2024 INSC 520

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. __________OF 2024
[ARISING OUT OF SLP (CIVIL) NO. 6920 OF 2023]

M/s OMSAIRAM STEELS & ALLOYS PVT. LTD. … APPELLANT

VS.

DIRECTOR OF MINES AND GEOLOGY, BBSR & ORS. … RESPONDENTS

J U D G M E N T

DIPANKAR DATTA, J.

Leave granted.

2. The final judgment and order dated 29th March, 2023 of the High Court of Orissa[1], dismissing the writ petition[2] presented by the appellant, is under assail in the present appeal.

[1] High Court
[2] Writ Petition (Civil) 9630/2023

3. We find in the array of parties three respondents. The Director of Mines and Geology, Bhubaneshwar is the first respondent, under whose aegis MSTC Ltd., i.e., the second respondent, conducted an e-auction which forms the genesis for the present appeal. State of Odisha is the third and final respondent.

4. The factual matrix relevant for deciding the present appeal, as discerned from the records, is that:

I. The third respondent floated a tender document for e-auction of mining lease of, *inter alia*, Orahuri manganese and iron ore block on 09th January, 2023.

II. To participate in the process to follow, the appellant submitted the requisite fees of Rs 5,00,000/- (Rupees five lakh only). Thereupon, the appellant was permitted to submit its online bid.

III. Clause 14 of the tender document mandated the submission of Bid Security in a sum of Rs 9,12,21,315/- (Rupees nine crore twelve lakh twenty-one thousand three hundred and fifteen only) in the form of a bank guarantee in favour of the first respondent, which too the appellant complied with on 17th February, 2023.

IV. The Mineral Auction Rules, 2015[3], promulgated under the Mines and Minerals (Development and Regulation) Act, contemplate a two-round process – (i) submission of technical bids and initial price offers; and (ii) selection of technically qualified bidders for participation in the e-auction. Per requirements of the e-auction,

[3] MA Rules

the qualified bidders have to propose their Final Price Offer, over and above the Floor Price, with each bidder being allowed to make a higher bid by a minimum increment of 0.05%. Each bidder would have 8 (eight) minutes' time from the last highest bid to enhance their bid, and upon the expiry of eight minutes, the last highest bid prevailing would triumph as the winning bid.

V. The appellant cleared the first round of the process and was subsequently informed that the e-auction would be conducted from 11.00 AM to 1.00 PM (subject to auto extension of eight minutes) on 21st March, 2023 for which the Floor Price would be 84.00%.

VI. As scheduled, the auction process commenced on 21st March, 2023 and it lasted for almost seven hours, possibly much beyond what the first respondent had anticipated. In due course of time, the bidders went on enhancing their bids, so much so that the bids at 06.09 PM had increased from 84% to 104.05% after 136 (one hundred thirty six) attempts made by the bidders. At 06.13 PM, the appellant intending to better the bid by the minimum margin of 0.05% once again made its entry in the online portal, but contrary to its intended submission of 104.10%, entered a bid of 140.10% at the overall 137th attempt. With no bidder countering the same, the e-auction concluded at 6.17 PM with the last bid recorded as that of the appellant at 140.10%.

VII. Having realized that it had committed a mistake, if not a blunder, the appellant made frantic calls to the first respondent. Since the calls went unheeded, the appellant by an email sent to the first respondent at 08.17 PM sought to inform it of the mistake and prayed for rectification of its bid. The email sent by the appellant contained, *inter alia*, the following prayer:

> "***
>
> Subject – Regarding Miss (sic, Mis) Bidding in Orahuri manganese & Iron Ore Mineral Block NIT dated January 09, 2023
>
> ***
>
> With reference to the above subject, it is to inform that while bidding for the above mentioned Orahuri Manganese & Iron ore Mineral Block, the running Bid Percentage of Competitor was 140.05 (sic, 104.05), by mistake, we mentioned 140.10 instead of 104.10. Please guide us that how to rectify the mistake in this regard and oblige.
> Thanking you in anticipation and expecting due direction.
> ***"

