

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-13492-2015

Reserved on:- 22.09.2015

Date of decision:- 19.10.2015

VNS Infrastructure Pvt. Ltd.
Versus
...Petitioner

State of Haryana and others
...Respondents

CWP-27700-2013

Rajbir Singh
Versus
...Petitioner

State of Haryana and others
...Respondents

CWP-4-2015

Rajvir Chauhan
Versus
...Petitioner

State of Haryana and others
...Respondents

CWP-83-2015

M/s Om Minerals
Versus
...Petitioner

State of Haryana and others
...Respondents

CWP-164-2015

M/s Jai Yamuna Ji Developer
Versus
...Petitioner

State of Haryana and others
...Respondents

CWP-327-2015

M/s Markandeshwar Construction Co.

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-470-2015

M/s MSK (Joint Venture)

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-2646-2015

Dkrrish Builders Pvt. Ltd.

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-13056-2015

M/s Zelkova Buildcon Pvt. Ltd.

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-13068-2015

M/s Charites Real Estate Pvt. Ltd.

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-13500-2015

Antheia Properties Pvt. Ltd.

...Petitioner

Versus

State of Haryana and others

...Respondents

CWP-16479-2015

Sanjay Jaglan

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

1. Whether reporters of local papers may be allowed to see the judgement?
2. Whether to be referred to the reporters or not?
3. Whether the judgement should be reported in the digest?

Present: Mr. Sanjay Kaushal, Senior Advocate,
with Mr. Sumeet Goel, Advocate,
and Mr. Manav Bajaj, Advocate,
for the petitioners in CWPs-13492-13056-13068-13500-2015.

Mr. Ashwani Chopra, Senior Advocate,
with Mr. Sushil Jain, Advocate,
and Ms. Roopa Pathania, Advocate,
for the petitioners in CWPs-27700-2013, 164-327-16479-2015.

Dr. Anmol Rattan Sidhu, Senior Advocate,
with Ms. Shalini Attri, Advocate,
for the petitioner in CWP-4-2015.

Mr. Jagmohan Bansal, Advocate,
for the petitioner in CWP-83-2015.

Mr. Pardeep Singh Poonia, Advocate,
for the petitioner in CWP-470-2015.

Mr. S.K. Monga, Advocate,
for the petitioner in CWP-2646-2015.

Mr. Amar Vivek, Additional Advocate General, Haryana.

Mr. Brijeshwar Singh Kanwar, Senior Standing Counsel,
Mr. Vivek Singla, Advocate,
with Mr. Shivoy Dhir, Advocate,
and Mr. Piyush Khanna, Advocate,
for the Union of India.

* * * *

S.J. VAZIFDAR, A.C.J.

These petitions raise the same questions of law and require a
consideration of the import and the interpretation of similar agreements and
are, therefore, disposed of by this common order and judgement.

2. The petitioners have sought a writ of certiorari declaring clause 3 (i) of a Letter of Intent (LoI) issued in its favour dated 03.01.2014 as illegal and unreasonable and quashing the same. The petitioners have also sought an order rewriting the clause.

The clause stipulates that the period of the contract shall commence with effect from the date of the grant of environmental clearance by the competent authority or on the expiry of a period of 12 months from the date of the LoI, whichever is earlier. The petitioners contend that the words 'whichever is earlier' ought to be substituted with the words 'whichever is later'. All the petitioners contend that mining operations can commence only upon their obtaining environmental clearance and that, therefore, the period of the contract ought to commence from the later of the two dates, namely, the grant of environmental clearance or on the expiry of a period of 12 months from the date of the LoI.

This proposition was also sought to be supported on the basis of The Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the Act) and The Haryana Minor Mineral Concession, Stocking, Transportation of Minerals and Prevention of Illegal Mining Rules, 2012 (hereinafter referred to as the Rules). The petitioners in some of the petitions have also challenged the validity of Rules 55, 62 and 64 as being arbitrary and onerous and repugnant to the provisions of Section 15 of the Act.

3. We have rejected all the contentions. These petitions are not a mere afterthought. Nor are they a mere attempt to wriggle out of the contractual obligations. They are a blatant and an unfair attempt to enhance the consideration payable to the petitioners under a concluded contract by

retaining the benefits under the contract and simultaneously seeking to amend the clause by rewriting it in a vital manner. To allow this petition would be a travesty of justice – unfair not only to the State of Haryana but to all other bidders and to potential bidders. The petitioners entered into the agreements fully aware and conscious of the clause. They have not rescinded and do not intend rescinding the contract. They have derived and continue to derive benefit under the contract. They, however, want clause 3(i) to be amended. This is entirely impermissible. The clause is neither arbitrary, nor unreasonable nor unfair. It is a usual clause in several agreements.

Even if we had held otherwise, it was certainly not open to us to rewrite the clause altering in a substantial manner the contractual rights of the parties. Further, even if we had rewritten the clause as suggested by the petitioners, it would have been imperative to set aside the tender process and to invite fresh tenders on the basis of the amended clause. Had the amended clause been in existence others may have bid and those who had bid may have submitted higher bids.

We have also rejected the submissions based on the provisions of the Act.

4. We will for convenience refer to the facts from CWP-13492-2015.

Respondent No. 2 is the Director, Mines and Geology Department, Haryana; respondent No. 3 is the Assistant Mining Engineer, Department of Mining and Geology, Haryana and respondent No. 4 is the Union of India.

