IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17096 of 2022

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Avez Ahmed Son of Riyaz Ahmed Resident of MIG- 23, Awash Vikas Colony, Haldwani, Nainital, Uttarakhand- 263139 represented by his power of attorney holder namely Ashish Mishra, male aged about 29 years son of Dayaram Mishra, resident of Village- Tikulia, P.O.- Arsia Bazar, P.S.- Sarpatha, District- Jaunpur U.P.- 223103.

... ... Petitioner/s

Versus

1. The Bihar State Mining Corporation Ltd. through its Chief Executive Officer, Bihar, Patna.
2. The Chief Executive Officer, Bihar State Mining Corporation Ltd., Bihar, Patna.
3. The General Manager, Bihar State Mining Corporation Ltd., Bihar, Patna.
4. The Administrative Officer, Bihar State Mining Corporation Ltd.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Gautam Kumar Kejriwal, advocate Mr.Mukund Kumar, Advocate Mr.Akash Kumar, Advocate Mr.Aditya Raman, Advocate
For the Mines	:	Mr.Naresh Dikshit, Advocate Mr.Brij Bihari Tiwary, Advocate

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH

ORAL JUDGMENT

Date : 23-04-2024

Heard Mr. Gautam Kumar Kejriwal along with Mr. Mukund Kumar, Mr. Akash Kumar and Mr. Aditya Raman, learned counsels appearing on behalf of the petitioner and Mr. Naresh Dikshit along with Mr. Brij Bihari Tiwary, learned counsels for the Mines Department.

2. The petitioner has sought for following relief(s) in paragraph no.1 of the writ petition, which is re-produced hereinafter :-

> *"(a) For issuance of writ in the nature of certiorari for quashing of the order dated 02.08.2022 issued vide memo number 1789 by the respondent Bihar State Mining Corporation Ltd. Patna (hereinafter referred to as the "Corporation" for short) through its Chief Executive Officer (Respondent Number 2) whereby the representation of the petitioner has been rejected and the petitioner has been demanded to deposit the outstanding dues of the Corporation with interest and has also blacklisted the petitioner for a period of one year for alleged non-payment of the installment;*
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> *(b) For issuance of a writ or order or direction in the nature of mandamus upon the respondents to refund the proportionate auction amount, earnest money deposit/security deposit and the proportionate statutory taxes and duties paid by the petitioner in favour of the respondent Corporation against order of contract for operation of sandghats in the district of Jamui till 31.03.2022 for all the non-working days since issuance of the letter of acceptance dated 27.11.2021;*
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> *(c) For further issuance of a writ or order or direction restraining the respondents from taking any coercive action against the petitioner in terms of the notice inviting tender, the agreement for any reasons and the impugned order dated 02.08.2022 issued vide memo no.1789;*
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> *(d) For further holding and a declaration that in terms of the directions of the Honourable Supreme Court in the order dated 10.11.2021 passed in Civil Appeal Number 3661-3662 Of 2020 (The State Of Bihar And Others Versus Pawan Kumar And Others) the respondent Corporation is the lease holder or say the concessionaire in terms of the provisions of the*

Bihar Minerals (Concession, Prevention Of Illegal Mining, Transportation And Storage) Rules, 2019 (hereinafter referred to as the rules 2019 for short) and the petitioner is simply a contractor engaged by the said Corporation to carry out the instructions of the said Corporation for the purpose of mining in the sandghats allotted in terms of the tender notice;

(e) For holding and a declaration that the petitioner is entitled to refund of the proportionate auction amount deposited by the petitioner on grounds of the principle no mining no payment as impliedly the respondent Corporation had collected from the petitioner the cost/value of mineable sand existing in the sandghats and therefore the petitioner would be liable to account for only that stock of sand which has been removed from the sandghats and not for the stock lying intact;

(f) For grant of any other relief or reliefs to which the petitioner is found entitled to in the facts and circumstances of the case."