VIII. The next day, i.e. 22nd March, 2023, the first respondent replied to the appellant. Inability to allow the appellant rectify its mistake was expressed due to the e-auction having attained completion. The return email reads as follows:

> "***
> In response to the email, with regards to rectification of the mistake during the auction of Orahuri Manganese & Iron ore block, it was verified at the MSTC portal that no other bidder has submitted 24.05% prior to your bid and the last bid submitted as 140.10% by your firm on the same was closed as Final Price Offer.
> As such, since the e-auction process for Orahuri Manganese & Iron ore has already been completed. As I have been directed to inform you that the request for rectification of last

bid is not acceptable and hence the request is hereby rejected being devoid of any merit.
***"

IX. *Vide* letter dated 24th March, 2023[4], the first respondent informed the appellant of its bid of 140.10% having been accepted, being the highest bid, and that it was declared as the Preferred Bidder. In view of rule 10 of the MA Rules stipulating that the preferred bidder is required to deposit the first instalment of the upfront payment within fifteen days of such declaration, failing which, the security deposit would stand forfeited, the appellant was directed to deposit Rs 3,64,88,526/- (Rupees three crore sixty four lakh eighty eight thousand five hundred twenty-six only).

X. Aggrieved thereby, the appellant invoked the writ jurisdiction of the High Court, characterizing the mistake to be a *bona fide* and inadvertent human error and prayed that the impugned communication be quashed, and that the e-auction process for grant of the mining lease be re-commenced.

XI. The High Court, *vide* the impugned judgment, held that the appellant having admitted to have made a bid of 140.10%, such bid could not at a subsequent stage be pleaded as a mistake. The appellant was further held to be bound by its bid. The dispute was also held to be beyond the confines of the writ jurisdiction

[4] impugned communication

of the High Court, which led to summary dismissal of the appellant's writ petition.

5. The appellant has taken exception to this judgment of the High Court in the present appeal on multiple grounds. As noted by the High Court, there is no dispute that the appellant had made the highest bid of 140.10%. The task before us is limited to determining whether the appellant can attribute this bid to a *bona fide* mistake, and pray for re-commencement of the e-auction process.

6. Mr. Rohatgi, learned senior counsel for the appellant, in laying a challenge to the impugned judgment advanced the following submissions:

a) In a bidding period of 7 hours starting from 11.00 AM till 18.09 PM, the bids had only increased from 84.00% to 104.05%, i.e., an increment of only 20.05%. On most of the occasions the bidders enhanced their bid by 0.05%, which was the minimum in terms of the terms and conditions of the tender document. It is only on certain stray occasions that the bidding went beyond 0.5%. The highest enhancement was by 5.05% at 1.19 PM by a bidder other than the appellant. In course of the entire bidding, the appellant enhanced the prevailing bid 47 (forty seven) out of 137 (one hundred thirty seven) times and its enhancement ranged between 0.05% and 2.00%. The appellant also sought to enhance its bid by 0.05% at the 137th attempt but purely because of a human error, instead of 104.10%, what it entered was

140.10%. No reasonable businessman would submit a bid of 140.10% as against the prevailing highest bid of 104.05%, i.e., an increase of 36.05%, when the minimum required increment was only 0.05%. Forfeiture of the security deposit of Rs 9,12,21,315/- (Rupees nine crore twelve lakh twenty one thousand three hundred and fifteen only) on the appellant's failure to deposit the first instalment of the upfront payment of Rs 3,64,88,526/- (Rupees three crore sixty four lakh eighty eight thousand five hundred twenty six only), as threatened vide the impugned communication, is a disproportionate punishment sought to be inflicted on it for what was a *bona fide* human error.

b) The appellant is being forced to accept an exorbitant, unrealistic and unsustainable bid of 140.10%, which the appellant never intended to make.

c) Notwithstanding the error being entirely human and inadvertent in nature, the e-auction platform offered no scope for rectification of any error. The system merely allowed the appellant to see its bid figure in words, mistaken though it may have been, but there existed no method for correction or cancellation of the bid.

