination letter. However, the Court held that once a notice of termination has been issued, it cannot be withdrawn unilaterally and a notice of termination can be revoked only through agreement between both the parties deciding mutually that the effect should not be given to termination.
4. By an agreement in writing, the parties may decide to reinstate the terminated contract.
5. It may be clarified here that revocation of termination notice cannot be termed as novation simply because novation refers to substitution of the old



Amit Meharia

Managing Partner, MCO Legals

LLB (Hons) King's College London, Solicitor (Supreme Court of England & Wales)

## Expertise:

Corporate Due Diligence & Corporate/Commercial Arbitration

✉ amit.m@mcolegals.co.in



Abinash Agarwal

Senior Associate, MCO Legals

LLB., Faculty of Law, University of Delhi, B.Com(Hons.) University of Delhi

## Expertise:

Civil Litigation, Commercial Arbitration, Legal Due Diligence, Legal Compliances

✉ abinash.a@mcolegals.co.in

contract with a new contract where the obligations of the party also change. However, in case of revocation of termination notice, the same contract is reinstated and the obligations of the parties stand as they were prior to the termination. The decision to make changes in the original contract after the revocation of the termination is entirely circumstantial and depends on the discretion of the parties.

6. In *Kalyanasundara Nadar vs. Muthuraman* (1967 SCC OnLine Mad 380) on an argument that if the termination is not terms of the contract, then the termination itself would be a breach of contract, the Court observed that where the action of termination is ultra vires, it may be declared as null and void and the aggrieved party may be directed to continue in the manner as it were before the termination.
7. In *Sanjay Agarwal vs. Union of India* (2019 SCC OnLine Del 11723, the Court found the advice of the Law Ministry to be totally flawed which had observed that if a contract does not stipulate revival after termination, then the contract cannot be revived. The Court held that even in the absence of any specific provision under the contract or the ICA, a party is enabled to revoke its decision of termination when it comes to a finding that warrants so at a later point in time. It is open for a party to reconsider its decision. However, the foreign courts have also cautioned that even in cases of purported termination, a declaration for the contract to subsist must be made only under special circumstances. [*Francis vs. Kuala Lumpur Councillors*, (1962) 1 W.L.R. 1411]
8. The termination may also be revoked by an order of court where the court finds that the termination was illegal and an administrative overreach. In *Aakash Exploration Services vs. Oil and Natural Gas Corporation* (2019 SCC OnLine Guj 7040) the Court set aside the notice of termination and directed the parties to continue with the work in terms of the contract.

## Conclusion

1. The decisions of the court and general principles that guide tender and contracts there under point to a clear conclusion that revocation of the termination notice is possible where:
  - a. court finds that the termination was improper, or
  - b. parties mutually agree that the termination notice will not be given effect to, or
  - c. the termination itself was bad in law.
2. If the aggrieved party decides to challenge the termination, then the court may award damages on the ground of wrongful termination. On the other hand, where the parties go on to accept mutually that the termination will be revoked, then it cannot be challenged in court. However, a more concerning question still remains as to what shall be the consequences of revocation of termination on the intervening period when the termination was actually in effect. This certainly requires judicial clarifications by the Hon'ble Courts.
3. Where the party unilaterally revokes the termination notice, then again it is in the hands of the aggrieved party to either challenge it or accept it. If a challenge is made then courts have held that unilateral revocation of termination is not permissible.
4. The rule of party autonomy will apply here.
5. Apparently, though revocation of termination can be done but the underlying difficulties pose a serious threat to such actions, which are even justifiable for non-revocation of termination. One such scenario can be damages claimed during the intervening period.
6. Thus, it shall be prudent to incorporate necessary clauses in contracts, in anticipation of scenarios, when the revocation of termination maybe possible.