5. Respondent No. 1 issued an auction notice on 30.11.2013 notifying an auction of four blocks/units of minor minerals in the State of

Haryana. The petitioner's bid of Rs. 51.04 crores against the reserve price of Rs. 13.10 crores being the highest was accepted and respondent No. 2 issued an LoI dated 03.01.2014 in its favour. The relevant sub clauses of clause 3 and clause 5 of the LoI read as under:-

"3. The State Government having accepted the aforementioned highest bid offered by you, the Department is pleased to issue this Letter of Intent (LoI) in your favour in respect of the mining unit/area namely "Sonepat Unit-3" subject to the following terms and conditions:-

(i) The period of contract shall be 09 years and the same shall commence with effect from the date of grant of environmental clearance by competent authority or on expiry of a period of 12 months from the date of this communication of acceptance of highest bid/issuance of 'Letter of Intent', whichever is earlier;

(iii) The amount of the highest successful bid i.e. Rs. 51,04,00,000/- [Rupees Fifty One Crores Four Lac) shall be the "Annual Contract Money" payable by you as the contractor in the manner prescribed in the contract agreement to be executed on form MC-1 appended to State Rules;

(iv) The above said annual contract money shall be increased at the rate of 25% on completion of each block of three years. Accordingly, the year wise amount of the annual contract money shall be as per details given below:-

<i>Sr. No.</i>	<i>Year of the Contract Period</i>	<i>Annual Contract Money</i>
<i>1.</i>	<i>First Year</i>	<i>Rs. 51,04,00,000/-</i>
<i>2.</i>	<i>Second Year</i>	<i>Rs. 51,04,00,000/-</i>
<i>3.</i>	<i>Third Year</i>	<i>Rs. 51,04,00,000/-</i>
<i>4.</i>	<i>Fourth Year</i>	<i>Rs. 63,80,00,000/-</i>
<i>5.</i>	<i>Fifth Year</i>	<i>Rs. 63,80,00,000/-</i>
<i>6.</i>	<i>Sixth Year</i>	<i>Rs. 63,80,00,000/-</i>
<i>7.</i>	<i>Seventh Year</i>	<i>Rs. 79,75,00,000/-</i>
<i>8.</i>	<i>Eighth Year</i>	<i>Rs. 79,75,00,000/-</i>
<i>9.</i>	<i>Ninth Year</i>	<i>Rs. 79,75,00,000/-</i>

(v) As per the terms and conditions of the grant, you are liable to deposit Rs. 12,76,00,000/- i.e. equal to 25% of the annual bid amount as “security deposit” and Rs. 4,25,33,334/- on account of one month’s advance contract money. Out of which you have already deposited an amount of Rs. 05,11,00,000/- (sixty thousand excess) i.e. equal to 10% of the annual bid amount as ‘initial bid security’ at the fall of hammer. The balance amount of Rs. 07,65,00,000/- of the bid security i.e. 15% of the annual bid amount along with Rs. 4,25,33,334/- on account of one month’s advance contract money shall be deposited before commencement of the mining operations or before expiry of the period of 12 months, whichever is earlier;

(xi) After execution of agreement, either before commencement of the mining operation or before expiry of the period of 12 months from the date of issuance of this LoI, whichever is earlier, in case of failure to deposit the balance 15% amount towards security [as required under clause (v) above] the acceptance of bid/issuance of LoI/execution of agreement shall be deemed to have been revoked and 10% amount deposited towards as initial bid security at the time of auction shall stand forfeited. Further, un-paid 15% amount towards security shall be recovered as arrears of land revenue and you shall be debarred from participation in any subsequent bids for a period of 5 years;

(xii) You shall be liable to deposit the contract money in advance at monthly intervals as per provisions of contract agreement i.e. from the date of commencement of the contract agreement;

(xvii) Further, the actual mining will be allowed to be commenced only after prior Environmental Clearance is obtained by you as the LoI holder/mining contractor for the Mining Blocks from the Competent Authority separately or jointly for the mining unit as permitted by the Competent Authority required under EIA notification dated 14.09.2006, as amended from time to time by the MoE&F, GoI and guidelines/circulars issued in this behalf;

(xxv) The contractor shall not undertake any mining operations in the area granted on mining contract without obtaining requisite permission from the competent authority as required for undertaking mining operations under relevant laws.

5. Please note that one Sh. Rajbir Singh had filed a CWP bearing No. 27700 of 2013 before the Hon'ble Punjab & Haryana High Court challenging the conditions of the auction notice and the rules relating to payment of Rent and Compensation to the land owners and the time of 12 months allowed to the highest bidders/LoI holders for obtaining the Environmental Clearance as per EIA notification of the Ministry of Environment & Forests, Government of India. While the Hon'ble High Court did not restrain the auction proceedings and held that the auctions may be held but it has also directed vide its orders dated 17.12.2013 that the same shall be subject to final outcome of the above said CWP. Accordingly, this acceptance/LoI is being issued subject to the outcome in CWP No. 27700 of 2013 pending before Hon'ble Punjab & Haryana High Court."

