

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 31ST DAY OF JANUARY 2013

PRESENT

THE HON'BLE MR. K. SREEDHAR RAO, ACTING CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE S. ABDUL NAZEER

WRIT PETITION No.11321/2011 (GM-MM-S)

BETWEEN :

M/s. Chitrakoot Steel and Power Pvt. Ltd.

With its Registered Office at:

Chennai – 600 004

Rep. by its authorized representative

Sri. T.G. Satyaprakash

S/o. Sri. B. Kumarswamy

Age: 51 years

R/o. Sandur

Bellary District

... PETITIONER

(By Sri. B.V. Acharya, Senior Counsel along with
Sri Y.H. Vijayakumar & for Sri. N.Y. Guruprakash, Adv.)

AND :

1. The State of Karnataka
By its Secretary
Commerce and Industries Department
Department of Mines and Geology
Vikas Soudha
Dr. Ambedkar Veedhi
Bangalore 560 001

2. The Chairman and Deputy Commissioner
District Task Force Committee
Bellary District
Bellary-583 101
 3. The Director of Mines and Geology
Government of Karnataka
Khanija Bhavan
Race Course Road
Bangalore – 560 001
 4. The Deputy Director
Department of Mines and Geology
Government of Karnataka
Hospet
Bellary District
- ... RESPONDENTS

(By Sri. R.G. Kolle, AGA)

This writ petition is filed under Articles 226 and 227 of the Constitution of India praying to quash the order at Annexure-G dated 4.11.2008 and etc.

This writ petition coming on for *Orders* this day, **ACTING CHIEF JUSTICE** made the following:

ORDER

K. SREEDHAR RAO, Ag.CJ., (Oral)

The State seized the extracts of iron ore for illegal mining in about 123 places. The total quantity seized was approximately around 3,42,520 metric tonnes. On 12.8.2008, by notification, tender was called for. On 16.8.2008, the

petitioner bid the entire quantity of iron ore for a sum of Rs.18,83,86,000/- at the rate of Rs.550/- per metric tonne. The terms of auction provided for deposit of 25% of the bid amount and the balance of 75% to be deposited within 15 days from the date of deposit. The petitioner deposited 25% of the bid amount which was in a sum of Rs.4,70,96,500/-.

2. One Sunil Kumar filed a writ petition in W.P. No.11131/2008 on 19.8.2008 challenging the integrity and validity of the auction proceedings. Interim stay of the auction proceedings was granted. The said writ petition came to be withdrawn on 16.9.2008. Consequently, whatever the interim order granted get dissolved.

3. The petitioner had not deposited the balance of 75% of the bid amount within the time stipulated. The petitioner was not aware of the proceedings in W.P. No.11131/2008. On 3.10.2008, the petitioner on coming to know about the writ petition filed by Sunil Kumar requested respondent Nos.3 and 4 to furnish the information regarding the said writ petition.

4. On 21.10.2008, the petitioner wrote another letter to know about the status of the said writ petition. On 10.11.2008, there was theft of iron ore, which was the subject matter of the auction. The petitioner made representations dated 28.11.2008 and 2.1.2009 to respondent No.3 and 4 for joint survey of the auctioned mineral lot to ascertain the available quantity in view the reports of the theft.

5. On 10.2.2009, respondent No.3 wrote a letter to respondent No.1 with a copy to petitioner to permit the petitioner to make balance of 75% of the bid amount in instalments on the ground that there was no provision of forfeiture of 25% of the bid amount. Respondent No.4 by an order dated 14.11.2008, forfeited 25% of the bid amount on the ground that the petitioner failed to deposit the balance of 75% within 15 days.

6. The Respondent No.4 wrote a letter directing the petitioner to pay the first installment of Rs.5,00,00,000/- on or before 15.3.2009. It is the submission of the petitioner that the

letter is shown to be written on 16.3.2009 is antedated and it was actually written as 13.3.2009. The petitioner received the said letter on 16.3.2009.

7. The petitioner filed W.P. Nos.10846-10848/2009 for a direction to respondent Nos.2 and 3 therein to consider and dispose of the representations dated 18.3.2009 and 30.3.2009 or in the alternative, for joint survey to ascertain the quantity available. This Court by order dated 2.7.2009 in para Nos.9 and 10 made the following observation and dismissed the writ petition.

