

(2022) 08 DEL CK 0019

In the Delhi High Court

Case No : Civil Writ Petition No. 10860 Of 2022, Civil Miscellaneous Application No. 31607 Of 2022

Esl Steel Limited & Anr

APPELLANT

Vs

Union Of India & Anr.

RESPONDENT

Date of Decision : 01-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 14
Coal Mines (Special Provisions) Rules, 2015 — Rule 8(4), 14
Coal Mines (Special Provisions) Act, 2015 — Section 16

Citation : (2022) 08 DEL CK 0019

Hon'ble Judges : Yashwant Varma, J

Bench : Single Bench

Advocate : Sandeep Sethi, Rishi Agrawala, Avnish Mathews, Shruti Arora, Ivo D? costa

Final Decision : Dismissed

Judgement

Yashwant Varma, J

1. This writ petition has been preferred seeking the following reliefs:

"a. Issue a writ or order in the nature of mandamus to the Respondent No. 2 to determine the fixed cost under Rule 14 of the Coal Mines (Special Provisions) Rules, 2015 before conducting the 13th tranche of auction under the Coal Mines (Special Provisions) Act, 2015 for Block No. 2 at Parbatpur, Jharkhand;

b. Issue a writ or order in the nature of mandamus to the Respondent No. 1 and 2 to defer the bidding for the 13th auction until a determination of the fixed cost;

c. Ad interim ex parte relief in terms of prayer clause (b);

d. Order as to costs; and"

2. The petition itself has come to be instituted in the backdrop of a process initiated by the Nominated Authority for allotment of the Parbatpur Central Coal

Mine. The aforesaid coal mine which was initially allotted to the Steel Authority of India Limited ["SAIL"] has come to be included in a tendering process initiated by the respondents consequent to SAIL having submitted a request for surrender of the coal mine. That request, which was submitted by SAIL, ultimately came to be accepted by the Nominated Authority on 05 December 2019 and a further decision taken to initiate the process of allocation in accordance with the procedure prescribed in the Coal Mines (Special Provisions) Act, 2015 ["the Act"].

3. A Notice Inviting Tenders ["NIT"] was thereafter issued. The petitioner desirous of seeking certain clarifications with respect to the "Fixed Amount" payable to the prior allottee appears to have addressed a letter to the respondents. Having failed to receive a satisfactory response, the present writ petition has come to be instituted. The last date for submission of bids stands extended upto 03 August 2022 as was noticed by the Court in its order of 19 July 2022. The NIT while setting out the payments required to be made by the successful bidder makes the following provisions:

"On signing the Agreement, the Successful Bidder, within such period as prescribed in Clause 3.8, shall, to the Nominated Authority:

(i) furnish the Performance Security as specified in Clause 7;

(ii) pay a fixed amount for the compensation for land and mine infrastructure; cost borne by the Prior Allottee for the preparation of geological report; cost borne by the Prior Allottee for obtaining all statutory licenses, permits, permissions, approvals, clearances or consents relevant to the mining operations; cost incurred by CMPDIL for preparation of the mine dossier including block boundary and financial valuation along with applicable taxes; (collectively the "Fixed Amount"). If the Successful Bidder is a Prior Allottee, then, the compensation payable to such Successful Bidder shall be set off or adjusted against the Fixed Amount payable by such Successful Bidder. The Fixed Amount is required to be deposited by the Successful Bidder in accordance with the relevant provisions of the Act and the Rules and as provided in the Agreement. The Fixed Amount payable is based on the available information and the assessment made by the competent authority and will be uploaded as a part of this Tender Document. Any upward revision in the Fixed Amount on a subsequent date by the Government or the Nominated Authority consequent to any process or on the orders of any competent court of law, shall also be payable by the Successful Bidder. Additionally, in case of any downward revision in the Fixed Amount on a subsequent date by the Government or the Nominated Authority, the same would be refunded by the Nominated Authority to the Successful Bidder;

(iii) For Fully Explored Mines, pay an amount equal to INR 92,51,89,290.00 (Indian Rupees Ninety Two Crore Fifty One Lakh Eight Nine Thousand Two Hundred and Ninety) as the first instalment of the Upfront Amount."