6. In CWP-27700-2013, the petitioner challenged clause 1 of the LoI in that case which was similar to clause 3(i) of the LoI issued in CWP-13492-2015. Clause 1 is as follows:-

"The terms and conditions of the auction:

1. The period of contract shall commence w.e.f. the date of grant of environmental clearance by competent authority as required under EIA notification dated 14.09.2006 and as amended from time to time by the MoEF, GoI or on expiry of a period of 12 months from the date of acceptance of highest bid/issuance of "Letter of Intent" (LoI) which ever is earlier."

7. By a letter dated 20.01.2014, the petitioner commenced the process for obtaining the environmental clearance by seeking a determination of the Terms of Reference for undertaking a detailed

Environment Impact Assessment (EIA) study for the purpose of obtaining environmental clearance in accordance with the provisions of the EIA notification of the year 2006. The petitioner had submitted the information in the prescribed format alongwith a pre-feasibility report. The proposal was considered by the Reconstituted Expert Appraisal Committee in its meeting held on 20/21.03.2014.

8. The Government of India, Ministry of Environment and Forests by a letter dated 09.05.2014 acknowledged these facts, noted that the petitioner's proposal was in respect of a sand mining project confined to excavation of sand from the proposed site and referred to the nature of the mining operation. By the said letter, the Government of India prescribed fifty six Terms of Reference for undertaking a detailed EIA study. An additional seven general points were also mentioned constituting the directions to be complied with by the petitioner.

9. It is not necessary to set out the entire process involved leading to the environmental clearance being granted. Suffice it to note that the petitioner's case is that the grant of the environmental clearance is not in its hands once it is duly made and that the environmental clearance takes about two years even if the application is duly made. In support of the contention that the environmental clearance is almost always expected to take two years, the petitioner relied upon an affidavit filed by the State of Haryana in the Supreme Court in the case of *Deepak Kumar Vs State of Haryana and others* (SLP-19628-29-2009). The affidavit stated that the process of obtaining prior environmental approval of the competent authority is time consuming and that the State of Haryana faced several constraints in the process of mining and seeking environmental approvals with the CEC.

The petitioners, therefore, contend that the respondents themselves admit that it takes a period of about two years to obtain the environmental clearance.

10. In CWP-13492-2015, from which we have stated the facts, the environmental clearance was received on 03.08.2015 i.e. within a period of one year and seven months from the date of the application for the Terms of Reference dated 20.01.2014. However, as pointed out by Dr. Sidhu, the learned senior counsel appearing on behalf of the petitioner in CWP-4-2015, this was after several orders were passed by this Court and in view of this Court having virtually monitored the progress in the matter.

11. We will, however, for the purpose of this judgement assume that at the relevant time it would have taken a period of about two years to take the environmental clearance. It would make no difference. In fact, the said affidavit filed by the State of Haryana in the Supreme Court supports the respondents' case and not the petitioners' as we will demonstrate later.

12. The learned counsel appearing on behalf of the petitioners submitted that the stipulation in the LoI that the period of the contract shall commence with effect from the date of the grant of environmental clearance or on expiry of 12 months from the date of the LoI's 'whichever is earlier' is unreasonable and unfair. Each of the LoI's stipulates the period of the contract. For instance, the LoI in CWP-13492-2015 is for a period of 09 years. They contend that this period of 09 years gets curtailed to the extent of the time taken by the authorities from the date of the application for environmental clearance till the environmental clearance is granted by the authorities concerned. This they contend is wholly unfair and has the effect of curtailing the contract period for no fault of theirs.

13. The submission is not well founded. The petitioners were not unaware of the term. They were not taken by surprise. They participated in the bidding process. They never raised an objection. They did not even contend that for some reason their attention was not drawn to this provision. They entered into the contract with open eyes. They accepted the benefit of the contract. They had started working the contract and derived benefit thereunder. They cannot be permitted to approbate and reprobate.

14. Mr. Amar Vivek's reliance upon the last sentence in clause 5 and upon clause 26 of the terms and conditions of the auction notice in CWP-4-2015 is well founded. They read as under:-

“5. -----Further the bidders are also expected to have gone through the terms and conditions of auction notice and also the applicable Acts and Rules for undertaking mining.

26. The mining contractor shall get prepare a “Mining Plan” along with the Mine Closure Plan (Progressive & Final) from the Recognised Qualified Person as per chapter 10 of the “Haryana Minor Mineral Concession, Stocking, Transportation of Minerals and Prevention of Illegal Mining Rules, 2012” for mining area granted on contract. The contractor shall not commence mining operations in any area except in accordance with such Mining Plan duly approved by an officer authorized by the Director, Mines & Geology, in this behalf. Further, the actual mining will be allowed to be commenced only after prior Environmental Clearance is obtained by the LoI holder/mining contractor for the Mining blocks area from Competent Authority as required under notification dated 14.09.2006 issued by the MoE&F, GoI or as amended from time to time.”

15. There is nothing unusual about the impugned clauses. Any one with any experience with such contracts including those unrelated to mining

would be familiar with such clauses. It is for the parties making the offer including bidders at an auction to assess the time that they are likely to take in obtaining or complying with a condition precedent and to submit their bids accordingly.