“ In any view of the matter, the question as to whether the quantity of 342520 MT of iron ore is available for the petitioner is seriously a disputed question of fact in the present case which cannot be gone into in exercise of writ jurisdiction of this Court and the said question of fact which is a contractual matter has to be worked out by the petitioner before a competent Civil Court. In any view of the matter petitioner does not dispute that disputed 75% of the auction should be deposited within time granted by way of three installments by letter dated 3.3.2009 and admittedly the petitioner

has failed to deposit 75% and as per the terms of the contract, it has been admitted by the petitioner that 25% amount deposited has to be forfeited in case of non payment of balance 75% amount and the forfeiture has been in accordance with law.

10. This Court by a detailed order held that disputed question of fact pertaining to a contract cannot be gone into the writ petition by holding an enquiry regarding evidence and party has to be delegated to the Competent Civil Court for working out remedy in accordance with law. ”

8. R.P. No.367/2009 for review came to be disposed of on 10.9.2009 with the following observation made in para No.7.2:

“ 7.2. However, it is submitted by the learned Senior Counsel appearing for the review petitioner that if the third respondent – Director of Mines and Geology is willing to permit the petitioner to lift and transport the exact quantity of iron ore available at the spot, on payment of value of the same, the petitioner may be permitted to approach the

Director of Mines and Geology. This Court has passed a detailed order on 2.7.2009 dismissing the writ petitions and the said order, in view of the above said facts, does not suffer from any error or illegality as to call for interference in this review petition. However, dismissal of the writ petitions (W.P. Nos.10846 to 10848 of 2009) by this Court by order dated 2.7.2009, would not preclude the petitioner to work out its remedy in accordance with law.”

9. The petitioner filed Misc. Civil No.19303/2009 seeking clarification of the order passed in the review petition. This Court disposed of the said Misc. Civil case by order dated 19.11.2009 with the following observations.

Except to clarify that the observation made in the order dated 2nd July, 2009, in writ petitions No.10846 to 10848 of 2009 would not preclude the petitioner to work out the remedy in accordance with law, would entitle it to make further representation to the authorities concerned and seek appropriate relief and the respondents shall dispose of the same without being influenced by

any of the findings rendered in the above proceedings, no further orders are called for.

Accordingly, Misc. Cvl. No.19303 of 2009 is disposed of.

10. This Court had given liberty to the petitioner to make a representation to the respondent authorities and the petitioner made a representation on 3.12.2009 for refund of 25% of the bid amount. Respondent Nos.3 and 4 notified for re-auction on 3.2.2010. Since the bid amount was very low, the bid was not confirmed. The petitioner filed WP. No.5124/2010 for a writ of certiorari quashing the notification for re-auction and in the alternative, sought for a direction to deliver the exact quantity of saleable iron ore against the payment already made by it which is in a sum of Rs.4,70,96,500/-. This Court in para Nos.7 and 9 made the following observations:

“ As regards the other grievances made by the petitioner, this Court has observed in W.P. Nos.10846-848/2009 that it was open to the petitioner to seek redressal before the Civil Court. However, by way of clarification of this order, this

Court has ordered on 19.11.2009 that the petitioner was also entitled to make further representation to the authorities concerned and seek appropriate relief, whereupon the respondents shall dispose of the same without being influenced by any of the findings rendered in the proceedings. This Court clearly show that the petitioner's right for making a representation to the authorities and the corresponding obligation of the authorities to consider the same was clarified. Although initially this Court had relegated the petitioner to have the disputes resolved by approaching the Civil Court, later the petitioner is given a right to get his representation considered for either refund of the amount deposited or for any other consequential relief. So far as re-auctioning of the material is concerned, we do not find any vested right in the petitioner to stall the auction of the materials as the petitioner failed to comply with the terms and conditions though it had emerged as successful bidder on an earlier occasion. The public property of such huge quantity worth several crores, cannot be allowed to languish like this and the action taken by the authority to re-auction the same cannot be interfered with, as otherwise, it will lead to further loss to the exchequer. It is clear from the

previous proceedings and from terms of the report filed by the COD referred to in the previous order passed by this Court that considerable quantity is missing from the iron ore stacked in the lands. Therefore, we are not inclined to stop the auction proceedings only because the representation submitted by the petitioner before the competent authority is still under consideration. However, we would like to make it clear that the authorities concerned are duty bound to consider the representation submitted by the petitioner and pass appropriate order expeditiously as huge amount paid by the petitioner is with the respondents which has to be accounted for in accordance with law, particularly keeping in mind the facts stated in the representation submitted.

As already observed, the representation submitted by the petitioner shall be considered and disposed of in accordance with law and in the light of the observations made herein above, within a period of four weeks from the date of the receipt of a copy of this order.”