3. Learned counsel appearing on behalf of the petitioner submitted that the Bihar State Mining Corporation Limited (hereinafter to be referred as the 'Corporation') established under the Mines & Geology Department, Government of Bihar has entered into a lease agreement with the petitioner in respect of Cluster No.10 (Dumari, District Jamui) to mine out sand on behalf of Bihar State Mining Corporation Limited (respondent no.1).

4. The petitioner, being aggrieved by the action of respondent for refund of the proportionate auction amount, had filed CWJC No.1718 of 2022 for redressal of his grievance. This Court having found that the petitioner has established the existence

of a legal right, interfered with the action of the Corporation taking into consideration the law laid down by the Apex Court in the case of **D.N.Jeevaraj Vs. Chief Secretary, Government of Karnataka & Ors.** reported in **(2016) 2 SCC 653** and this Court while passing order dated 21.03.2022 had given liberty to the petitioner to approach the authority concerned i.e. the Chief Executive Officer (respondent no.2). Learned counsel further submitted that though the case of the petitioner has been dealt in the order of the Chief Executive Officer (respondent no.2), but the Chief Executive Officer has failed to consider that the mining activity work to be carried by the Corporation in the light of Apex Court order pursuant to which DSR were finalized and the mining would be carried through the contractors. The original leasee and the lease agreement had been entered into by the State Government in favour of the Corporation. The Executive Officer did not consider the said fact that the terms and conditions of the original lease, which has been entered between the Corporation and the State Government is binding on the Corporation and any failure on the part of the Corporation in obtaining Environmental Clearance Certificate, which led to issuance of work order at a very late stage is not due to the petitioner and he can not be accounted for having delayed in the matter in mining in the area relating to Cluster No.10 (Dumari, District Jamui) and Cluster No.14 (District Jamui).

5. *Per contra* Mr. Brij Bihari Tiwary, learned counsel for the Department of Mines has submitted that the specific statement has been made in paragraph nos. 21 and 22 of the counter affidavit that Rule 16(v) of Bihar Sand Mining Policy, 2019 framed in accordance with directions of the Apex Court with respect to sand mining, as laid down in **Criminal Appeal No.3661-3662 of 2020 (State of Bihar & Ors. Vs. Pawan Kumar & Ors**), which binds both the parties. Referring to several Rules, which binds the petitioner to abide by the terms and conditions as laid down in the Rules and the petitioner having violated the terms and conditions of the Rules, Respondent no.2 has passed a reasoned order for forfeiture of the first installment, which the petitioner has deposited. Learned counsel has further submitted that the terms and conditions of the lease agreement with the petitioner is self-contained and the petitioner while entering into lease agreement was aware of the provisions contained in Bihar Sand Mining Policy, 2019, as such the petitioner has violated the terms of the agreement and the order dated 02.08.2022 of the Executive Officer can not be interfered.

6. Learned counsel further submitted that the Executive Officer, Bihar State Mining Corporation Ltd. (respondent no.2) has rejected the representation of the petitioner and directed to deposit the outstanding dues with interest and has also blacklisted for the period of one year for the alleged offence. The contract was existing till 31.03.2022 since the date of acceptance. Allegedly the aforesaid order having been passed without taking into account the stock of the sand, which can be removed from the sand ghat.

7. The petitioner herein has challenged the forfeiture of the security deposit on the ground of non-payment of second installment without considering that the Tender Document in its para 14 (iii) clearly stipulates that *"If the contractor fails to make the payment if the agreement amount within the period stipulated, then the earnest money/security deposit made by him shall be forfeited and the contractor shall be blacklisted by cancelling his agreement and declaring him ineligible for any auction conducted by the Corporation.* Para 18 of the Bihar Sand Mining Policy, 2019 enumerates the provision for surrender of Concession. Para 18 is re-produced herein for ready reference :

> *".... 18. Annual settlement amount shall be paid before surrender of said sand ghat by settlee. In case of surrender, the security deposit along with the other payments made by him shall be forfeited."*