4. The dispute raised in the present writ petition is with respect to the Fixed

Amount which is liable to be paid by the successful bidder. The Fixed Amount was notified by the Nominated Authority on 21 June 2022. It discloses that SAIL had earlier paid a sum of Rs. 38.05 crores approximately for mining infrastructure and Rs.25.31 crores for land to the prior allottee. It further discloses that the prior allottee has subsequently submitted a claim of Rs.189.63 crores for land and Rs.1342.13 crores for mining infrastructure which was at the time of issuance of the aforesaid notification "under examination" by the Nominated Authority. Admittedly, it is the claim subsequently submitted by the prior allottee which had been disclosed to all intending bidders.

5. Mr. Sethi, learned senior counsel appearing for the petitioner, has contended that the Act envisages a determination of the Fixed Amount for the coal mine by the Nominated Authority and the petitioner essentially seeks an assurance from the respondents that the amounts disclosed as representing the Fixed Amount in the tender document is final and not liable to be revised. Mr. Sethi would contend that the disclosures made in the NIT with respect to Fixed Amount must in any case represent a value arrived at after due determination by the Nominated Authority. It was contended that if there be any uncertainty or doubt with respect to the Fixed Amount, it would clearly impede the ability of an intending bidder to structure its bid and thus cause grave prejudice.

6. Mr. Sethi submitted that it is well settled that the terms and conditions of a tender must be certain and if they be vague or subjective, it would violate Article 14 of the Constitution. In support of his submission, Mr. Sethi placed reliance upon the following principles as enunciated by the Supreme Court in *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.* (2007) 8 SCC 1 :-

"38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the

bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In *Reliance Airport Developers* [(2006) 10 SCC 1] the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided."

7. To buttress the aforesaid submission, Mr. Sethi also referred to a decision rendered by a Division Bench of the Court in *M/s Starnet Communications Pvt. Limited v. Bharat Sanchar Nigam Limited (BSNL)* 2012 SCC OnLine Del 207 where the following observations came to be made:

"20. Now coming to the merits of the controversy, we are of the view that once the terms of a tender are finalized (it is after due and deliberate exercise), the parties must strictly be bound by the same. We may say that if the respondent was on the other side, it would have insisted on a strict adherence to the terms and conditions of the tender. There cannot be a legal uncertainty in this behalf and the parties cannot be taken by surprise nor can the parties be compelled, having been successful in the tender, to vary the terms and conditions. If the interpretation of the respondent was to be accepted, it would be like an ambush clause where a party is first made to apply and after succeeding in the tender, is compelled to vary the terms and conditions of the tender. In respect of the aforesaid principle, we are supported by the observations of the Supreme Court in *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd.*; (2007) 8 SCC 1. We reproduce the relevant para nos. 38 & 39 as under:

"24. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

8. Appearing for the respondent, Mr. Kurup, learned counsel, drew the attention of the Court to Section 16 of the Act and contended that the determination of compensation which is liable to be paid to the prior allottee necessarily takes into consideration the amounts payable to the prior allottee along with interest from the date of purchase or acquisition of the land till the date of the execution of the vesting order or the allotment order as the case may be. It was pointed out that the quantum of compensation for mine infrastructure is also to be determined accordingly. Mr. Kurup points out that the tender document has clearly disclosed that the Fixed Amount payable is based on available information and an

assessment made by the competent authority. It was pointed out that the relevant clause clearly and unequivocally discloses that any upward revision in the Fixed Amount on a subsequent date by the Government or the Nominated Authority is also liable to be paid by the successful bidder. Laying further emphasis on that very clause, Mr. Kurup highlights the fact that it also provides that in case of any downward revision in the Fixed Amount on a subsequent date, the same would be refunded to the successful bidder. According to Mr. Kurup the very nature of determination of compensation payable to a prior allottee evidences a process of enquiry being undertaken by the Nominated Authority which need not necessarily have attained finality prior to the coal mine being put up for auction and allotted to a successful bidder. It was pointed out that the determination of compensation is itself subject to the right of a prior allottee to question and challenge the same in accordance with the procedure prescribed under the Act and therefore it cannot be said that it would remain static or fixed on the date when the coal mine is put up for auction.