16. There are several contracts which are dependent upon the happening or not happening of an event. Chapter III of the Indian Contract Act deals with contingent contracts. Nothing prevents the parties from agreeing to the payment of the entire consideration in advance even in the case of contingent contracts. It is possible that the contingency may not arise. In that event, the party that paid the amount(s) in advance would have to adopt proceedings for recovery of the same in the event of the contract being frustrated. The mere requirement to make payment in advance does not render a contract unfair or unreasonable much less void. Whether the parties are entitled to a refund or not would depend upon the nature of the contract and the agreement between the parties.

17. The period of 12 months in clause 3(i) of the LoI is at the highest an indication of the approximate time that may be taken for the environmental clearance. It is a bargain between the parties that the contract shall be deemed to have commenced upon the expiry of the period of 12 months irrespective of whether the environmental clearance was obtained by them or not. By this provision, the respondents do not by any stretch of imagination represent or hold out that the environmental clearance would be obtained within 12 months. The period of 12 months is what the respondents were willing to wait till. The petitioners in any event would not have been justified in presuming any assurance or even a suggestion by the respondents that 12 months is the outer limit for obtaining the environmental clearance.

The State of Haryana could not have made a representation in this regard as it has nothing to do with it.

18. This was a commercial decision. It is, if not obvious, at least reasonable to presume that the bidders who are fully conscious of the implication and importance of the date of commencement of the contract stipulated in clause 3(i) or clause 1, as the case may be, would have taken the same into consideration while working out and submitting their financial bid. In any event, they ought to have done so. If they failed to do so, it was entirely at their peril. The respondents cannot possibly suffer for a lapse on the petitioners' part. The bids were in several crores of rupees. Each of these bids was several times higher than the reserve price. These were not modest, simple or small time bidders for petty works. Each of them has dealt with a high stake commercial venture. It is likely that this was not the first enterprise of any of the bidders. Not that it would make any difference even if it was, for entrepreneurs seldom take these decisions without the assistance of others.

19. We would in fact be doing the petitioners and their advisors business acumen no credit by assuming that they would not have considered crucial aspects relating to the period of the commencement of the contract before submitting the bids. They would obviously have made an assessment of their application for environmental clearance. They would have made an assessment of the period likely to be taken in obtaining the environmental clearance. It is elementary that any bidder would structure the financial bid after assessing the time likely to be taken in obtaining the environmental clearance. The period of time would vary from bidder to bidder. The financial bid would correspondingly be structured depending upon the

assessment in this regard. The less time expected for the environmental clearance, the higher the bid. A bidder who expects the environmental clearance to take one year would bid a higher amount than a bidder who expects it to take three years. He thereby submits his financial bid considering that he would be entitled to carry on mining operations for only seven years. His bid would accordingly be lower.

20. To alter the contract, as prayed for by the petitioners, would entitle the bidder to an extraordinarily unfair advantage. On the one hand, his financial bid would be based on his ability to operate the mines for seven years and on the other hand, by virtue of the period for mining being extended by the Court re-writing the clause, he would be entitled to carry out the mining operation for a longer period. In other words, although his financial bid was submitted for mining operations for a period of seven years, he would upon the contract being re-written get the benefit of carrying out mining operations for nine years. This would be grossly inequitable and unfair to the party inviting the bids – in this case the State of Haryana.

21. Thus, merely because the environmental clearance took more than 12 months it would make no difference whatsoever to the contractual rights of the parties. The petitioners have gone ahead with the contract. They have not chosen to rescind the same. They cannot demand a variation of a particular contractual term.

22. Even a case for rectification of the contract would be riddled with disputed questions of fact. An action for rectification under the Specific Relief Act is not merely a question of law. It is a mixed question of law and of fact in cases such as these. It would be difficult to determine such an action in a petition under Article 226 of the Constitution of India.

23. It was then contended that the contract was wholly un-reasonable and unfair for in a given case or at least theoretically it is possible that the entire amount would become payable without the bidder being able to carry out mining operations even for a day. It was contended that such a situation would arise if the environmental clearance is delayed by the Union of India beyond the date of the last installment and for which the bidder is not at fault at all. The petitioners, therefore, asked us to consider this clause in the abstract and in a hypothetical situation where the Union of India unnecessarily and unjustifiably delays granting the environmental clearance and where the bidder is not at fault in any manner whatsoever.

24. Even in such a situation, a bidder is not without a remedy. If it is impossible to obtain environmental clearance for no fault of any party including the Union of India, it would be open to the petitioners to file an action based on Section 56 of the Indian Contract Act, 1872 contending that the contract stands frustrated. Indeed several issues would arise in such a case including whether it is a case of frustration or merely of commercial impossibility.

25. If the environmental clearance takes unduly long, the bidders would have their remedy. The nature and the extent of the remedy would depend upon the facts and circumstances of each case. There may be cases where the Government of India is at fault. There may be cases where the party seeking the environmental clearance is at fault. There may be cases of contributory negligence. The given set of facts may entitle the petitioners to raise the plea of frustration. The action in that regard would in turn require a consideration as to whether it was a case of commercial impossibility or frustration as contemplated in Section 56 of the Indian Contract Act. It can

hardly be suggested that if the party seeking the environmental clearance is entirely at fault, it would be liable to pay nothing till the termination of the contract by act of parties or by efflux of time.

26. Moreover, in such a hypothetical situation which we are called upon to assume viz that the Union of India is at fault and that the fault is inexcusable, the bidder would always have a remedy against the Union of India for the same. The respondents, who invited the bid, cannot be denied the benefit of the contractual obligations undertaken by the petitioners conscious of the contingencies which are now relied upon in support of their contentions.

