

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.584 OF 2020

1. Rajkumar Singh s/o Late Shri Surya Singh
Aged about 61 years, Occ. Business
r/o 187 Vindhewasini, Oradali Bazar,
Varanasi Uttar Pradesh.
2. Kailash Kumar Singh s/o Ramchandra Singh
Aged about 55 years, Occ. Business,
r/o 207 Vindhewasini, Oradali Bazar,
Varanasi Uttar Pradesh.
3. Daya Shankar Singh s/o Ramlakhan Singh
Aged about 54 years, Occ. Business
r/o 207 Vindhewasini, Ordali Bazar,
Varanasi Uttar Pradesh.
4. Saurabh Kumar Singh s/o Rajkumar Singh
Aged about 36 years, Occ. Business
r/o 187 Vindhewasini, Ordali Bazar,
Varanasi Uttar Pradesh.
5. M/s Kumar Construction Company,
A partnership firm registered under the
provisions of Indian Partnership Act, 1942
vide Registration No. 22281/V-10659, having
its head Office at B-2/2, Imlok Colony Nadesar
District Varanasi Uttar Pradesh through its
Power of Attorney holder of petitioner No.1 to 5
Shri Abhishek Singh s/o Satishchandra Singh
Aged about 39 years r/o Plot No. 6 Welcome
Housing Society Godhni Road,
Nagpur – 440 030. **PETITIONERS**

...VERSUS...

1. Western Coalfields Limited,
A Government of India undertaking
through its Chairman-cum-Managing
Director Coal Estate, Civil Lines,
Nagpur.

2. The General Manager (Civil)
Western Coalfields Limited,
Coal Estate, Civil Lines, Nagpur.
3. M/s Akash Constructions,
a proprietary concern through its
proprietor Shri Rahul Tripathi having
it office at Flat No. 41, House No. 101,
Shiv Anand Royal, Bhamti, Nagpur. **RESPONDENTS**

Mr. M. M. Sudame, Advocate for Petitioners.

Mr. A. M. Ghare, Advocate with Mr. P. V. Ghare, Advocate for
Respondents 1 and 2.

CORAM: **ROHIT B. DEO AND M. W. CHANDWANI, JJ.**

DATE: **1st AUGUST, 2023.**

ORAL JUDGMENT: (PER ROHIT B. DEO, J.)

Heard. Rule. Rule made returnable forthwith by
consent of the learned counsels for the parties.

2. The petitioners 1 to 4 are partners of petitioner 5 firm.

3. Respondent 1 – WCL issued e-tender notice for
awarding the work of “diversion of village road Ghatropana village
to coal transport gate in Gondegaon sub area of Nagpur area”.
The petitioner 5 deposited EMD of Rs.3,54,800/- (Rupees Three
Lakhs Fifty Four Thousand Eight Hundred) and participated in the
e-tender. Petitioner 5 was admittedly the lowest bidder.

However, the petitioner was held ineligible, for reasons which need not detain us, and the contract was awarded to respondent 3, who was L-2.

4. While the rejection of the bid of the petitioner 5 is seriously attacked on several grounds, we are informed in unison that WCL has cancelled the tender, with the result that we are not required to adjudicate on the legality or otherwise of the action impugned.

5. The petition however, survives to the extent vide communication dated 23.01.2020 the General Manager of WCL has purported to forfeit the EMD of Rs.3,54,800/-, which forfeiture is assailed in the petition by amending the petition.

6. In order to justify the action of forfeiture of the EMD, WCL is relying on clause 15 (v) of the tender conditions, which we extract:

15 (v) In case the L-1 bidder fails to submit requisite documents online as per NIT or if any of the information/declaration furnished by L-1 bidder online is found to be wrong by Tender Committee during evaluation of scanned documents uploaded by bidder, which changes the eligibility status of the bidder, then his bid

shall be rejected and EMD of L-1 bidder will be forfeited.

7. While WCL is not relying on clause 14.4, the said clause is of some relevance and read thus:

14.4 The Bid Security/Earnest Money may be forfeited:

a. if the Bidder withdraws the Bid after Bid opening during the period of Bid validity / extended validity with mutual consent, OR

b. in the case of a successful Bidder, if the Bidder fails within the specified time limit to: (i) sign the Agreement; OR (ii) Furnish the required Performance Security/Security Deposit.

Additionally, the bidder will not be allowed to participate in the re-tender. The company reserves the right to debar such defaulting contractor from participating in future bids for a minimum period of 12 months.

8. Clause 14.4 considers a situation in which the bidder withdraws the bid after bid opening or if the successful bidder fails within the specified time to sign the agreement or to furnish the required performance security/security deposit. It is common ground that clause 14.4 does not come into play inasmuch as the firm which was L-1 did not either withdraw the bid or refused to

execute the agreement or to furnish the performance security/security deposit. We are left with clause 15 (v) which we have already extracted *supra*.

9. At this stage, the learned counsel for WCL Mr. Ghare invites our attention to paragraphs 3 and 4 of the affidavit in response dated 14.03.2023 which read thus:

3. *It is submitted that, e-tender was floated by the answering respondents through online portal i.e. e-procurement system of Coal India Limited. It is submitted that, bid of the petitioner no.5 firm was automatically declared L-1 by the portal. It is submitted that, once portal declared original bid of L-1 is rejected, EMD is automatically forfeited by the portal and it then allows the company to consider the bid of L-2. In this case after bid evaluation, the bid of petitioner no.5 firm was rightly rejected and its EMD of Rs.3,54,800/- came to be forfeited. The extract of online portal showing status of petitioner no.5 firm is filed herewith as DOCUMENT NO.1.*

4. *Moreover, it is submitted that, there is no specific rules which permits refund of EMD to a rejected bidder (whose EMD is forfeited) for a situation which has arisen in the present work/matter. On the other hand, clause 18 of the e-tender notice permits refund of EMD to rejected bidders*

except to those bidders whose EMD is forfeited. It is thus submitted that, decision of the Tender committee to forfeit the EMD of petitioner no.5 firm being legal and valid, the same cannot be refunded by the answering respondents.

10. We find from the affidavit in response that it is not even the case of the WCL that there was any application of mind and/or that a conscious decision was taken to invoke the provisions of clause 15 (v) *supra*. In any event, the tender having been cancelled, it is extremely doubtful whether the said clause is triggered at all. The other important aspect of the matter is admittedly the petitioners have not been heard. View from any angle, the order of forfeiture of EMD is unsustainable in law, and is quashed.

11. The amount withheld be refunded to the petitioners within the next two weeks failing which the amount shall attract interest at the rate of 18% per annum.

12. The petition is partly allowed.

(M. W. CHANDWANI, J.)

(ROHIT B. DEO, J.)