7. *Per contra*, Mr. Prakash Ranjan Nayak, learned counsel for the respondents submitted that the e-auction process had attained finality, and the appellant could not be allowed to reopen the same for what it claims was a mistake on its part.

8. We have heard learned counsel for the parties and perused the impugned judgment as well as the other materials on record.

9. The first respondent, by way of additional information, informed this Court that once a bid is typed by the bidders on the e-auction platform, after clicking on the 'Bid' button, the system displays a pop-up showing the bid amount both numerically and in words. The bidder then has to authenticate the bid with a Digital Signature Certificate; once the signature is validated, the bid is recorded by the system. This formality, according to the respondents, the appellant complied and hence, it cannot be permitted to turn around and say that the bid of 140.10% was by mistake.

10. Both parties have submitted to us a visual step-by-step of how the e-auction process functions, and a perusal of the same makes it evident that once the bidder enters the numerical value and clicks on 'Bid', a pop-up does appear showing the bid in numerical and in words; however, the system does not apparently provide any option to cancel such bid or to re-type the bid amount, should any error or mistake in the bid be noticed. The only option the system pop-up gives to the bidder is to submit the bid with the Digital Signature Certificate with no scope for rectification or retraction. We, thus, presume that in case of an error or mistake, a bidder may choose not to submit the bid with the Digital Signature Certificate with the result that it has to quit the process. This lends weight to the appellant's submission that there was

indeed a human error or mistake, rectification of which was not permitted by the system.

11. We now proceed to examine the issue whether such an error or a mistake would entitle the appellant to request for a fresh e-auction process.

12. It is well settled that, normally, the courts would be loath to interfere in commercial matters, especially when such interference has the effect of delaying the execution of mega projects of national importance.

13. This Court, in ***Silppi Constructions Contractors v. Union of India and Ors***[5] held:

> "19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out……The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give 'fair play in the joints' to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer"
>
> (emphasis ours)

14. Thus, it is evident that while undertaking the exercise of judicial review of matters relating to tenders, the court has to strike a fair balance

[5] 2019 SCC OnLine SC 1133

between the interests of the Government, which is always expected to advance the financial interests of the State, and private entities. As observed by this Court, not every small mistake must be perceived through the lens of a magnifying glass and blown up unreasonably. The present case is precisely of such a nature. A mere typographical error forms the fulcrum of the present *lis* and, thus, the principles of proportionality, reasonableness and equity demand that the appellant's grievance be heard.

15. The grounds on which equitable relief can be sought, when the premise for such a relief is a mere mistake, was laid down by this Court in ***W. B. State Electricity Board v. Patel Engg. Co. Ltd***.[6], in the following words:

> "27. Exceptions to the above general principle of seeking relief in equity on the ground of mistake, as can be culled out from the same para, are:
> (*1*) Where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder; but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake.
> (*2*) Where the bidder on discovery of the mistake fails to act promptly in informing to the authority concerned and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids.
> (*3*) Where the bidder fails to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offer; however where the mistake is discovered after opening of bids, the bidder may be permitted to withdraw the bid."

[6] (2001) 2 SCC 451

16. While deciding ***Patel Engineering Co. Ltd.*** (supra), this Court was referred by senior counsel for the respondents 1 to 4 therein to paragraph 84 of the American Jurisprudence (2nd Edn., Vol 64, p. 944) and it was felt useful to quote the same. We too find it prudent to reproduce the relevant passage hereinbelow:

> "As a general rule, equitable relief will be granted to a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and where, upon the discovery of that mistake, he acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake particularly when he does so before any formal contract is entered into."

17. This Court, on the facts of the case in ***Patel Engineering Co. Ltd.*** (supra), held that negligent mistakes in bid documents could not be permitted to be corrected on the basis of equity. There, the bidders had merely informed the State authorities of the alleged mistake in their bid more than two months after the same was announced in front of all the bidders who responded to the tender.