27. In this view of the matter, it is not necessary for us to consider the submissions made on behalf of the respondents that the affidavit filed on behalf of the State of Haryana in the Supreme Court has been mis-construed. In their affidavit in reply, they have attempted to establish as to why the period of two years mentioned by them in the said affidavit cannot be considered relevant in the present case. For instance, it was contended that the affidavit was in the context of the State of Haryana itself applying for the environmental clearance. However, in view of our findings, it is not necessary to express any opinion in this regard.

28. In any event, the affidavit filed by the State of Haryana in the Supreme Court to the effect that the environment clearance takes about two years far from supporting the petitioners' case militates against it. We will assume that the petitioners were aware of this affidavit before submitting their bids and relied upon the same while submitting their bids. In that event, it is obvious that the petitioners would have taken the same into account while structuring their financial bid. It is impossible to accept that a party

who believes that it is not going to get the environmental clearance for two years would submit a financial bid on the basis that it would be entitled to carry on mining operations even during those two years. This is not the normal course of events or business dealings.

29. The reliance upon the elaborate procedure stipulated, inter alia, in the notification for the year 2006 is of no assistance to the petitioners either. It would in fact indicate that the petitioners were fully aware of the fact that the environmental clearance would take long. More important, it would indicate the fact that the petitioners were aware that there could be no fixed date for obtaining the environmental clearance. Further, still it would establish that the State of Haryana was not really concerned with or responsible for the same. The matter was entirely between the petitioners and the Union of India.

30. There indeed cannot be any fixed date for the commencement of the contract. Nor is it necessary for there to be one for there to be a valid contract. It is not unknown that businessmen make offers based on projections. That is done day in and day out. That has been the course of business over the years. There is nothing unusual about the clause in question.

31. Even if we had upheld the petitioners' contention that the clause is unreasonable, unfair and invalid, it would not have been open to us to alter the term of the contract by substituting the words "whichever is earlier" with the words "whichever is later". In the event of the clause being quashed and re-written, we would have undoubtedly set aside the entire tender process and directed the respondents to invite fresh bids. To re-write a condition of the contract introducing such a vital change would be unfair to various other

parties who may not have submitted their bids in view of the said clause. Even the unsuccessful bidders may have submitted higher bids had they known that the clause would be amended. Such parties should be given an opportunity of submitting bids on the basis of the amended terms and conditions. Re-writing such a term would constitute a post-contractual alteration which is impermissible.

32. The learned counsel appearing on behalf of the petitioners, however, contend that such a result ought not to follow in those petitions which relate to LoI's with the said clause 5. We do not agree. Clause 5 makes no difference whatsoever. Even if the respondents had agreed to the same, we would not have given our imprimatur to it for re-writing a clause introducing such a vital change in the contractual terms would be unfair to the other bidders for the same reason. It would also be impermissible for the same reason, namely, that it constitutes a post-tender alteration of a vital term. Even assuming that no other bidders are interested in bidding, it would make no difference for even the persons who submitted their bids may well have enhanced their bids had they been informed in advance of the amended term. If the respondents amend the term on their own, it would be a different matter and be open to challenge by any party.

33. To accept the petitioners' contention that the words 'whichever is earlier' ought to be corrected to read 'whichever is later' would bring in uncertainty and create utter chaos for the State of Haryana – the party inviting the bids. There is no justification whatever to place it in such a predicament. The time taken to obtain environmental clearance would vary from bidder to bidder. There would be no common yardstick then to evaluate the bids in such cases from the perspective of time. The successful

bidder may not obtain the environmental clearance for an unduly long period of time for any reason. The State of Haryana would then be required to wait for an uncertain period of time to be paid under the contract. The party inviting the bids is not concerned with how long the bidders take to get the environmental clearance. It is interested in realizing the best price for the mineral mining concession granted by it. It has nothing to do with the bidders obtaining environmental clearance – a matter solely between the bidder and the Union of India. It would in fact have been open to the State of Haryana not to grant any moratorium. It could have merely invited bids for the grant of mining concessions for a fixed duration. There would have been nothing illegal, arbitrary or unreasonable in that. We do not see how the provision of a moratorium of 12 months makes any difference.

34. In any event, we do not consider clause 3(i) or 1, as the case may be, to be either unfair or arbitrary. The contention that the said clauses 1 and 3(i) are unreasonable or unfair is, therefore, rejected.

35. This brings us to the contention on behalf of the petitioners that these clauses are contrary to and in violation of the provisions of the said Act and the said Rules.

36. Mr. Kaushal, the learned senior counsel appearing on behalf of the petitioner in CWP-13492-2015 submitted that the liability to pay any amount for mining operations can commence only upon the mineral actually being extracted. The argument was based on Section 15(3) of the Act which provides that the holder of the mining lease or any other mineral concession granted under any rule made under sub section (1) shall pay royalty or dead rent, whichever is more, in respect of minor minerals 'removed or consumed by him'. In other words, according to him, any amount is payable only in

respect of minor minerals actually removed or consumed by the holder of the mining lease or any other mineral concession.

