IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 19271 of 2008

Gajanand Agrawal	....	***Petitioner***
		Mr. Sidheswar Mohanty, Advocate
	-versus-	
General Manager (CMC), Mahanadi Coal Fields Ltd.	....	***Opposite Party***
		Mr. N.C. Sahoo, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

<u>ORDER</u>
07.02.2022

<u>Order No.</u>

04. 1. The prayer in this petition is for a direction for quashing an order dated 1st December, 2008 passed by Opposite Party – the General Manager (CMC), Manahandi Coalfields Ltd. (MCL) cancelling the tender and the letter of acceptance (LOA) issued by MCL to the Petitioner on 30th September, 2008 and forfeiting the Earned Money Deposit (EMD). The Petitioner has prayed for a direction to MCL to refund to the Petitioner the EMD of Rs.2,50,000/- along with interest.

2. The background facts are that the General Manager, Contract Management Cell (CMC), MCL issued a notice inviting tender (NIT) dated 12th June, 2008 inviting sealed tenders from experienced contractors for the job of "Hiring of Tippers for transportation of coal from Hirakhand Bundia Mine Bunker/Pit head to Orient Colliery siding" at an estimated cost around Rs.7.5

crores for a period of three years. The NIT stated that the tenderer was required to inspect the site of the purposed work assessed the nature and volume of work before submitting the bid.

3. The Tender Committee (TC) found that the Petitioner was the lowest responsive bidder. The TC found that the rate quoted by the Petitioner was 16.69% higher than the estimated value and accordingly called him for negotiation. The Petitioner did not agree to lower the rate but submitted a letter stating that "presently road condition is very poor please issue LOI for one year or 2 & 3 year, road condition is improved then accept 2 and 3 year LOI". This conditionality was not accepted by the TC.

4. On 30th September, 2008 MCL issued to the Petitioner an LOA advising him to furnish a bank guarantee in lieu of the security deposit in the enclosed format. The Petitioner was advised to send back a copy of that letter duly signed by him as a token of acknowledgement.

5. The Petitioner did not do so. Instead, on 1st October, 2008 he wrote to MCL stating that his offer would hold good only for one year due to the bad road condition and if the road condition improved he might accept the offer for the second and third year respectively. He accordingly asked that the contract period be amended as one year instead of three years. This was a unilateral move by the Petitioner which was not accepted by MCL.

6. When the Petitioner did not commence work and did not deposit the performance security in terms of LOA, MCL decided to invoke Clauses 20.4 and 30.2 of the Instruction to the Bidders read with Clause 4.2 of the general terms and conditions of the contract. The impugned letter dated 1st December, 2008 was accordingly written to the Petitioner cancelling the LOA issued and forfeiting to the EMD in the sum of Rs.2,50,000/-

7. Learned counsel for the Petitioner contends that the above cancellation of the LOA and forfeiture of the EMD was in violation of the principles of natural justice since no advance intimation was sent to the Petitioner and no explanation was called for from him. While not disputing that this is purely a contractual matter learned counsel for the Petitioner argues that the Court should nevertheless interfere by issuing a mandamus to MCL to return the EMD amount of Rs.2,50,000/- to the Petitioner together with interest.

8. On the other hand, Mr. N.C. Sahoo, learned counsel for the Opposite Party – MCL points out that the Petitioner having participated in the tender, and knowing fully well the tender conditions, could not insist on change of the terms of the contract and particularly the period of contract from three years to one year. He also could not unilaterally seek to make it conditional on the road condition which was well known to him. Counsel for the MCL reiterated that this being a contractual matter this Court should not, in the exercise of its writ jurisdiction, interfere.

9. The above submissions have been considered.

10. The relevant clauses of the NIT which have been invoked by MCL read as under:

> "Clause 20.4 & 30.2 of Instructions to bidders.
>
> "20.4- Withdrawal of a Bid between the deadlines for submission of Bids and the expiration of the period of Bid validity specified in the Bidding Data or as extended pursuant to Sub-Clause 14.2 may result in the forfeiture of the Bid Security pursuant to Clause – 15.
>
> 30.2 Performance Security should be 5% of annualized value of contract amount and should be submitted within 28 days of receipt of LOA by the successful bidders in any of the form given below:-
>
> - A Bank Guarantee in the form given in the bid document.
>
> - Govt. Securities, FDR or any other form of deposit stipulated by the owner.
>
> - Demand draft drawn in favour of Mahanadi Coalfields Ltd. On any Scheduled Bank payable at its Branch at Sambalpur.
>
> The bid security deposited in the form of Bank Guarantee shall be duly discharged and returned to the contractor. The bid security deposited in the form of Demand Draft shall be adjusted against the security deposit.
>
> If performance security is provided by the successful bidders in the form of bank guarantee it shall be issued either :-
>
> (a) at Bidder's option by a Nationalized / Scheduled India Bank or
>
> (b) by a foreign bank located in India and acceptable to the employer

(c) the validity of the Bank Guarantee shall be for a period of one year or ninety days beyond the period of contract whichever is more.

Failure of the successful bidder to comply with the requirement as above shall constitute sufficient ground for cancellation of the award of work and forfeiture of the bid security.

Clause 4.2 & 4.3 of General Terms and Conditions.

4.2 Performance Security should be 5% of annualized value of contract amount and should be submitted within 28 days of receipt of LOA by the successful bidders in any of the form given below:

- A Bank Guarantee in the form given in the bid document.

- Govt. Securities, FDR or any other form of deposit stipulated by the owner

- Demand Draft drawn in favour of Mahanadi Coalfields Ltd. On any Schedule Bank payable at its Branch at Sambalpur.

The bid security deposited in the form of Bank Guarantee shall be duly discharged and returned to the contractor. The bid security deposited in the form of Demand Draft shall be adjusted against the security deposit.

4.3 If performance security is provided by the successful bidders in the form of bank guarantee it shall be issued either

(d) at Bidder's option by a Nationalized / Schedule Indian Bank or

(e) by a foreign bank located in India and acceptable to the employer

> (f) the validity of the Bank Guarantee shall be for a period of one year or ninety days beyond the period of contact whichever is more.
>
> Failure of the successful bidder to comply with the requirement as above shall constitute sufficient ground for cancellation of the award of work and forfeiture of the bid security."

11. It appears that the Petitioner, knowing fully well what the terms and conditions were, submitted his bid. There is merit in the contention of the MCL that the Petitioner fully knew what the condition of the roads were. There was no compulsion on the Petitioner to participate in the bid if indeed it was impractical. IN terms of clause 8 of the tender notice the EMD was valid for a period of four months beginning 27th July 2008. The Petitioner waited till 1st October, 2008 to withdraw from his commitment and did not deposit the security amount. In the circumstances, the MCL was justified in seeking recourse to clauses 20.4 and 30.2 of the instruction and clauses 4.2 and 4.3 of the General Terms and Conditions of the contract and rightly forfeited the EMD.

12. Learned counsel for the Petitioner in a desperate attempt, after the matter was heard at length, sought leave to withdraw the petition to seek other appropriate remedies. Considering that this is a purely a contractual matter, and considering that this writ petition has been pending in this Court for over 14 years and during this period no attempt has been made by the Petitioner to seek other appropriate remedies in accordance with law, the Court is not inclined to accept the above plea at this stage.

13. There is no merit in this writ petition and it is dismissed as such.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/P.A.