(2022) 09 UK CK 0134

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 246 Of 2021

Shivam Mines & Minerals APPELLANT

Vs

State Of Uttarakhand & Others RESPONDENT

Date of Decision : 22-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2022) 09 UK CK 0134

Hon'ble Judges : Vipin Sanghi, CJ;R.C. Khulbe, J

Bench : Division Bench

Advocate : B.P. Nautiyal, Mohd Matloob, Vikas Pande, Sandeep Kothari, M.C. Pant

Final Decision : Disposed Of

Judgement

Vipin Sanghi, CJ

1. The present writ petition has been preferred by the petitioner under Article 226 of the Constitution of India to, firstly, assail the letter bearing no.703/ Khanan/Nivida (2020-21) dated 11.01.2021, whereby the petitioner’s allotment of mining contract for mining lot Mahendrapur for the period 2020-25 was cancelled. After amending the writ petition and impleading respondent no.5, the petitioner also assails the communication dated 28.01.2021, bearing letter no.769/Khanan/Nivida, whereby the respondent-authorities sought to make the allotment of the said mining lot in favour of respondent no.5. The petitioner seeks a mandamus to respondent nos.2 and 3 to permit him to deposit the amount of first installment along with the security money in accordance with the procedure prescribed in the tender conditions contained in the tender document.

2. The case of the petitioner is that the respondent issued a public tender in respect of mining lot Mahendrapur, District Tehri Garhwal vide tender no. 95/ दस/ तीन-05 (2020-21), dated 24.08.2020. The petitioner participated in the said tendering process and emerged as the highest bidder. The respondents vide letter dated 21.12.2020 required

the petitioner to make a deposit of Rs.41,82,831/-, being the first installment which was computed as 1/9th of the total amount payable by the petitioner for the contract, within one week, whereafter the MoU would executed. The respondents also demanded the security deposit of Rs.55,77,108/- in the form of fixed deposit or bank guarantee valid for a period of five years.

3. The case of the petitioner is that under the terms of the tender, the mechanism of payment was clearly stipulate in Clause 9(VIII) of the terms and conditions contained in Part-2 of the tender document under the heading “Technical Specifications”. The said clause reads as follows:-

4. The petitioner submits that the petitioner was once bitten, and therefore, twice shy. The petitioner submits that in relation to another mining lot Saarna 17/1, in respect whereof the petitioner emerged as H1 bidder, the petitioner was similarly required by the respondent to make deposit of the first installment even before the execution of the MoU, which the petitioner did on 27.11.2020. The respondents, however, did not permit the petitioner to start the mining operation up till 27.01.2021, on account of the fact that they did not have the renewed lease in their favour from the State Government, and the consequent right to grant the mining contract.

5. When the respondent-Garhwal Mandal Vikas Nigam (for short “GMVN”) issued the communication dated 21.12.2020, the petitioner met the officers of the respondent-GMVN and brought to their notice the aforesaid tender condition contained in Clause 9(VIII), in terms whereof, the liability to deposit the performance security and the first installment would arise upon execution of the MoU, and not before it.

6. Learned Senior Counsel for the petitioner submits that the petitioner was forced to adopt the said stand, on account of the petitioner’s experience in relation to the mining lot Saarna 17/1, as the petitioner was not permitted to operate the mining contract for two months after deposit of the first installment and furnishing the performance security, to its grave detriment.

7. Learned Senior Counsel further submits that the aforesaid modus operandi adopted by the respondent no.2-GMVN was also adversely commented upon by the State Government in its communication dated 18.11.2021, in relation to another mining contract. In this communication, the State Government, inter alia, observe as follows:-

8. Learned Senior Counsel further submits that the respondent-GMVN was, in fact, not even in a position to permit the petitioner to carry out the mining activity- even if the petitioner had deposited the demanded amount and, thereafter executed the MoU, since the lease in respect of the land in question, granted by the State Government to GMVN had not been renewed. In this regard, learned Senior Counsel has drawn our attention to the letter dated 13.10.2021, addressed by respondent no.2 to the State Government for renewal

of several of their mining leases, including the lease for the land in question. The relevant part thereof reads as follows:-