11. The petitioner initiated contempt against the 3rd respondent for non compliance of direction in W.P.

No.5124/2010. In the contempt proceedings, it was reported that representations have been considered and orders of rejecting the request of refund was made. Thus, the contempt case came to an end.

12. The petitioner filed the present writ petition for a writ of certiorari and for a mandamus directing the respondents to conduct joint survey to ascertain the quantity of iron ore available, and in alternative, it has sought for return of EMD amount deposited by it with interest at 18% p.a. from 16.8.2008 till the date of payment. A prayer is also made for direction to Lokayuktha or the Central Bureau of Investigation to investigate into the reported theft of iron ore. This Court by interim order directed the Corps of Detectives to investigate into the matter. After enquiry, COD reports that 1,55,196.6785 metric tonnes were found to be missing as against the total stock of 3,42,520 metric tonnes.

13. The records would disclose that the 3rd respondent vide Annexure-V dated 27.3.2010 had, in fact, recommended for refund of the EMD amount. The Government vide

Annexure-W dated 13.8.2010 informed the 3rd respondent to exercise his discretion and pass orders in accordance with law. The 3rd respondent pursuant to Annexure-W passed the order vide Annexure-X dated 18.8.2010. The said order was the one produced in the contempt proceedings to explain that the representations of the petitioner have been considered and orders have been passed.

14. Sri. R.G. Kollé, Additional Government Advocate, stoutly opposed the writ petition on the basis of the following submissions:

- (i) The present writ petition is not maintainable since in the earlier W.P. Nos.10846-10848/2009, there is a categorical observation that the question involved requires investigation into the disputed facts and that the petitioner has to avail the remedy before the Civil Court. Therefore, the said finding operates as res judicata.

- (ii) The terms of lease with regard to theft of the materials would disclose that after deposit of 25% bid amount, there was responsibility on the petitioner to have kept watch and ward to protect the material. It is because of inaction and negligence of the petitioner, theft has taken place for which the respondents cannot be held responsible.
- (iii) The auction was held on “as is where is basis”. The quantity notified was only approximate quantity. The total bid amount made by the petitioner was in a sum of Rs.18,83,86,000/- whereas in the subsequent auction, it offered the bid for Rs.17,47,63,200/-. There is nearly a short fall of revenue of Rs.1,36,00,000/- on account of breach of contract on the part of the petitioner. Therefore, it cannot be said that the State has not suffered loss on account of breach of contract by the petitioner.

- (iv) In fact, stay order was granted by this Court in W.P. No.11131/2008 did not prevent the petitioner from depositing 75% of the bid amount within the stipulated time. Therefore, there is a clear breach of contract committed by the petitioner.
- (v) The amount of loss suffered by the Government is in the form of unliquidated damages which has to be determined by the Civil Court and the same cannot be considered and determined in this writ petition.

15. Per contra, Sri. B.V. Acharya, Senior Counsel appearing for the petitioner submits that the interim order of stay against the auctioning granted in the writ petition in W.P. No.11131/2008 virtually frustrates the contract of auction. Respondent Nos.3 and 4 suppressed the said fact in view of the said interim order. Respondent Nos.3 and 4 were disabled to receive 75% of the bid amount. Therefore, the entire auction proceedings is negated by the doctrine of frustration.

16. The contention that the orders in W.P Nos.10846-10848/2009 operated as resjudicata is untenable since this Court in Misc. Cvl. No.19303/2009 had clarified that the petitioner is not precluded to work out remedy in accordance with law and also permitted to make further representations to the authorities concerned. When the authorities did not respond to the representations, the petitioner had to file W.P. No.5124/2010. This Court directed the authorities concerned to consider the representations. When respondent Nos.3 and 4 failed to consider the same, contempt proceedings were initiated. Respondent No.3 suppressed his earlier recommendation for refund and submitted to the Court that the representation is considered and request of the petitioner is rejected. Therefore, the question of res judicata would not come into play.

17. With regard to loss sustained, it is submitted that the petitioner had bid at the rate of Rs.550/- per metric tonne. The State in the subsequent auction has got the price at the rate of Rs.575/- per metric tonne. Therefore, it cannot be

argued that by second auction, the State has suffered loss on account of breach of contract by the petitioner.

18. Provisions of Section 74 of the Indian Contract Act envisages that the aggrieved party should seek only damages for the loss, if any and there is no provision in law to seek penal damages. Therefore, the forfeiture of the EMD amount is untenable when the State has not suffered any loss by re-auction. In fact, the terms of auction does not permit forfeiture of the EMD amount. It is for that reason, the 3rd respondent had recommended vide Annexure-V for refund of the EMD amount.