18. The present case notably has certain features on facts, which makes it distinguishable from the case in ***Patel Engineering Co. Ltd.*** (supra). Here, it is not disputed that the appellant made multiple calls to the first respondent immediately upon realising that it had committed an error., Specific averments made by the appellant are present in the pleadings that upon realisation of its mistake, telephone calls were made to the first respondent, as well as to the helpline numbers of the second respondent, both of which went unanswered. The respondents, in their counter affidavit, have not specifically denied the said averments;

hence, by application of the doctrine of non-traverse, the aforementioned averments are deemed to have been admitted by the respondents.

19. The appellant's *bona fide* intent to rectify the error or mistake is also evident from the email dated 21st March, 2023, which was sent at 08.17 PM being exactly two hours after the e-auction process had concluded at 06.17 PM. Although the email does not specifically refer to the numerous phone calls claimed to have been made by the appellant, nothing much turns on it in the absence of rebuttal by the respondents as noted above. Furthermore, unlike the case in ***Patel Engineering Co. Ltd.*** (supra) where the tender rules provided for a limited extent of correction, no such rule was brought to our notice in the present case allowing the bidders at least some scope of correction. Rule 20 of the MA Rules allows rectification of clerical or arithmetic mistakes only with respect to orders passed by the Government or authorities thereunder, but not bids of the nature under consideration.

20. Despite the respondents' contention to the contrary, it is evident that there was no opportunity available on the platform for the appellant to rectify the error in the bid, having once entered it. Even if any bidder like the appellant had realized that the bid amount requires to be rectified, it could not have done so because of the system not permitting such a course. It had either to suffer the effects of the error or mistake, i.e., forfeiture of Bid Security on failure to deposit the first instalment of the upfront payment, or quit the process realising such error /

mistake having been committed by it. It seems that anyone committing an error or mistake in submitting the bid and seeking to rectify it would be caught between the devil and the deep sea. Upon discovery of the error or mistake that was committed, the appellants have satisfied us on the point that they wasted no time in informing the respondents and sought an opportunity to rectify the same.

21. Applying the test laid down by this Court in ***Patel Engineering Co. Ltd.*** (supra) and considering the trend of bids offered by the bidders as noticed in paragraph 4 supra, it is found that in the present case – (i) the bidders had only 8 (eight) minutes to enhance their bid; (ii) the appellant offered its bid of 140.10% within 4 (four) minutes of the last bid of 104.05%; (iii) there is sufficient material on record to suggest that the appellant did not consciously enhance its bid to 140.10% to take undue advantage, rather it can be inferred from the circumstances that the mistake in entering the bid was committed inadvertently (if an act is not inadvertent, it ceases to be a mistake); (iv) the appellant, on discovery of the error or mistake, acted promptly in informing the authority concerned for rectification of the bid; and (v) the MA Rules governing the e-auction process does neither provide any method for a bidder to withdraw the mistaken bid, nor does the e-auction method seem to provide any recourse for rectification or allow a bidder to quit the process without jeopardizing its right as regards a forfeiture of the Bid Security. In such a factual matrix, holding the appellant accountable to what is evidently an extravagant bid erroneously or mistakenly

offered, as compared to the immediately preceding bids, would seem to us to be unconscionable, on facts.

22. We can safely conclude, having regard to the trend of rate of enhancement of bid by the appellant [i.e., the appellant enhanced the prevailing bid 47 (forty seven) out of 137 (one hundred thirty seven) times and its enhancement ranged between 0.05% and 2.00%] and the fact that the bidders were playing safe by marginally increasing the prevailing bid price to test each other leading to increase of the Floor Price from 84.00% to a highest of 104.05% after 7 (seven) hours of bidding, the appellant did not intend to enhance the bid by 36.05%. Even otherwise, it seems to make little commercial sense for any intending bidder to outrun the other bidders by jumping from 104.05% to make an exorbitant bid of 140.10% when, till the preceding bid, each one of them had evidently been crawling. In view of the clear nature of error or mistake committed by the appellant and the disproportionate punishment that awaits it, if interference is declined by us, we are of the opinion that the path of rendering justice to the parties has to be treaded carefully to ensure that the interests of both the respondents and the appellant do not suffer disproportionately.

