

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on : 26.06.2019****Order delivered on : 25.07.2019****Writ Petition (C) No.1120 of 2019**

M/s Shivam Coal Carriers Private Limited, through its Director Captain Ram Singh, having its registered office at 206, Palco House, 2162/T-10, Guru Arjun Nagar, Main Road, West Patel Nagar, New Delhi – 110 008

---- Petitioner**Versus**

1. South Eastern Coalfields Limited, through the Chairman cum Managing Director, SECL Bhavan, Seepat Road, Bilaspur – 495 555, Chhattisgarh
2. The General Manager (HOD, CMC), South Eastern Coalfields Limited, SECL Bhavan, Seepat Road, Bilaspur – 495 555, Chhattisgarh
3. The General Manager, South Eastern Coalfields Limited, Bhatgaon Area, Surajpur – 497 235, Chhattisgarh
4. The Sub Area Manager, South Eastern Coalfields Limited, Jagannathpur Sub Area, Bhatgaon, Surajpur – 497 235, Chhattisgarh

---- Respondents

For Petitioner	: Mr.Bharat Sangal, Senior Advocate with Mr.Kshitij Sharma and Mr.Rishabh Rarg, Advocates
For Respondents	: Mr.Vivek Chopda, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Sanjay K. Agrawal, Judge****C.A.V. Order****Sanjay K. Agrawal, J.**

1. The petitioner herein, who is a company registered under the provisions of the Indian Companies Act, 1956 and engaged in coal loading and removing of overburden work, has called in question legality, validity and correctness of the impugned order dated 26.2.2019 (Annexure P/1) passed by respondent No.3 herein, by which Letter of Intent (LOI) dated 2.5.2018

issued in its favour for work of Hiring of HEMM for OB removal including Access Trench & diversion of nallah at Jagannathpur OCM, Bhatgaon Area has been cancelled and earnest money deposit amounting to ₹ 50,00,000/- has been forfeited and eventually the petitioner herein has been debarred from participating in future bids for a period of 24 months and fresh tender for said work has been floated at the risk and cost of the petitioner herein.

2. The Central Government under the provisions of the Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereinafter called as 'the Act of 1957') after issuance of notification under Sections 8 to 11 of the Act of 1957 acquired 662.151 hectares of land at village Jagannathpur, Tahsil Pratappur, District Surguja for open cast project of SECL at Bhatgaon area by notifications dated 4th August, 2010 and 3rd March, 2011 and thereby the subject land stands vested with the Central Government and thereafter with respondent-SECL under Sections 10 and 11 of the Act of 1957, but the company have no power to transfer the said land without prior approval of the Central Government. The Additional Collector, Surajpur by its order dated 17.4.2018 directed that name of the respondent-SECL be recorded in the acquired land at village Jagannathpur and Pampapur. The land having vested with the respondent-SECL under Section 11 of the Act of 1957, the respondent-SECL on 30.10.2017 (Annexure P/3) floated e-tender notice inviting applications from reputed and experienced contractors for Hiring of HEMM for excavating all kinds of strata/overburden/in situ, loading in to tippers, transportation and unloading of excavated materials & silt, dumping, dozing, scrapping/removal of all bands, preparation/maintenance of haul road, water sprinkling and spreading of material at the site shown. The petitioner herein submitted its bid for the said work on 14.11.2017, which the

respondent-SECL requested it to accord its consent for extension of bid validity period for a period of 120 days, which was accepted by the petitioner and ultimately, the petitioner's bid was accepted on 2.5.2018 and Letter of Intent was issued in its favour. It is the case of the petitioner that the CMPDI team as well as the petitioner went to mines to carry out initial measurement, but the villagers assaulted them and therefore, measurement could not be undertaken and thus, on 11.6.2018 the petitioner requested the respondent-SECL to handover the site and in turn, the respondent-SECL requested to meet him personally to discuss the issue on 19.6.2018. On 20.6.2018, the petitioner requested the respondent-SECL to refund its earnest money deposit and on 24.6.2018 the respondent-SECL requested the petitioner to personally meet and discuss the issue which was reiterated by the respondent-SECL on 5.7.2018 and ultimately, on 5.7.2018 the petitioner made its stand clear and requested the respondent-SECL to refund its earnest money deposit. Thereafter, the petitioner filed writ petition being WP(C) No.2146 of 2018 before this Court seeking refund of its earnest money deposit and thereafter, the respondent-SECL issued show-cause notice to the petitioner as to why its Letter of Intent (LOI) issued to it be not cancelled and earnest money deposit be not forfeited, which the petitioner replied. The writ petition was disposed of by this Court on 13.9.2018 reserving liberty in favour of the respondents to take decision on the issue. After consideration, on 26.2.2019, Letter of Intent issued in favour of the petitioner was cancelled by the impugned order and earnest money deposit was forfeited and the petitioner company has been debarred from participating in future bids, which has been questioned in this writ petition stating inter-alia that statutory clearance for the said work was not obtained

