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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 2088 of 2018

M/s K.S. Infra JV Through Its Lead Member M/s Suresh Kumar Murarka, Having Its Office At 2nd Floor. Shri Shyam Kripa Khaparganj Marwadi Line, Bilaspur - 495001, Chhattisgarh.

---- Petitioner

Versus

South Eastern Coalfields Limited, Through Its General Manager, (HOD, CMC) SECL Bhavan Seepat, Road Bilaspur Chhattisgarh.

---- Respondent

For Petitioner	:	Shri Rishabh Garg and Shri Kshitij Sharma, Advocate.
For Respondent	:	Shri Vivek Chopda, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

Order on Board

P. R. Ramachandra Menon, Chief Justice

01.08.2019

1. The Petitioner has moved this Court with the following prayers :

> “a. That, the Hon'ble Court may be pleased to issue a writ of an appropriate nature quashing/setting aside the impugned order-dated 06.07.2018 passed by the Respondent.
>
> b. That, the Hon'ble Court may be pleased to issue a writ of an appropriate nature directing the Respondent to refund the EMD forfeited by them to the Petitioner.
>
> c.That, the cost of this petition may kindly be allowed in favour of the Petitioner.

> d. That, any other relief(s) or direction(s) which the Hon'ble Court deems fit and proper in the circumstances of the above case may kindly be passed.”

2. Heard the learned counsel for the Petitioner as well as learned counsel for the Respondent.

3. The question is mainly with regard to the forfeiture of EMD remitted by the Petitioner along with the tender. On 11.05.2017, a notification was issued by the Respondent for hiring of Heavy Earth-Moving Machinery for Over Burdern removal and its associated works at Bijari Opencast Project, Raigarh area. The Petitioner allegedly satisfied all the requirements and hence participates in the tender by submitting all the relevant materials. It is pointed out that the Petitioner was declared to be 'L-1' in the reverse auction conducted and by virtue of the mandate of Clause 11 and Clause 12, the evaluation of the tender had to be done within the stipulated time of '120 days' and outcome had to be let known to the successful bidder. Nothing transpired within the stipulated time, but then, the Respondent addressed the Petitioner by way of Annexure P/3 dated 10.08.2017 seeking the Petitioner to grant extension of time by '120 days', to keep the tender valid. This was considered and Annexure P/4 dated 17.08.2017 consent was given by the Petitioner, so as to have the validity period extended up to 31.12.2017. Despite the lapse of eight months, outcome of evaluation was not communicated to the Petitioner. Later, the Respondent issued Annexure P/5 communication dated 28.11.2017 requesting the Petitioner to grant consent for extension of the validity period by a further period of '120 days', which was never responded to by the Petitioner. The

Respondent issued some reminders dated 15.12.2017, 22.12.2017 and 29.12.2017, which were not responded to, as the Petitioner not interested to have the validity period extended any further. As a natural consequence, the validity of the tender originally agreed by him and subsequently agreed to be extended till 31.12.2017 as per Annexure P/4, came to an end on 31.12.2017.

4. The Petitioner in the said circumstance, wrote a letter to the Respondent dated 04.05.2018 by way of Annexure P/7 pointing out that, as no evaluation of the tender was done within the specified time, the EMD might be returned. In response to this communication, Annexure P/8 was issued stating that the EMD of the Petitioner was forfeited, as the Petitioner was not qualified to participate in the tender. This, according to the Petitioner was totally high-handed, as forfeiture of the EMD was after expiry of the validity period and that too, without affording an opportunity of hearing at any point of time. In the said circumstance, the said order was subjected to challenge by filing Writ Petition (C) No.2088 of 2018 before this Court seeking to set aside the impugned order and seeking the EMD to be returned to the Petitioner.

5. The relief was opposed from the part of the Respondent who filed a detailed reply. The stand of the Respondent is that the tender committee had considered the evaluation of the tender submitted by the Petitioner (who was at 'L-1') and had initially recommended to have it awarded to him. This was accordingly placed before the Board of Directors of the Respondent for approval. This is revealed as per Annexure R/1 dated 20.06.2017. The matter was considered by the Board, who observed as

per Annexure R/2 proceedings dated 25.07.2017, that the matter required to be reconsidered. It was accordingly, that the matter was sent back to the tender committee, who considered the matter afresh as reiterated the earlier stand as revealed from Annexure P/3 dated 12.09.2017 (whereby it was recommended to award the work to the Petitioner). At the same time, it is to be noted that, there was some development by virtue of introduction the GST and accordingly, the Petitioner was required to upload all the requisite materials which was complied with by the Petitioner and it was also considering the said aspect, that Annexure R/4 proceedings were finalized by the tender committee on 14.09.2017, recommending to award the contract to the Petitioner who was at 'L-1'. Again, the matter was placed for consideration before the Board, but the Board, as per Annexure R/5 dated 25.10.2017, observed as follows :

> “*The Board noted the apprisal of GM(CMC)-HOD and after detailed deliberations advised to seek the Opinion of the Advisor (P&V), CIL, as to whether the observations made and the Committee deliberations thereon by the TC and the reviewed recommendations of the TC are in compliance with the e-Tendering Manual of CIL and the extant guidelines in this regard, if any, for further deliberation and consideration by the Board.*”

6. As per the above proceeding, the Board decided to get an 'opinion' from some advisor as to course of action to be pursued. It is stated that, based on the 'opinion' given by the so-called advisor, Annexure R/6 decision was taken on 20.01.2018, whereby the EMD was decided to be forfeited, holding that the Petitioner who is at 'L-1' was not liable to have the

contract awarded in their favour. The Petitioner contends that, this *per se* is wrong and unsustainable in all aspects, primarily for the reason that no decision could have been taken on the basis of 'opinion' given by an outsider, further that the decision was taken after the expiry of the validity period of the bid and above all, it was without affording an opportunity of hearing to the Petitioner at any point of time.