9. Learned Senior Counsel submits that, till date, the position is that the State Government has not renewed the mining lease in favour of respondent no.2 and, therefore, even if the petitioner were to deposit the amounts demanded by the respondent no.2 now- which demand itself is contrary to the tender conditions, the petitioner would again be left in the lurch. He, therefore, submits that the respondent no.2 was not justified in, firstly, demanding the amounts vide its letter dated 21.12.2020, before execution of the MoU and, secondly, till respondent no.2 was in a position to grant permission to the petitioner to operate the mining contract.

10. Learned Senior Counsel has also referred to the Mining Policy framed by the State Government dated 30.09.2016, and in particular, Clause 17 thereof, which reads as follows:-

11. Learned Senior Counsel submits that, in terms of the aforesaid clause, before grant of a contract for mining to the contractor, it is essential for respondent no.2-GMVN to complete all the formalities. He submits that unless the lease of respondent no.2 is itself renewed, respondent no.2-GMVN cannot permit the petitioner to operate the contract.

12. Learned Senior Counsel further submits that, in the light of the aforesaid, the action of the respondent no.2-GMVN, in cancelling the allotment made in favour of the petitioner for mining contract relating to mining lot Mahendrapur for the period 2020-25, due to non-deposit of the demanded amounts, was illegal and arbitrary.

13. Learned Senior Counsel further submits that after cancelling the petitioner’s allotment vide impugned communication dated 11.01.2021, the respondent no.2-GMVN first offered the contract to the H2 bidder, who refused to accept the same and, thereafter, issued the second impugned communication dated 28.01.2021, allotting the same mining lot in favour of respondent no.5. Learned Senior Counsel submits that the said allotment made in favour of respondent no.5 is illegal, and a result of wrongful cancellation of the allotment made in favour of the petitioner.

14. The present petition was preferred by the petitioner on or about 01.02.2021, after issuance of the communication dated 11.01.2021, cancelling the allotment made in favour of the petitioner. In view of the urgency, the petition was taken up by the Court on 15.03.2021. On the said date, subject to petitioner’s depositing Rs.60,00,000/-before the Registrar General of this Court within a week, further proceedings of the tender process were stayed. It was made clear that the said order would not have any effect on the agreement to be executed between the State Government and the Garhwal Mandal Vikas Nigam, i.e. respondent no.2. Subsequently, respondent no.5 was impleaded as a party respondent, and the amendment sought by the petitioner in the writ petition to

challenge the allotment made in favour of respondent no.5 was allowed on 06.04.2021.

15. Mr. Sandeep Kothari, learned counsel for respondent nos.2 and 3- GMVN submits that the petitioner was obliged to deposit the performance security and the first installment, as demanded by respondent no.2 within one week of the petitioner being declared as the H1 bidder. In this regard, learned counsel places reliance on Clause 8(ii) of the aforesaid terms and conditions, which reads as follows:-

16. Learned counsel for the GMVN further submits that the petitioner has participated in other similar tenders as well, with similar terms and conditions, and the petitioner has deposited the first installment and the performance security without waiting for execution of the MoU. Therefore, it is not open to the petitioner to now contend that the petitioner was not obliged to make the deposit, as demanded by respondent no.2-GMVN, vide its letter dated 21.12.2020. Learned counsel submits that since the petitioner failed to deposit the demanded amounts, respondent no.2-GMVN was justified in cancelling the allotment made in favour of the petitioner on 11.01.2021, and to proceed to allot the same to the H2 bidder and, in case, the H2 bidder was not interested, to the H3 bidder.

17. Learned counsel further submits that when the tender was initially issued on 24.08.2020, the respondent no.2-GMVN was holding a valid renewed lease in respect to the land in question. The lease had been renewed in the year 2019 for a period of five years. Thus, it was valid when the tender was issued on 24.08.2020. However, subsequently, the State Government directed the GMVN to apply for renewal of the lease every year. It is in this light that the respondent-GMVN sought renewal of the lease deeds in respect of several areas, including in respect of Mahendrapur on 13.10.2021. As pointed out by the petitioner, the renewal is still awaited.

