(2005) 08 CAL CK 0062

In the Calcutta High Court

Case No : T. No''s. 217 and 218 of 2005

Bharat Coking Coal Limited APPELLANT

Vs

Chandrama Hard Coke Mfg. Co. RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Citation : (2006) 4 CHN 468

Hon'ble Judges : Tapan Kumar Dutt, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : A.K. Mitra and Kalimuddin Mondal, for the Appellant;Debi Pal, S.S. Roy, Utpal Dhar and V. Mitra, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—The learned Counsel for the parties have been heard at length. The learned Counsel for the respondent/writ petitioner did not ask for any direction to file affidavits to the stay petition and chose to rely on the averments in the writ petition in support of the contentions urged by him. This appeal from an interim order is treated on the day''s list by consent of the parties, and both the appeal and the stay application are disposed of by the following judgment.

2. On 6th April, 2005 a writ petition was filed by the writ petitioner M/s. Chandrama Hard Coke Manufacturing Company, a proprietary concern and its proprietor before this Hon''ble Court, inter alia, challenging the scheme for sale of coal in non core sector by way of e-auction.

3. On 6th April itself, the learned Judge of the Writ Court, without calling for any affidavit, was, inter alia, pleased to pass an interim order to the following effect:

Let there also be an interim order until further order to the effect that during the pendency of this writ petition petitioners herein will be entitled to purchase coal required by them subject to their eligibility according to the prevailing linkage system on payment of basic price as determined by the respondents to be effective from January 1, 2005 and also subject to filing indemnity bond securing the differences between the e-auction price and the basic price.

4. Then an application was filed by BCCL for modification of the said order. The said modification application was rejected by the learned Judge on 6.05.05, again without calling for any affidavit, and the following order was passed:

Having heard the learned Advocates appearing for the parties and considering the averments made in this application and also considering the order passed by the Hon''ble Supreme Court in SLP (c) 9232/05 on 2nd May, 2005, I do not find any cogent reason to vary and/or vacate and/or modify the earlier order dated 6th April, 2005 passed by this Bench.

Accordingly, I do not find any merit in this application and the same is,therefore, dismissed.

There will be, however, no order as to costs.

5. Challenging both the orders, this appeal has been filed by BCCL on various grounds.

6. BCCL contended before this Court that the writ petitioner is one of the 816 linked consumers with BCCL and such linked consumers are spread all over the country. The writ petitioners purchase coal from BCCL at the prevalent price of coal as notified on the date of delivery. The linked consumers like the writ petitioners are required to deposit the price of the quantity of coal allotted to them for the concerned month. In case of any increase in the notified price of coal between the date of allotment and that of delivery, the linked consumer pays the difference in price on the date of delivery. This is the standard practice followed in the matter of sale of coal by BCCL and its purchase by linked consumers like the writ petitioners.

7. Counsel for the BCCL further urged that in order to ascertain the best price of coal, e-auction has been introduced and BCCL is one of the first companies to hold the e-auction in respect of coal produced by it. The BCCL held e-auction on coal on various dates, namely between November, 2004 and December, 2004 and then between February, 2005 and March, 2005 and again in the month of April, 2005 and as also in the month of May, 2005. In such e-auction huge quantities of coal are offered and made available to persons through Website at least seven days before the date of holding e-auction. Notice of e-auction is hung up on the notice board at the registered office of BCCL in which quantity of coal in their respective grades and source of such coal and collieries are notified. Any buyer including the linked consumers in non-core sector can participate in e-auction subject to the condition that minimum offer of purchase should be 50 tones of coal. The price is displayed through Website. The participants who deposit earnest money for e-auction are eligible to participate in the said e-auction. The booking of quantity of coal as well as the price quoted is available on the auction site of MSTC and M/s. Metal Junction Company (P) Ltd. The best price of such bid as received are accepted and displayed on the Website. The

system of e-auction according to BCCL is transparent system and any person requiring coal can participate and buy without any undue pressure from any quarter. The prices, which are available at e-auction, obviously represent the market price. An average is made of the prices which are offered and ultimately on an average being made the coal is sold at that price. In the terms and conditions of holding e-auction, it is also provided that if any of the parties commits a default in payment or refuses to lift or cancels the allotted quota, in that case its earnest money will be forfeited and such bidder would be deactivated by MSTC or M/s. Metal Junction, as the case may be, so as to debar the said bidder from participating in e-auction of BCCL. This clause has been inserted in order to prevent artificial hiking of prices by way of speculation.

8. Explaining the above feature of e-auction, the learned Counsel for BCCL, submits that there is no reason for the writ petitioners to challenge the aforesaid procedure which is transparent, fair and gives everyone equal opportunities to participate in e-auction for sale of coal. The learned Counsel further submitted that coal has been decontrolled since 1st of January, 2000 and the writ petitioners buy coal from the appellant for manufacturing" beehive hard coke which are again sold by them as decontrolled items in the market. The learned Counsel further submitted that BCCL is entitled in law, to sell coal to its linked consumers at the price which is prevalent in the market and since it is selling coal to the writ petitioners and they are utilizing it for a commercial purpose, BCCL is entitled to realise the full price for its product at which it is entitled to sell the same. The learned Counsel further submitted that there is no reason for the Writ Court to pass an interim order by way of a mandatory direction and as a result of which the appellant will be deprived from realising the prevalent market price for its product.