8. The perusal of the aforesaid para 18 of Bihar Sand Mining Policy, 2019 makes it evident that Clause 31 is not stipulated by the Department of Mines and Geology on its own motion as the same is done in accordance with the Policy, 2019. Therefore, there is no merit in the said submission of the petitioner and the same deserves to be dismissed at the very threshold. The learned counsel has also relied on judgment of the Hon'ble Supreme Court in the case of ***National Highways Authority of India V. Ganga Enterprises*** reported in **(2003) 7 SCC 410** has been pleased to hold that :

9. Therefore, a conjoint reading of the relevant clauses and the aforesaid judgments passed by the Hon'ble Supreme Court reveals that if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer. In view of the same, there is no merit in such a challenge of the petitioner and it is the Tendering Authority i.e. the State in this case which is taking all adequate precautions for preventing any loss to the public exchequer.

10. Heard the parties.

11. The State Government has come out with Bihar Sand Mining Policy, 2019 only after proper consideration of relevant

facts, environmental concerns, as well as, the need of regulation of the minor minerals suitable to local needs, as well as, the principle of sustainable development and the same is reflected in the Policy. It is further submitted that the State Government has notified the Bihar Sand Mining Policy, 2019 with the objective to : -

> *(i) To ensure that sand mining is done in an environmentally sustainable manner;*
> *(ii) To ensure availability of adequate quantity of sand for construction at a reasonable price and*
> *(iii) To increase the number of settlees to ensure generation of employment.*

12. The Bihar Sand Mining Policy, 2019 contains the various provisions, which govern the settlement of sand ghats in the State. Some of the relevant provisions are quoted hereinbelow :

> *(a) The Rule 12 of the Policy, 2019 deals with the sale price of sand. The said Rule is re-produced hereinbelow :*
>
> > ***"12. Sale Price of Sand** :- The sale price of sand to the end user or the public shall be decided by the market force."*
>
> *(b) The Rule 16(v) deals with the situations wherein the settlee shall not be entitled to any compensation. The said Rule is re-produced hereinbelow :-*
>
> > *16 (v). The settlee shall not be entitled for any compensation in case of ban imposed by MoEF & CC/SEIAA/DEIAA for river bed mining in monsoon period (months of July, August & September or as stated in the EC), non-availability of mineral resources, any obstruction in the approach road, obstruction caused in the production/dispatch of sand on account of any*

problem arising due to boundary dispute or any other reason thereof."

(c) The Rule 16(xi) deals with the role of Collectors in settlement of sand ghats. The said rule is re-produced hereinbelow :

> *"16(xi). The Settlee shall abide by the terms and condition and directions issued in the public interest by the Collector in respect of operation of sand ghats."*

(d) The Rule 18 of the Policy, 2019 deals with the Surrender of Concession and is re-produced hereinbelow :

***"18. Surrneder of Concession –** Annual settlement amount shall be paid before surrender of said sand ghats by the settlee. In case of surrender, the security deposit along with the other payments made by him shall be forfeited."*

13. The petitioner has also challenged the Clause wherein the provision for compulsory sale of 25 % of the monthly production to the Stockist License Holder is provided. It is submitted that such a provision has been made in the Tender Conditions so that smaller enterprises are able to take part in the business and this provision does not hamper the interests of the petitioner in any manner whatsoever. The said provision is a welfare provision and the same is in no manner hampering the interests of the petitioner and such a challenge is nothing but an attempt to mislead this Hon'ble Court for the undue gains to the petitioner.

14. In terms of the Rule 16(v) of the Bihar Sand Policy, 2019, wherein it is specifically provided that the settlee shall not be entitled for any compensation in case of band imposed by MoEF & CC/SEIAA/DEIAA for river bed mining in monsoon period (months of July, August & September, or as stated in the EC), non-availability of mineral resources, any obstruction in the approach road, obstruction caused in the production/dispatch of sand on account of any problem arising due to boundary dispute or any other reason thereof. Therefore, the said Rule 16(v) makes it evident that the respondent is correct in holding that the setlee shall not be entitled to any compensation/claim in case the settlee is unable to carry out sand mining during the settlement period for any reason whatsoever.