9. Having noticed the rival submissions, the Court at the outset notes that Clause 2 of the tender document makes an unambiguous disclosure to the effect that the Fixed Amount has been computed based on the information available with the respondents and the assessment made by the competent authority. It further clearly stipulates that in case there be an upward revision in the Fixed Amount, the successful bidder would be liable to bear the same. Viewed in that light, it is evident that a successful bidder cannot possibly require the respondents to freeze the Fixed Amount as on the date of allotment and the issuance of a vesting order. This position also flows from Section 16 of the Act which while dealing with the subject of computation of compensation provides for the same being calculated upto the date of the execution of the vesting or allotment order as the case may be.

10. In terms of the Rules which have been framed, the Court notes that as per Rule 8(4) a successful bidder has to pay the Fixed Amount for the value of land and mine infrastructure as well as the floor price or reserve price as the case may be and the variable amount of the bid in case of an auction. The Nominated Authority, while preparing the Mine Dossier, which forms part of the information which is made available to all intended bidders, is obliged to call for relevant information from the prior allottee and gather further details from secured creditors, auditors, counter parties to contract and such other persons which in its opinion may be in a position to provide relevant information. The determination of compensation is then guided by the provisions made in Rule 14. Rule 14 is indelibly linked to Section 16 of the Act and thus it is evident that the process of determination is one which need not necessarily have attained finality or closure on the date when bids are to be submitted by interested parties. The Nominated Authority upon receipt of necessary information from the prior allottee is obliged to obtain information and inputs from various stakeholders. This process of ascertainment need not have attained finality on the date when the NIT comes to be published. The petitioners have in any case been placed on

due notice with respect to the variable character of the Fixed Amount in terms of the disclosures made in the tender document.

11. The reliance placed on the decision of the Supreme Court in Reliance Energy also does not take the case any further for the following reasons. What was stressed in Reliance Energy was that tenders must incorporate terms and conditions with clarity and that a bidding process must follow the principles of legal certainty. The Supreme Court emphasized that the norms and benchmarks that are fixed under a tender must be certain and not vague. It was essentially a reiteration of the settled principle that the "rules of the game" should not be changed or varied and the goal posts not moved once the process of tendering has commenced. The said principles have been reiterated in M/s Starnet Communications Pvt. Ltd. with the Division Bench holding that parties to a tendering process cannot be taken by surprise as a result of variation of tender conditions. However, neither of these principles would appear to have been violated in the facts of the present case in light of the clear and unambiguous disclosures made in the NIT.

12. The submission of Mr. Sethi that a prior allottee who may also be a participant in the bidding process is placed at an advantage since it would be aware of the exact details relating to the Fixed Amount, also does not merit acceptance for the following reason. While the prior allottee may be privy to information and details with respect to various components which may form part of the Fixed Amount, it remains an assessment of what according to the prior allottee is due and payable under that head. The amount of compensation would still remain subject to an enquiry, assessment and ascertainment by the Nominated Authority. The claim under the head of compensation that may be raised by the prior allottee is neither final nor binding on the Nominated Authority. It is undoubtedly subject to an evaluation and assessment by the Nominated Authority. Viewed in that light, it is evident that this submission too does not merit acceptance.

13. Accordingly, and for all the aforesaid reasons, the writ petition fails and shall stand dismissed. Pending application shall stand disposed of.