9. The learned Counsel for the respondents/writ petitioners, on the other hand, has submitted that system of e-auction is wholly unreasonable, arbitrary and is violative of Article 14. The learned Counsel further submits that e-auction is run on a trial basis. Nobody knows when the process of a e-auction will come to a stop and if the e-auction process comes to a stop in that case the price which is fixed by e-auction is a higher price and the petitioners will loose by buying coal at such a higher price. The learned Counsel submitted that in order to guard against such eventuality, the learned Judge of the Writ Court has passed the order directing the appellant to sell coal to the writ petitioners on the price as notified on 1st January, 2005 and the balance between the notified price on 1st of January, 2005 and the price obtained on e-auction has been secured by filing of indemnity bond. The learned Counsel further submitted that there is nothing illegal in the said interim order which has been passed. The learned Counsel relied on the statement dated 29"' January, 2005 given by Shri Sibu Soren, Minister of Coal. Relying on the statement, learned Counsel submitted that policy of e-auction has not been finally approved by the Government and relying on the said decision, learned Counsel tried to say that a firm policy decision by the Government about introduction of e-auction has not been taken. Therefore, the

price which has been obtained through e-auction should not be realized by the appellant. Learned Counsel also submits that sale of coal by way of e-auction purports to abolish the system of linkage and the classification between linked and non-linked consumers is thus sought to be abolished. It was also submitted that abolition of linkage in the non-core sector would amount to treating unequals as equals if the customers in the non-core sector are treated on equal footing with customers of core sectors. The learned Counsel also submitted that sale of coal by e-auction scheme would amount to sale of coal in an arbitrary manner at an exorbitant price and the same is against the spirit of distribution of essential commodities. Learned Counsel refers to the grounds Nos. XII, XIII and XIV in the writ petition in order to highlight that sale of coal through e-auction is unreasonable and arbitrary. Learned Counsel also submits that challenging e-auction, various proceedings have been moved in various High Courts and also in Supreme Court and various Courts have passed interim order on the sale of coal through e-auction. Therefore, the learned Judge by granting the interim order, as referred to above, has not committed any illegality. It was also submitted that if the protection of interim order is nullified in that case, writ petition would become infructuous.

10. These are by and large the rival contentions of the parties.

11. From the facts discussed above, it is clear that writ petitioners are purchasing coal from BCCL in order to carry on a commercial venture.

12. Insofar as the writ petitioner''s allegation of e-auction abolishing the system of linkage is concerned, it appears that said case has not been properly made out. From the order dated 8"' April, 2005 issued by the Government of India, it has been made clear that coal supplies to non-core sector linked consumers on the maximum permissible quota would continue. Apart from that it also appears that on 8th of April, 2005, Central Government has directed the coal companies to fix the price of coal for linked consumers on the basis of average e-auction price and by the said document the Central Government have approved release of a further quantity of 10 million metric tones of coal for e-auction during 2005-2006. Learned Counsel for the appellant further submitted that statement of Shri Sibu Soren in January, 2005 is contradicted by the stand of the Central Government as reflected in the order dated 8th of January, 2005 and by the said order, the Government of India, Ministry of Coal has approved the sale of coal through e-auction during 2005-2006. Therefore, it appears to this Court, at least prima facie, that there is no substance in the apprehension of the writ petitioners that e-auction has been introduced for a limited period and it is just on a trial basis. This Court also finds that on the basis of the Central Government order dated 8"' April, 2005 the appellant has by a notice dated 20th April, 2005 notified the price of coal on different collieries through e-auction.. This shows that sale of coal through e-auction is not on a really trial basis. Insofar as the writ petitioner''s case that the system of e-auction is arbitrary, this Court finds that the learned Judge of the Writ Court did not record any prima facie finding in

the orders under challenge that the said system is unreasonable or unfair. To this Court also, prima facie, the system of e-auction does not appear to be unfair and unreasonable. No such case was made out before us by the learned Counsel for the writ petitioners.

13. Insofar as the orders of different High Courts and especially that of the Apex Court dated 22nd May, 2005 is concerned, this Court is of the opinion that an interim order cannot be regarded as a precedent. It is well-settled that an interim order is always passed by a Court on a prima facie appraisal of the facts and circumstances of a particular case. The same is true of the orders of the Supreme Court dated 22nd May, 2005 and 3rd March, 2005 and they were passed in a totally different fact situation. Unfortunately, the attention of the learned Judge could not be drawn to those factual aspects on the basis of which those orders were passed as the learned Judge did not call for any affidavits and the relevant facts could not be disclosed to His Lordship.