by the respondent-SECL right in time and possession was not with the SECL, therefore, work could not be undertaken by it and despite repeated requests, the respondent-SECL did not pay any heed to the request made by the petitioner except making verbal assurances, which led the petitioner to make a request to the respondent-SECL for refund of its earnest money deposit which they failed to refund and which compelled the petitioner to file this writ petition challenging their illegal and arbitrary action of forfeiting huge amount of ₹ 50,00,000/-, which is unsustainable and bad in law, as such, the impugned order is liable to be set aside and appropriate writ be issued directing the respondent-SECL to refund ₹ 50,00,000/-, which has been deposited by the petitioner as earnest money by quashing the impugned communication dated 26.2.2019 (Annexure P/1).

3. Return has been filed by the respondent-SECL stating inter-alia that the petitioner has remedy of invoking arbitration clause in terms of clause 13 of conditions of contract for resolution of dispute and if it feels aggrieved and dissatisfied with the order of the competent authority, it may get its dispute, if any, settled by invoking the arbitration clause under the Arbitration and Conciliation Act, 1996, as such, the writ petition deserves to be dismissed on the ground of availability of statutory remedy to it under the terms of contract. It has also been pleaded on merits that statutory clearance from forest and environment under the Act was obtained right in time i.e. prior to floating of tender on 30.10.2017 and permission of Coal Controller was also obtained on 27.4.2018. Acquisition has also been completed in all respects under the Act of 1957 and 95% land being possessed by the SECL and 94% land holders have already been paid compensation and mutation proceeding has already been completed pursuant to order of the Additional

Collector, Surajpur dated 17.4.2018. The petitioner did not commence the work right in time and it is guilty of delay in commencing the work by misinterpreting the terms of contract as well as the terms of NIT and therefore, its Letter of Intent has rightly been cancelled and consequently, in accordance with the terms of NIT, earnest money deposit amounting to ₹ 50,00,000/- has been forfeited and it has been blacklisted for 24 months and fresh tender has been floated for the said work at the risk and cost of the petitioner, which is strictly as per terms of contract and no interference is called for in exercise of jurisdiction under Article 226 of the Constitution of India.

4. Mr. Bharat Sangal, learned Senior Counsel appearing on behalf of the petitioner, would submit that action of the respondent-SECL in cancelling the Letter of Intent (LOI) issued in favour of the petitioner including forfeiture of earnest money deposit is arbitrary, illegal and contrary to law, as from the Letter of Intent dated 2.5.2018 it was quite vivid that statutory clearance and physical possession of subject land was not available with the respondent-SECL, yet Letter of Intent was issued in favour of the petitioner in hasty manner. He would further submit that even after a month of issuance of Letter of Intent (LOI) when the petitioner mobilized its men and machinery at the site, work could not be commenced because statutory clearances and physical possession of land were not available with the respondent-SECL and despite being informed to the respondents-authorities, they did not pay any heed to the request made by the petitioner except making verbal assurances and when the petitioner filed writ petition seeking refund of earnest money deposit, the respondent-SECL issued show-cause notice and cancelled the Letter of Intent (LOI) issued in favour of the petitioner and

forfeited its earnest money deposit, which is violative of the petitioner's fundamental right guaranteed under Articles 14 and 19 (1) (g) of the Constitution of India. Therefore, the impugned order dated 26.2.2019 (Annexure P/1) passed by respondent No.3 deserves to be set aside and appropriate writ be issued directing the respondents to refund an amount of ₹ 50,00,000/-.

5. Mr.Vivek Chopda, learned counsel appearing on behalf of the respondents/SECL, would submit that the dispute relating to cancellation of contract and forfeiture of earnest money is arbitrable dispute and it can be resolved by way of clause 13 of conditions of contract, which provides settlement of dispute and clause 13A of conditions of contract provides settlement of dispute through Arbitration. He would further submit that the matter relates to breach of contract and the present petition involves disputed question of fact, therefore, the petitioner be relegated to the remedy of arbitration as contained in clause 13A of the conditions of contract. Mr.Chopda on merit of the matter would submit that despite all statutory clearance and vacant subject land was provided to the petitioner, he did not commence the work in question, by which after giving him notice and opportunity of hearing, subject Letter of Intent (LIO) was cancelled and earnest money deposit (EMD) has been forfeited in favour of respondent-SECL, which is strictly in accordance with law, as such, the writ petition as framed and filed deserves to be dismissed with cost(s).

6. We have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

7. The first preliminary objection is that the dispute raised by way of this writ petition is arbitrable by way of clause 13A of conditions of contract, which provides settlement of disputes through arbitration under the provisions of the Act of 1996 as amended by the Act of 2015. Undoubtedly, the dispute is arbitrable and the petitioner has remedy of arbitration under the Act of 1996.