He referred to clause 3(xxv) of the LoI which provides that a contractor shall not undertake any mining operations without obtaining requisite permission from the competent authority as required for undertaking mining operations under relevant laws. One such requirement is obtaining the environmental clearance. Thus, according to him, mining operations could not have been undertaken till the environmental clearance was obtained and accordingly in view of sub section (3) of Section 15, no amount was payable till the environmental clearance was obtained for till then the petitioners could not have removed or consumed the minor minerals.

37. The submission is not well founded. The error of this submission is established not on account of Mr. Amar Vivek's submission, but paradoxically by Mr. Kaushal's successful rebuttal thereof. It is appropriate, therefore, to examine Mr. Amar Vivek's unsuccessful attempt to answer the submission and Mr. Kaushal's successful rebuttal thereof. We will thereafter demonstrate how Mr. Kaushal's rebuttal establishes the fallacy of his submission.

38. Mr. Amar Vivek contended that the amount(s) payable under the LoI constituted the dead rent which is chargeable under the said Rules made in exercise of powers under sub section (1) of Section 15. He submitted that by virtue of the LoI, the petitioner is the holder of "any other mineral concession" and is as such liable to pay dead rent at the rate prescribed by the Rules framed by the State Government in respect of minor minerals. Section 15(1-A)(g) entitles the State Government to make rules

inter-alia fixing the dead rent. The Rules in turn fix the dead rent (Rule 56).

He relied upon Section 9A.

39. Sections 9A and 15 in so far as they are relevant read as under:-

“9-A. Dead rent to be paid by the lessee :-

(1) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall notwithstanding anything contained in the instrument of lease or in any other law for the time being in force, pay to the State Government, every year, dead rent at such rate as may be specified, for the time being, in the Third Schedule, for all the areas included in the instrument of lease:

Provided that where the holder of such mining lease becomes liable, under Section 9, to pay royalty for any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area, he shall be liable to pay either such royalty, or the dead rent in respect of that area, whichever is greater.

15. Power of State Governments to make rules in respect of minor minerals:-

(1) The State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1-A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

.....

(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;

(h) the manner in which rights of third parties may be protected (whether by way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations.

(3) The holder of a mining lease or any other mineral concession granted under any rule made under sub-section (1) shall pay royalty or dead rent, whichever is more in respect of minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals:

Provided that the State Government shall not enhance the rate of royalty or dead rent, whichever is more in respect of any minor mineral for more than once during any period of three years."

40. Mr. Amar Vivek's submission is not well founded for two reasons.

Firstly, Section 9A does not apply to mineral concessions in respect of minor minerals in view of Section 14 which reads as follows:-

"14. [Sections 5 to 13] not to apply to minor minerals:-

The provisions of [Sections 5 to 13] (inclusive) shall not apply to [quarry leases, mining leases or other mineral concessions] in respect of minor minerals."

41. Secondly, as rightly submitted by Mr. Kaushal, the amounts payable under the LoI do not constitute dead rent, that dead rent is payable only in respect of the leases and that dead rent is alien to contracts such as those contained in the LoI. The amounts payable under the LoI fall within the ambit of the words "other charges" in Section 15(1-A)(g) of the Act.

Section 15 (1-A)(g) entitles the State Government to make rules for fixing

and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable. The amounts payable under the contract fall within the ambit of the words 'other charges' in Section 15(1-A)(g). Mr. Kaushal's submission that the amounts payable under the contract do not fall within the meaning of the term dead rent is correct. They fall within the meaning of the words 'other charges' in Section 15(1-A)(g).

42. Rule 2(x) and (xi) of the Rules, which support this view, read as under:-

"2. Definitions :-

(1) In these rules, unless the context otherwise requires-

(x) 'contract money' means the amount to be paid by the contractor(s) for raising the mineral(s) from the area granted on contract;

(xi) 'dead rent' means the minimum amount payable in a year by the person granted a mining lease under these rules irrespective of the fact as to whether or not he operates/ could operate the area fully or partly."

Thus, the Rules themselves make a distinction between contract money and dead rent.

43. Further, Part II of the Rules deals with the 'Grant of Mineral Concessions'. Chapter - 3 thereof deals with the 'Grant of a Mining Lease' and Chapter - 4 deals with the 'Grant of Mining Contracts'. Thus, the Act and the Rules themselves make a distinction between contracts and leases and correspondingly between contract money and dead rent. The amounts payable under the LoI constitute contract money and not dead rent.

The basis of Mr. Amar Vivek's answer to Mr. Kaushal's submission is, therefore, erroneous. The amounts payable under the LoI do not constitute dead rent and, therefore, the provisions of the Act relating to dead rent can be of no assistance in meeting Mr. Kaushal's submission.

44. The fallacy in Mr. Kaushal's submission is, however, established by reason of our having accepted his contention that the amounts due under the LoI are not dead rent. If that be so, Mr. Kaushal's submission that the amounts payable under the LoI are contrary to Section 15(3) is not well founded. His contention, based on Section 15(3), was that amounts are payable under a contract only upon the holder of the mineral concession removing or consuming the minor minerals. Section 15(3), however, applies only to "royalty and dead rent" and not to "other charges". Amounts due under the LoI as we held earlier constitute "other charges". Thus, Mr. Kaushal's submission based on Section 15(3) even if well founded with respect to leases and accordingly to royalty and dead rent does not hold good with respect to contracts and consideration/contract money payable thereunder. We express no opinion regarding Mr. Kaushal's submission even with respect to royalty and dead rent.