23. It is here that we consider it appropriate to examine the applicability of the doctrine of proportionality. This doctrine has slowly but steadily found its way into this Court's jurisprudence. In ***Coimbatore District***

Central Coop. Bank v. Employees Assn.[7], albeit discussing the proportionality of the punishment imposed on striking workmen, this Court delineated the basis of the doctrine as follows:

> "18. 'Proportionality' is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.
> 19. de Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [*Judicial Review of Administrative Action* (1995), pp. 601-05, para 13.085; *see also* Wade & Forsyth: *Administrative Law* (2005), p. 366.]
> 20. ***
> 21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no 'pick and choose', selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a 'sledgehammer to crack a nut'. As has been said many a time, 'where paring knife suffices, battle axe is precluded'."
>
> (emphasis ours)

24. If the balancing test is applied to the factual matrix of the present case, it is as clear as daylight that the forfeiture of the entirety of the appellant's security deposit worth Rs 9,12,21,315/- (Rupees nine crore twelve lakh twenty one thousand three hundred and fifteen only) as against evident human error, which has not been shown to even border

[7] (2007) 4 SCC 669

on *mala fides*, or knowingly done, is punitive. The enforcement of an otherwise commercially unviable bid, with the forfeiture of the deposit hanging over the appellant's head akin to a sword of Damocles, can hardly be said to be in either party's best interests. Perhaps, the respondents could consider to provide a cross check and affirmation, from the party, to avoid human errors and mistakes.

25. However, we would be remiss in not observing that the e-auction in question was a competitive bidding process which demanded a high degree of caution and care on the part of the appellants. As was noted by this Court in ***Patel Engineering Co. Ltd.*** (supra), the bidders being experienced corporate entities are expected to have the assistance of technical experts, and exercise a greater than ordinary degree of care, if not meticulousness, to obviate and prevent such situations, in order to maintain the sanctity and integrity of the tender process. Though there has been a human error, but the same also evinces a degree of remiss and carelessness the result of which is bound to cost the public exchequer heavily in terms of time, effort and expense.

26. Whether forfeiture of security deposit of Rs. 9,12,21,315/- (Rupees nine crore twelve lakh twenty one thousand three hundred and fifteen only), is in the form of penalty or liquidated damages is an issue which we choose not to delve into in the present matter, to give the *lis* a quietus. In the interest of equity and in exercise of power under Article 142 of the Constitution, we thus deem it fit to pass the following orders. We quash the impugned communication issued by the first respondent. A

coordinate Bench of this Court, *vide* interim order dated 06th April, 2024, had extended to the respondents the liberty to conduct a fresh e-auction as per law. We, thus, confirm the liberty so extended to the respondents to conduct such fresh e-auction, if not conducted already. Further, in order to maintain the balance between the interest of the State and the private party, i.e., the appellant, we do not wish to let the appellant go scot-free. On account of the appellant's failure to act with the required degree of care, which has not only had the effect of inevitably delaying the mining project but would also cost both the respondents and the other participant bidders precious time, effort and money, we direct the appellant to pay to the first respondent Rs 3,00,00,000/- (Rupees three crore only) within a month from date. In default thereof, the bank guarantee furnished by the appellant may be encashed by the first respondent. Should the appellant effect payment of Rs 3,00,00,000/- (Rupees three crore only) within the period stipulated, the bank guarantee shall cease to be operative and stand cancelled. Out of Rs 3,00,00,000/- (Rupees three crore only) paid by the appellant, Rs.2,75,00,000/- (Rupees two crore seventy five lakh only) shall be appropriated towards loss of revenue arising out of the delay in commencing mining activities, costs towards expenses incurred for the earlier e-auction process and for the fresh process that is underway or to be conducted in terms of this order, as the case may be, and other sundry purposes, if any. The remaining Rs.25,00,000/- (Rupees twenty five lakh only) should be expended towards charitable purposes for

development of the young tribal population of the district where the subject mine is situate.

27. The impugned judgment and order, accordingly, is set aside. The civil appeal stands partly allowed on terms aforesaid, with the parties being left to bear their own costs.

..................................J
(SANJIV KHANNA)

..................................J
(DIPANKAR DATTA)

New Delhi;
15th July, 2024.