8. It is well settled that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, this Court may still exercise its writ jurisdiction at least in three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged (See Whirlpool Corpn. v. Registrar of Trade Marks¹ and Harbanslal Sahnia and another v. Indian Oil Corpn. Ltd. and others²).

9. It is the case of the petitioner herein that the respondent-SECL did not provide possession of subject land to execute/initiate the work in question despite repeated requests made by him and made only oral assurances by which he could not commence the work in question and when he filed writ petition before this Court for refund of earnest money, show-cause notice for cancellation of contract in question was issued and thereafter, Letter of Intent was cancelled and his earnest money deposit was forfeited, as such, the respondent-SECL has acted most arbitrarily, particularly, forfeiting the earnest money amounting to ₹ 50,00,000/-, which is

¹ (1998) 8 SCC 1

² (2003) 2 SCC 107

ex-facie arbitrary. In view of above, we are entertaining the writ petition to the extent of examining and finding out as to whether forfeiture of earnest money to the tune of ₹ 50,00,000/- is legal and proper or it suffers from vice of arbitrariness leaving rest of dispute with regard to cancellation of contract, blacklisting and fresh tender for the said work and risk and cost to be raised by the petitioner by way of arbitration as provided in clause 13A of the conditions of contract, as such, the writ petition is entertained only to that extent indicated hereinabove leaving rest of the dispute to be adjudicated by way of arbitration, if any, to be invoked by the petitioner or avail any other remedy available to him under the law.

10. The next preliminary objection is that since the Letter of Intent has been cancelled and consequently, earnest money deposit has been forfeited and that being realm of contract, writ petition under Article 226 of the Constitution of India is not maintainable ?

11. The question so posed for consideration is no longer res-integra and stands authoritatively and conclusively decided by Their Lordships of the Supreme Court in the matter of **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others**³ in which Their Lordships have held that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution, but in an appropriate cases, the writ Court has the jurisdiction to entertain a writ petition involving disputed question of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some

³ (2004) 3 SCC 553

disputed questions of fact and even it was held that a writ petition involving a consequential relief of monetary claim is maintainable. It was observed as under:-

“19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur*⁴, this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.* (supra)]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or

4 (1969) 3 SCC 769

its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.”

12. The above-stated proposition of law laid down in ABL International Ltd. (supra) was followed with approval by Their Lordships of the Supreme Court very recently in the matter of ICOMM TELE Limited v. Punjab State Water Supply and Sewerage Board and another⁵.

13. Thus, it is quite well settled law that where the State or State authorities which is State within the meaning of Article 12 of the Constitution of India behaves arbitrarily, even in the realm of contract, this Court can interfere under Article 226 of the Constitution of India. Admittedly, the respondent-SECL comes under “other authorities” within the meaning of Article 12 of the Constitution of India and therefore, it has an obligation to act fairly not arbitrarily even in contractual matter.

14. Reverting to the merits of the present case in the light of principle of law so laid down by Their Lordships of the Supreme Court in ABL International Ltd. (supra) and followed by Their Lordships in ICOMM TELE Limited (supra), it is quite vivid that the subject land for work of Hiring of HEMM for OB removal including Access Trench & diversion of Nallah at Jagannathpur OCM, Bhatgaon Area was acquired under the Act of 1957, notification under Section 9 of the Act of 1957 was issued and land has been vested with the Central Government by virtue of the provisions contained in Section 10 of the Act of 1957 and accordingly, the Central Government has directed vesting of land/rights in favour of the Government company/SECL under Section 11 of the Act of 1957 and thereafter, under Section 12 of the Act of 1957 the competent authority may, by notice in writing, require any

person in possession of any land acquired under this Act to surrender or deliver possession of the land within such period as may be specified in the notice, and if a person refuses or fails to comply with any such notice, the competent authority may enter upon and take possession of the land, and for that purpose may use or cause to be used such force as may be necessary. Thus, in light of aforesaid provisions, the respondent-SECL while floating tender on 30.10.2017 indicating status of the land clearly mentioned in NIT that compensation has been disbursed to the land losers, but physical possession of land is expected to be with SECL within a period of two months and thereafter Letter of Intent (LOI) was issued in favour of the petitioner on 2.5.2018, but there is nothing on record to show that before issuance of Letter of Intent, possession of subject land was delivered to the SECL by the competent authority under the Act of 1957.