45. Section 15, therefore, entitles the State Government to make rules in respect of the other charges. The question then is whether the State Government has made such rules. It has. The rules entitle the State Government to fix the amounts payable under a contract entered into by it with others such as the petitioners. Rule 22(1) which falls within Chapter – 4 relating to the Grant of Mining Contracts and Rule 55(3)(iii) reads as under:-

“22. Grant of mining contracts by competitive bidding:-

*(1) The minor mineral deposits, where the Government decides to grant the mineral concession in respect of such area in the form of a contract, may be granted on mining contract for a period not less than seven years but not exceeding ten years **following a competitive bidding process** as prescribed under chapter 7 of these rules.*

(emphasis supplied)

55. Payments of the bid amount:-

(3) The process for completion of the various stages of payment as specified under sub-rule (2) above shall be as follows:

(iii) The letter of intent holder shall deposit the balance amount of Bid Security i.e. equal to 15% of the annual bid amount before commencement of mining operations or before expiry of the period allowed, which shall not be more than twelve months, whichever is earlier, along with an additional amount equal to one month's dead rent/ contract money."

46. The respondents by holding the auction followed Rule 22(1) as they granted the mineral concession by following a competitive bidding process.

47. Mr. Chopra, however, contended that Rule 55(3)(iii) is violative of Section 15(3) as it makes the holder of an LoI liable to pay amounts even before the minor minerals are removed or consumed by him. The challenge to Rule 55(3)(iii) is unfounded for the same reasons which we furnished while rejecting Mr. Kaushal's submission that clause 3(i) is contrary to Section 15(3). Section 15(3) does not deal with amounts due under a contract which is what the LoI is. In that event, the submission that the liability to pay arises only upon the minerals being removed or consumed even if accepted would be restricted only in respect of royalty or dead rent for sub section (3) of Section 15 does not refer to any other kind of payment.

The payment in respect of a contract is neither royalty, nor dead rent, on the petitioners' own case. The liability to pay only upon minerals being removed or consumed by the bidder would not, therefore, arise where the payments are to be made under contracts such as in the cases before us. The petitioners, therefore, have furnished a complete answer to their submission on the basis of their own contentions. Mr. Kaushal had submitted that the amounts payable under the contract falls within the expression 'other charges' contained in Section 15(1-A)(g).

48. To sum up therefore, the power of the State of Haryana to stipulate amounts in a contract to wit to charge contract money arises as follows: Under Section 15(1), the State Government may by notification make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Contracts fall within the expression 'other mineral concessions'. Under Section 15(1-A)(g), such rules may provide, inter alia, for fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable. The amounts payable under the contract do not constitute rent, royalty, fees, dead rent or fines, but fall within the ambit of the expression 'other charges'. The amounts payable under the contract and the time within which and the manner in which they are payable are fixed pursuant to the powers under Section 15(1-A)(g). Rule 22(1)(2) entitles the State Government to grant the mineral concession by following a competitive bidding process as prescribed under Chapter 7 of the Rules. The State of Haryana did precisely that by inviting competitive bids.

49. The challenge to Rule 55(3) is, therefore, rejected. The contention that clauses 3 and 1 of the LoI's are contrary to Section 15(3) is also rejected.

50. This leaves for consideration Mr. Chopra's challenge to Rules 62 and 64 of the Rules which read as under:-

“62. Mining over land in the ownership of third parties:-

*(1) Where a mineral concession is granted under these rules over any land in respect of which minor mineral rights vest in the State Government, the rights of the landowner shall be subordinate to that of the State Government for extraction of the mineral, access to the quarry/mine, stacking of minerals and other subsidiary purposes. **The landowner is entitled to a fair rent and compensation for such use of the land and any damage or injury caused to such land.***

(2) A mineral concession holder, who is granted the mineral concession under these rules, is entitled to use the land/ area for extraction of mineral in respect of which the said concession is granted. The mineral concession holder shall be liable to pay

(a) the annual rent in respect of the land area blocked under the concession but not being operated, and

(b) the rent plus compensation in respect of the area used for actual mining operations.

(3) In case the landowner is allowed to use part of the area granted under the mineral concession for his normal operations for which it was being used prior to the grant of mineral concession, concurrent with the concession grant, no rent shall be payable in respect of such portion of land which is not being used for actual mining operations for such period as it remains available to the landowner for his normal use. In cases where the mineral concession holder blocks the entire concession area as a result of which the landowner is not able to use such land or part thereof for his normal operations, the rent shall be payable in respect of the entire blocked area.

64. Determination of fair market rent, if not mutually settled between the parties:-

(1) Where no agreement is reached by way of mutual settlement between the landowner and the mineral concession holder regarding the rate of rent, the mineral concession holder shall offer to pay rent equal to the amount of Annuity, as applicable from time to time, as payable under the R & R Policy of the Government in cases of land acquisition.

(2) Where the land owner is not agreeable for a mutual settlement under rule 63 and is also not satisfied with the rent offered to be paid under sub-rule (1) above, the landowner or the concession holder may apply to the officer-in-charge of the concerned district to make a reference to the District Collector for determination of the fair rent payable in respect of such land.