18. Respondent no.5 has also opposed the petition. Learned counsel for respondent no.5 submits that the petitioner is a seasoned player in the field. He has participated in various other similar auctions and he always deposited the amounts due towards the performance security and the first installment within a week, without waiting for the execution of the MoU. He submits that the petitioner has raised a hyper-technical issue, while fully being aware of the prevalent practice in the trade. The interpretation advanced by the petitioner, founded upon Clause 9(VIII), is contrary to the petitioner’s own understanding of the tender conditions.

19. Learned counsel for respondent no.5 further submits that the present petition was filed by the petitioner after the issuance of the letter of allotment dated 28.01.2021 in favour of respondent no.5, even though, the cancellation of the petitioner’s allotment took place on 11.01.2021. Therefore, the writ petition is barred by delay and laches.

20. Learned counsel further submits that respondent no.5 deposited the amounts in excess of Rs.2.00 crores with the respondent-GMVN on 12.02.2021. Thus, in equity the allotment made to respondent no.5 should not be interfered with.

21. We have heard learned counsels, and considered their rival submissions in the light of the documents placed on record.

22. The tender conditions contained in Clause 8(ii)-relied upon by learned respondent no.2-GMVN, and in Clause 9(VIII)-relied upon by the petitioner, are at loggerheads, inasmuch as, while Clause 8(ii) states that the H1 bidder is obliged to deposit the requisite amounts within a week, and complete the formalities to start the mining operations from 1st October, Clause 9(VIII) in clear terms states that the successful bidder would have to deposit the bid amount within one week of the execution of the MoU. It further states that the amount to be deposited towards the first installment would be 1/9th of the total amount due from the contractor.

23. So far as the clause relating to submission of performance security is concerned, which is contained in Clause 9(ii), reads as follows:-

24. This clause does not state as to when the performance security would be required to be furnished. However, it is natural that the performance security would be required to be furnished only when the MoU is executed between the contractor and the GMVN.

25. The tender, in question, has been issued by the GMVN. It is the GMVN which is the author of the terms and conditions of the tender. Since there is a clear contradiction in the aforesaid clauses, namely Clause 8(ii) and Clause 9(VIII), and there is no clarity due to the confusion created by these two contradictory clauses, the doctrine of verba chartarum fortius accipiuntur contra proferentem would be attracted and bind the respondent-GMVN, and the tender document is liable to be construed against the respondent no.2- GMVN. In this regard, we may refer to the judgment of the Supreme Court in the case of Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd. And Anr, (2016) 15 SCC 315, wherein the Supreme Court observed as follows:

“10. ..The Common Law rule of construction “verba chartarum fortius accipiuntur contra proferentem” means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on Insurance Law[1] deals with the rule of contra proferentem as follows:

“The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. “One must not use the rule to create the ambiguity – one must find the ambiguity first.” The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances….”

26. The said principle of verba chartarum fortius accipiuntur contra proferentem has also been applied by the Supreme Court in the case of Bank of India and Anr. v. K.Mohandas and Ors, (2009) 5 SCC 313, wherein the Supreme Court observed thus:

“32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a wellknown principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem).”

27. In the light of the aforesaid, the respondent-GMVN cannot rely on Clause 8(ii), and the petitioner is entitled to rely upon Clause 9(VIII) to assert its right to first have the MoU executed, before being required to deposit the security amount or the first installment. The petitioner was, therefore, justified in not depositing the amounts demanded by respondent no.2-GMVN vide its letter dated 21.12.2020, since the GMVN did not execute the MoU in favour of the petitioner.