15. It is the case of the petitioner that on 11.6.2018, 19.6.2018 and 20.6.2018 the petitioner demanded possession of subject land to commence the work as even in inspection carried out by the team of CMPDI, hindrance was caused by the villagers and inspection of work could not be completed. The respondents in para-8 of their return have also admitted that though the subject land on which work was to be executed was under their possession, but there was some obstruction by villagers agitation due to which there was little delay in handing over the site, but the fact remains that no document has been brought on record by the respondent-SECL that after vesting of land under Section 11 of the Act of 1957, possession of subject land was handed over to SECL before issuance of Letter of Intent and SECL, in turn, has placed the petitioner in possession to initiate the work awarded to him by Letter of Intent dated 2.5.2018.

16. The Supreme Court in the matter of **Banda Development Authority v. Motilal Agrawal and others**⁶ laid down the manner qua taking of possession by land acquisition officer and held as under:-

37. The principles which can be culled out from the above noted judgments are:

(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a *panchnama* will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the *panchnama*. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.”

17. The respondent-SECL has not brought any document including *panchnama* evidencing that he was placed in possession of subject land after vesting of in his possession under Section 11 of the Act of 1957 after

⁶ (2011) 5 SCC 394

issuance of subject tender and before issuance of Letter of Intent in favour of the petitioner as the respondents while floating the notice inviting tender (Annexure P/3) and while detailing the status of land on 30.10.2017 specifically stated that physical possession of land is expected within a period of two months, but while filing return, though the respondents have specifically claimed 95% of land to be in their possession, but no document has been brought on record placing them in possession of subject land which they claimed to have given to the petitioner for execution of work in question. The land has been acquired under the Act of 1957 and the manner of taking possession of huge land is also indicated by Their Lordships of the Supreme Court in **Banda Development Authority** (supra) by preparing *panchnama*, which the respondents ought to have in their possession, but they did not produce the same before this Court to support their plea that they were placed in possession of subject land on which work of subject tender was required to be executed by the petitioner, which is apparent from the fact that despite several requests made by the petitioner noticed hereinabove, the respondents did not even give positive response except directing the petitioner to contact personally and gave oral assurances and promise and also for the reasons that the respondents themselves have mentioned in para-8 of their return that subject land was under their possession, though there was some obstruction by villagers due to which there was little delay in handing over the site, however, after removing all such obstruction, the petitioner was called for initial measurement along with CMPDIL, as such, it is well established on record that the petitioner was not placed in physical possession of subject land for initiating and executing the work, which was awarded to him by the respondents. No such document like *panchnama*

having given the possession by the competent authority to the respondent- SECL has been filed before this Court nor it is the case of the respondents that on particular date possession of subject land was taken by the competent authority by preparing *panchnama* in presence of witnesses and thereafter the respondents came in possession over the subject land on which work was required to be executed by removing overburden etc. It has nowhere been stated by the respondents that they came in possession of subject land on particular date and possession has already been handed over to the petitioner which goes to show that the petitioner was never placed in possession of subject land for execution of work in question. Therefore, we are of the considered opinion that the petitioner/contractor had reasonable cause or valid reason in not commencing the execution of work within the stipulated time in terms of clause 6.1 of conditions of contract and therefore, forfeiture of earnest money deposit on account of non-execution work within the stipulated time and consequently, forfeiture of earnest money deposit to the extent of ₹ 50,00,000/- suffers from vice of arbitrariness and smacks total non-application of mind, which is violative of Article 14 of the Constitution of India and consequently, the impugned order to that extent deserves to be struck down.

18. As a fallout and consequence of the above-stated discussion, the impugned order dated 26.2.2019 (Annexure P/1) passed by respondent No.3 to the extent of forfeiture of earnest money deposit i.e. ₹ 50,00,000/- is set aside. The respondents are directed to make payment of the aforesaid amount to the petitioner within a period of four weeks from today. However, with regard to cancellation of subject work and other related disputes, parties are left to invoke clause 13 and clause 13A of conditions of contract relating

to settlement of dispute by way of arbitration, if any. It is made clear that with respect to other parts of the impugned order (Annexure P/1), this Court has said nothing and any observation made hereinabove has been made only for the purpose of examining the validity and correctness of order forfeiting the earnest money deposit to the extent of ₹ 50,00,000/-.

21. The writ petition is allowed to the extent sketched hereinabove.

No cost(s).

Sd/-

(P.R.Ramchandra Menon)
Chief Justice

Sd/-

(Sanjay K.Agrawal)
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition (C) No.1120 of 2019

Petitioner

M/s Shivam Coal Carriers Private
Limited

Versus

Respondents

South Eastern Coalfields Limited
and others

(English)

Writ petition under Article 226 of the Constitution of India is maintainable even in contractual matter, if the State/State authorities within the meaning of Article 12 of the Constitution of India behaves arbitrarily.

(हिन्दी)

यदि संविधान के अनुच्छेद 12 के अर्थ में आने वाले राज्य/राज्य प्राधिकारी स्वेच्छाचारी आचरण करते हैं तो संविदागत मामले में भी भारतीय संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका पोषणीय है।