7. It is brought to the notice of this Court that, after forfeiting the EMD of the Petitioner, the Respondent went after the party who was at 'L-2'; but by that time, the bid validity of the said bidder was also over. Since the 'L-2' bidder was not prepared to have the work undertaken, his EMD was also forfeited, which was the subject matter of challenge in Writ Petition (C) No.2079 of 2018. After hearing, this Court observed that the course pursued by the Respondent was not correct or sustainable and accordingly, the above writ petition was allowed, whereby the impugned order was set aside and the Respondent is directed to return the EMD forfeited. Though the said verdict was taken up before the Apex Court by the Respondent, it did not turn to be fruitful and the SLP came to be dismissed.

8. Coming back to the course of action pursued in the instant case, the learned counsel for the Respondent submits that, it was ultimately revealed that the Petitioner was not eligible to get the contract as all the relevant documents were not submitted, but for producing some copies of the invoices. By virtue of the merit involved, the course pursued by the tender committee was found as not correct and it was accordingly deprecated by the Board, seeking to set things right, which took some time. Learned counsel also seeks to place reliance on Clause 23.4 of the

Instructions to Bidder, forming part of Annexure P/2, which is reproduced as below :

> "23.4 In the bidding process, the cause of rejection of bid of any bidder should be intimated to non-qualified bidder after the award of the work to the successful one and the Security/Earnest Money shall be refunded to unsuccessful bidders as per provision of Cl.14.3."

It is the submission of the learned counsel, that the duty to communicate the forfeiture of the EMD to the bidder who lost the bid is only after awarding the work to the successful bidder and in the said circumstance, there was no obligation on the part of the Respondent to have it communicated earlier.

9. We find it difficult to both the propositions mooted above. Bid validity has been specified in Clause 13, in crystal-clear terms, which is reproduced as below :

> **"13. BID VALIDITY**
>
> 13.1 The Bid Validity period will be 120 (one hundred twenty) days from the end date of bid submission. The validity period of tender shall be decided based on the final end date of submission of bids.
>
> 13.2 In exceptional circumstances, prior to expiry of the original time limit, the Employer may request that the bidder(s) extend the period of validity for a specified additional period. The request and the bidder's response shall be in writing. A bidder may refuse the request without

> forfeiting his bid security. A bidder agreeing to the request will not be required or permitted to modify his bid but will be required to extend the validity of his bid security for the period of extension, and in compliance with Clause 14 in all respects."

10. It is true that the bid validity was initially for a period of '120 days' which was sought to be extended by writing a communication to the Petitioner as Annexure P/3, for a further period of 120 days. This was accepted and the response was given in writing as envisaged under Clause 13.2, by writing Annexure P/4, to extend the validity period by a further period of 120 days i.e. till 31.12.2017. Even though, the Respondent had written a subsequent letter, as borne by Annexure P/5 and such other reminders seeking further extension of time, it was never accepted or responded by the Petitioner in any manner. This being the position, insofar as the right to refuse is conferred upon by the Petitioner, by virtue of Clause 13.2, the period which was originally extended based on written consent given as per Annexure P/4 had come to an end on 31.12.2017 and further extenstion could not have been taken as granted from 31.12.2017 for want of acceptance in writing.

11. It was quite open for the Respondent to have taken proper decision with regard to the acceptability of the documents submitted by the Petitioner and if the same was not in order, the bid could have been rejected then and there, within the stipulated period of 120 days or within the extended period based on the extension given as per Annexure P/4, forfeiting the EMD. Admittedly, it was not done and the matter was finalized only as per

the proceedings dated 20.01.2018 (as reflected from Annexure R/6) and the communication to the Petitioner was made only much later. Insofar as the factum of non-finalizing the bid within the extended time ending on 31.12.2017 is admitted from the part of the Respondent, it was no more open for them to have had the matter deliberated further, without the consent of the Petitioner or to have the EMD forfeited. Further, similar course pursued in respect of 'L-2' bidder, it is stated that his EMD was directed to be refunded as ordered by this Court in Writ Petition (C) No.2079 of 2018; which has become final, pursuant to dismissal of the SLP pursued by the Respondent.

12. In the said circumstances, we are of the view that the Petitioner is entitled to succeed. Accordingly, the writ petition is allowed and the impugned order is set aside. The Respondent is directed to return the EMD to the Petitioner forthwith, at any rate within a period of 'one month' from the date of receipt of copy of this verdict. No cost.

Sd/- **Sd/-**

(P.R. Ramachandra Menon)
Chief Justice

(Parth Prateem Sahu)
Judge

Anu