15. The respondents have relied on the law laid down by the Apex Court in the case of ***National Highways Authority of India V. Ganga Enterprises*** reported in **(2003) 7 SCC 410** and in this regard observation made in paragraph no.9 is re-produced hereinafter, as follows : -

> ***"… 9.*** *In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is*

accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted…."

15. The respondents have further relied on the judgment of the Hon'ble Supreme Court passed in the case of **Villayati Ram Mittal (P) Ltd. V. Union of India** reported in **(2010) 10 SCC 532,** which is re-produced hereinafter as follows :

*"… 12. It is thus clear that when earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to fo*rfeit the earnest money furnished by that tenderer…"

16. The Hon'ble Supreme Court in the case of ***Michigan Rubber (India) Ltd. V. State of Karnataka*** reported in **(2012) 8 SCC 216** has been pleased to hold that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

17. The Hon'ble Supreme Court in the matter of ***Saurabh Prakash Vs. DLF Universal Ltd. (2007) 1 SCC 228;*** wherein, distinction has been drawn and explained between words earnest money and security deposit in the context of contractual matter and consequence flows therefrom. For ready reference Para 42 and 43 of the aforesaid judgment is quoted hereinbelow:-

> *"42. The distinction between a security and an earnest money has also been pointed out by this Court in Maula Bux v. Union of India [(1969) 2 SCC 554] in the following terms:*
>
> *"4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt in Dictionary of English Law at p. 689; "Giving an earnest or earnest- money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds". As observed by the Judicial Committee in Kunwar Chiranjit Singh v. Har Swarup, AIR 1926 PC 1,:*

"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money."

43. Referring to Section 74 of the Indian Contract Act, it was observed:

"There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, Natesa Aiyar v. Appayu Padayachi; Singer Manufacturing Company v. Raja Prosad; Manian Pattar v. Madras Railway Company. But this view is no longer good law in view of the judgment of this Court in Fateh Chand case. This Court observed at p. 526: "'Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases: (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty,' 'The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74, reasonable compensation not exceeding the penalty stipulated for.' "

The Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74, applies only to cases where the aggrieved party is seeking to receive some amount on

breach of contract and not to cases whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty"

Comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. *In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture, and that, "There is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."*

18. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases:

(i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty than reasonable compensation not exceeding the penalty stipulated for is statutorily imposed.

19. "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State,

Rule of Law and Natural Justice" in "Democracy, Equality and Freedom" "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

20. Having considering the rival submissions made on behalf of the parties, as well as, having considered the order dated 02.08.2022, in which there is absence of clear observation giving the date when the Corporation had submitted the Environmental Clearance Certificate duly issued by the SEIAA, Bihar. It is admitted that the petitioner was issued work order on 03.12.2021 for the the first time, while the agreement was entered into between the Corporation and the petitioner on 27.12.2021.

21. These aspects have not been considered in the impugned order.

22. The order dated 02.08.2022 had been passed by the respondent no.2 and he had entered into contract with the petitioner and on his own has passed impugned order contained in Memo No.30/22-1789 dated 02.08.2022, which is against the cardinal principle of nemo debet esse judex in propria sua causa.

23. Considering the aforesaid facts and circumstances of the case, as well as, considering the fact that the petitioner having not violated the terms of the contract and the petitioner has been able to make out a case of infringement of his legal right. Order dated 01.08.2022 issued vide memo no.1789 by the Executive Officer, Bihar State Mining Corporation Ltd. (respondent no.2), whereby the representation of the petitioner has been rejected and the petitioner has been directed to deposit outstanding dues to the Corporation with interest and has also having black-listed the petitioner for the period of one year for alleged non-payment of the installment, which can be held to be passed without proper consideration of the representation of the petitioner. I find it proper that the petitioner may file a representation, which is required to be re-considered by the Managing Director or any authority in accordance with law within

a period of six weeks in accordance with law from the date of production of this order.

24. With the above observation/direction, the present writ application stands disposed of.

(Purnendu Singh, J)

Chn/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.05.2024
Transmission Date	NA