28. The fact that the petitioner has, in the past, deposited the amounts due under the tenders, even before the execution of the MoU in relation to other tenders, does not tantamount to a waiver by the petitioner of the right vested in the petitioner by virtue of Clause 9(VIII) of the tender conditions in question. Each tender results in a separate contract, and the conduct of the petitioner in relation to another tender/ contract would not take away the rights of the petitioner- bidder in relation to the tender/ contract in question. The respondents cannot be heard to say that the petitioner was bound to deposit the amounts, as demanded vide their letter dated 21.12.2020, it having conducted itself in a similar fashion in relation to another tender process. The petitioner, obviously and justifiably, entertained apprehensions on account of its past experience taken note of hereinabove in relation to the mining lot Saarna 17/1. In relation to the allotment made in favour of the petitioner qua mining lot Saarna 17/1, the petitioner was not able to operate the mining contract for a period of two months after making the deposit on 27.11.2020, since the respondent-GMVN did not have the lease of the land relating to the said mining lot from the State Government.

29. The petitioner, therefore, had justifiable apprehensions that the petitioner may land up in a similar situation, if the petitioner were to proceed to deposit the amounts demanded by the respondent-GMVN, without entering into the MoU.

30. We do not find any merit in the submission of learned counsel for respondent no.5 that the present petition is barred by delay and laches. The allotment in favour of the petitioner was cancelled on 11.01.2021, and within three weeks

thereof, the present petition was preferred by the petitioner. The petitioner was not aware when the present writ petition was preferred, that the respondent-authorities had proceeded to allot the mining lot in question in favour of respondent no.5 on 28.01.2021.

31. The petition was, firstly, listed before the Vacation Bench on 02.02.2021, when it was directed to be listed on 03.02.2021, and further directed to be listed on 08.02.2021. It was, thereafter, listed before the Court on 15.03.2021, when the interim stay was granted by the Court in relation to further proceedings of the tender process. The action taken by respondent no.5 in making the deposit of the amount on 12.02.2021 was during the pendency of this writ petition. The respondent-GMVN was aware of the filing of this writ petition, and actions taken by respondent-GMVN and respondent no.5 would not take away the valuable rights of the petitioner. Those actions were, obviously, subject to orders that the Court would pass in the present writ proceeding.

32. Pertinently, on account of the interim order dated 15.03.2021 operating, no MoU has been signed between the respondent-GMVN and respondent no.5 till date. It is not that respondent no.5 has been awarded the contract and respondent no.5 is running the same.

33. The respondent-GMVN was, therefore, not justified in cancelling the allotment made in favour of the petitioner by the impugned communication dated 11.01.2021. We, accordingly, quash the said impugned communication dated 11.0.2021.

34. As a consequence of the aforesaid direction issued by us, it follows that the allotment made in favour of respondent no.5 vide the second impugned communication dated 28.01.2021 cannot be sustained.

35. Learned Senior Counsel for the petitioner submits that the petitioner is willing to take its chances, and the respondent-GMVN may be directed to proceed to comply with the procedure prescribed in Clause 9(VIII) of the tender conditions.

36. The petitioner states that since the respondent-GMVN has already applied to the State Government for extension of lease, the petitioner is hopeful that the same would be done soon, once the MoU is entered into between the petitioner and the GMVN, and the petitioner deposits the amount in terms of the tender conditions.

37. We, accordingly, dispose of the writ petition with the direction to the respondent-GMVN to enter into the MoU with the petitioner, keeping in view the tender conditions, and within a week the MoU being executed, the petitioner shall deposit the amounts/ security demanded by the respondent-GMVN vide their letter dated 21.12.2020. The amount deposited by the petitioner in this Court, in the name of the Registrar General, along with the interest accrued thereon, shall be transmitted in favour of the respondent-GMVN immediately

after intimation is given to the Registrar General of this Court by the respondent-GMVN of the execution of the MoU. The said amount shall be adjusted against the amount liable to be deposited by the petitioner in terms of the letter dated 21.12.2020. The respondent-GMVN would forthwith refund the amount deposited by respondent no.5 in respect of the lot in question.

38. The writ petition and all pending applications stand disposed of in the above terms.