(3) Where either of the parties prefer a reference to the District Collector under subrule (2) above, the officer-in-charge of the concerned district shall forward the reference to the District Collector for determination of the fair market rent in respect of such land. The mining officer-in-charge of the district shall also require the mineral concession holder to deposit the rent for one year as prescribed under sub-rule (1) above as a tentative compensation with the Collector. Upon so doing, the mineral concession holder shall be entitled to commence mining operations over the said land area.

(4) Upon a reference from the mining officer-in-charge of the district concerned, the District Collector may call upon the parties to furnish the details of their claims and counter claims, inter alia, containing information on the parameters prescribed under sub-rule (5) of this rule and afford an opportunity of hearing to the parties.

(5) (I) Pursuant to the hearing granted to the parties to the reference, the District Collector shall determine the fair market rent of the land keeping in view the following:

(i) nature/ character of the land i.e. arable (single crop or multiple crop) or barani or banjar;

(ii) use to which such land was being put immediately before the grant of mineral concession;

(iii) annual net income that the landowner was able to derive/ earn from such land use;

(iv) normal increase in the income level that would have taken place in such net income during the intervening period;

(v) amount so worked out shall be added an amount equal to thirty percent in lieu of compulsory use of the land;

(II) While determining the fair market rent, the collector shall also decide the rate at which such rent would be increased on year-to-year basis during the currency of the mineral concession.

(6) Notwithstanding the parameters prescribed for determining the fair market rent under sub-rule (5) above, Collector shall not determine the rent at a rate lesser than the amount of annuity payable under the R&R Policy.

(7) The District Collector shall order parties and the mineral concession holder to pay such rent to the landowner from time to time, as determined by him.

(8) Any appeal against the order of the District Collector shall lie with the Government.”
(emphasis supplied)

51. Mr. Chopra contended that these Rules are arbitrary, onerous and repugnant to the provisions of Section 15 of the Act.

52. He firstly contended that the State Government has no power to make Rules that provide for rent and/or compensation to be paid to the land owner for the use of the land and any damage or injury caused to such land. The contention is totally unfounded. Indeed, absent such a provision, the grant of mineral concessions would be arbitrary, unfair and burdensome to the land owner. The land owner is deprived of the use of his land during the subsistence of the mineral concessions. It is but fair, therefore, that he is compensated.

Further, it is equally fair that if any damage or injury is caused to the land, the land owner ought to be compensated. The Rule is eminently just, fair and equitable. The State Government in fact would have been open to severe criticism had it not made such provisions. To accept Mr. Chopra's submission would lead to a travesty of justice. It would entail the land owner being deprived the use of his property for an indefinite period of time without being compensated for the same.

53. The contention that the State Government does not have the power to make such Rules is also unfounded. Section 15(1-A)(h) entitles the State Government to make such Rules. Clause (h) entitles the State Government to make any Rules to provide, inter alia, for the manner in which rights of third parties may be protected (whether by way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations. The owner of the land is prejudicially affected on account of his being deprived of the use of the land on account of the mineral concessions and also on account of any damage or injury caused to the land.

54. The submission that Rules 62 and 64 are ultra-vires the Rule making power is, therefore, rejected.

55. Mr. Chopra then submitted that the Rules are also contrary to Section 15(3) of the Act. This contention was based on the similar line of reasoning as the contention that clauses 3(i) and 1 are contrary to Section 15(3).

56. This contention is rejected for the same reasons that we rejected the contention challenging the legality of clause 3 on the ground that it is contrary to Section 15(3). Further, Rules 62 and 64 fortunately and rightly do not even contain a limitation. The payment of rent and compensation provided

under Rule 62 to the land owner is not covered by the bar, if any, under Section 15(3). Such payments do not fall within the ambit of Section 15(3). It follows, therefore, that the land owner's right to rent and compensation is not dependent upon the removal or consumption of the minerals. Indeed, such a provision would have been grossly unfair.

57. We are, however, unable to agree with Mr. Amar Vivek's submission that some of the petitioners have no locus-standi because they did not submit bids. A party is entitled to challenge the validity of the bid without participating in the auction. If the party succeeds in establishing that the particular term is illegal and on account thereof the entire bidding process is annulled and the party is thereby entitled to participate in the fresh bidding process, it certainly has locus-standi to challenge the tender process.

58. It is not necessary to deal with Mr. Amar Vivek's submission that the petitioner in CWP-27700-2013 is not entitled to file this writ petition as he had earlier filed a writ petition which was disposed of by an order and judgement dated 04.07.2013 and the point raised before us was also raised in that petition, but was not pressed. He submitted that the issue is, therefore, barred by res-judicata and on the principles analogous thereto. The submission even if well founded does not carry the petitioner's case further as the other petitioners would in any event be entitled to raise this contention. They cannot be prevented from doing so on account of the manner in which another party conducted its proceedings.

59. The writ petitions are, therefore, dismissed. The interim orders stand vacated. The balance amounts shall be payable with interest at the rate applicable between the parties under the agreement or otherwise as per law from the date on which they were payable till the date of payment and/or

realization. If no rate is applicable, the respondents shall pay interest at 15% per annum from the date of the interim orders till payment and/or realization.

This order is stayed upto and including 7th December, 2015 to enable the parties to challenge the same.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

19.10.2015
Amodh

Whether to be referred to the reporter	Yes ☒	No ☐
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