19. With regard to watch and ward of the auction material, the terms of auction does not fasten any obligation on the petitioner to keep watch and ward to prevent theft. The obligation on the part of the petitioner, as per the terms of auction, arises only on payment of full bid amount. Therefore, it cannot be argued that because of failure of watch and ward to prevent theft, the petitioner should be held responsible for

the loss. In view of the submission, it was contended that the petitioner is entitled to refund the bid amount with interest at 18% p.a.

20. The Senior Counsel has relied on the decision of the Supreme Court in **MOHAMMED GAZI VS.STATE OF MP AND OTHERS [2004 (4) SCC 342]** to contend that when the contract gets frustrated, it is impermissible for the auctioning authorities to deduct any amount towards damages. On facts, it was found that the petitioner has not reached the terms of contract. Therefore, the order of the Division Bench of the Madhya Pradesh High Court to deduct Rs.30,000/- from the EMD amount was held to be bad and the entire amount was directed to be refunded. It is argued that the facts and ratio laid down would squarely apply to the facts of this case.

21. Upon stern consideration of the rival contentions of the Counsel for the parties, it is to be held that the plea of resjudicata raised by the Additional Government Advocate does not apply to the facts of this case, because in the previous proceedings, it was clarified beyond pale of doubt that the

petitioner was permitted to make representations to the authorities to consider its case. The cause of action to file W.P. No.5124/2010 arose because of non consideration of the representations and the cause of action for the present writ petition arose on account of order of rejection vide Annexure-X.

22. The contention that the case involves investigation in to the disputed question of fact is untenable. At the earlier stage, W.P. Nos.10846-10848/2009 were filed to ascertain the quantity of missing iron ore. But later in his petition COD was directed to investigate into the matter. The COD after investigation, submitted a report as to the quantity of iron ore missing. The report of COD has clinchingly establish the fact of quantity of missing iron ore which appears to be obviously by way of theft. Therefore, the question of investigation into the quantity of missing iron ore by filing a civil suit does not arise.

23. The contention that the State has suffered loss to an extent of Rs.1,36,00,000/- on account of second auction does not appears to be a tenable contention. It was sought to be

argued that the auction was held on the basis of the total lot of iron ore on as is where is basis. For the total quantity in the first auction, bid amount of the petitioner was Rs.18,83,86,000/-, whereas in the second auction, the bid amount is only Rs.17,47,63,200/-. It is stated that the loss was caused to the Government.

24. The argument is not a well founded argument. The auction was not on the lot basis. In fact, the bid was permitted on the basis of metric tonnes. The approximated quantity for lot was also notified as 3,42,520 metric tonnes. In the re-auction, the price per metric tonne was bid at Rs.575/-. Obviously, there is a gain of Rs.25/- for each metric tonne. In that view, it is untenable for the State to contend that the re-auction has resulted in loss.

25. That conduct of respondent No.3 requires to be seriously noticed. In the first instance vide Annexure-V, he recommends to the Government for refund of the EMD amount to the petitioner. The 1st respondent strangely does not approve and rejects the recommendation and gives discretion to

respondent No.3 to pass appropriate orders which was not necessary in the context. Perhaps, initiation of contempt proceedings should have prejudiced respondent No.3 who has eventually passed an order of rejection against his own earlier recommendation of refund. In fact, this Court in W.P. No.5124/2010 had directed respondent No.1 to thoroughly investigate into the missing iron ore and fix responsibility on the officials who were responsible for causing the said missing of iron ore.

26. The provisions of Section 74 of the Act makes it expressly clear that in the event of breach of contract, the aggrieved party would be entitled to only seek compensation for the loss suffered. In the instant case, the materials on record do not disclose that the respondents have suffered any loss. On the other hand, they appear to have been benefitted by auction. The State was not justifying in withholding substantial sum of money and the petitioner to run pillar to post seeking refund of money which it is legally entitled to. The forfeiture order passed is obviously against the terms of tender

notification. Therefore, the respondents could not have forfeited the EMD amount.

27. With regard to watch and ward, the obligation on the part of the petitioner would arise only after deposit of the balance of 75% of bid amount, until then there is no responsibility on the part of the petitioner to keep watch and ward as per the terms of the contract.

In the circumstances, writ petition is allowed. The respondents shall refund the amount with interest at 12% p.a. from the date of deposit till the date of payment. The EMD amount to be refunded within six months.

**Sd/-
AG. CHIEF JUSTICE**

**Sd/-
JUDGE.**

Cs/-