14. The Supreme Court''s order dated 3rd March, 2005 arose out of a proceeding before Guwahati High Court. The factual distinction between the proceedings before Guwahati High Court and the instant proceeding are far too fundamental to be missed by any Court if it grants mandatory interim order by following the interim order granted by the Apex Court in the SLP arising out of Guwahati High Court proceedings.

15. Before the Guwahati High Court the writ petitioners were coal traders and are not linked consumers like the present writ petitioners. Apart from that, the learned Judge in Guwahati High Court was considering the lack of know-how of the traders in North-Eastern region in dealing with computers and also the non-availability of computer technology to them and came to a tentative conclusion that introduction of e-auction may cause hardship to the traders. But these facts are not relevant about the traders of BCCL at least no such case has been made out. Apart from that the writ petitioners before the Guwahati High Court booked the coal under Open Sales Scheme which was notified on 29th November, 2004 by North Eastern Coal fields (hereinafter called NEC) and on 17"'' December, 2004 one of the applicants in that case got delivery of coal and two others were given indents for rakes. These allotment orders were subsequently cancelled by NEC on 1st January, 2005 after NEC had issued a notice of e-auction dated 29th December, 2004 for sale of 40 rakes of coal. As such the writ petitioners came before Guwahati High Court and their grievances were that coal covered under Open Sales Scheme will become subject-matter of e-auction and as such the writ petitioners challenged e-auction. In the background of those facts, which are totally absent in this case, the Guwahati High Court stayed the notice of e-auction. In the special leave petition, filed before Supreme Court by coal companies in the aforesaid proceeding arising out of Guwahati High Court, the Solicitor General offered to sell those 8 rakes of coal to the writ petitioners at the price prevailing in December, 2004 only because those writ petitioners submitted their application along with requisite price on 14th December, 2004 and indents

were given by NEC on 12th December, 2004 when December, 2004 rates were prevailing. In the background of those facts, the Supreme Court passed its order in view of the submission of the learned Solicitor General that nearly 34 metric tones of coal is lying in stock in open yard with NEC and the disposal of the writ petition by the High Court is taking time and in the near time coal is getting deoxidized. It was also submitted by the learned Solicitor General that if the claim of the writ petitioner is to be catered to, it will require only 8 rakes of coal and which NEC was willing to supply at the rates prevailing in December, 2004 subject to the condition that they would file an indemnity bond before the High Court in the event of their claim failing before the High Court. But so far as the balance stock of coal, was concerned, NEC was allowed by the Hon''ble Supreme Court to sell it to the highest bidder through e-auction. Therefore, sale of coal by e-auction, on principle, was accepted and allowed by the Hon''ble Supreme Court. Thus, the interim order was passed by the Hon''ble Supreme Court on the suggestion of the Solicitor General and in the peculiar facts of the case. The same is made clear in concluding paragraph by the Hon''ble Supreme Court where the Court stated "this interim order is made because of the facts and circumstances of this case". The same order was repeated by the Hon''ble Supreme Court on 02.05.2005.

16. This Court is constrained to observed that this factual background in the case of Guwahati High Court on basis of which the order of the Hon''ble Supreme Court was passed could not be disclosed before the learned Judge as the interim order was passed without giving the appellant any chance to file an affidavit. Therefore, the learned Judge fell into an error by following an interim order like a precedent without ascertaining the peculiar facts on the basis of which such an order was based.

17. Now, considering the question on general principles of grant of interim order, this Court is of the opinion that in matters relating to fixation of price, the jurisdiction of the Court to grant interim order, is extremely limited. Can the Court by way of a mandatory interim order prevent the appellant from obtaining the price of a commodity which is freely bought and sold in market and that too without holding even prima facie, that the procedure for sale of commodity through e-auction is either illegal or vitiated by any infirmity? The answer has to be in the negative. It stands to reason that when a commodity has to be purchased from the market the seller is entitled to sell the commodity to the highest bidder and on a price which is available in the market. Just because the seller is BCCL and the commodity is coal there should not be any departure from the aforesaid principle especially when coal is now a decontrolled item. Apart from, as noted above, the writ petitioners are carrying on a commercial venture and are making beehive hard coke from coal purchased by them from BCCL. The price at which the commodity is sold by writ petitioners has not been disclosed in the body of writ petition. No averment has also been made giving any particulars to the effect that as a result of fixation of price by BCCL by way of e-auction, the writ petitioners are suffering in their business or they are experiencing any

hardship. Therefore, the prejudice of the writ petitioners, if any, has not been demonstrated.

18. Apart from that a mandatory interim order is very rarely passed. The jurisdiction to grant mandatory injunction is to be exercised with great caution. In all cases of interference by way of mandatory injunction, the Court must take into account the comparative convenience and inconvenience of the parties. (See Kerr on The Law and Practice of Injunction, pp.40--41, 6th Edition). From the facts of this case, it is clear that these principles were not followed by the learned Judge while passing the interim orders on 06.04.05 and 06.05.05.

19. BCCL in their stay petition clearly stated that the notified price of coal as on 1.1.2005 did not represent a fair value of market price of coal (para 27) and as a result of e-auction higher price of coal was fetched (paras 28 and 33). This is not disputed by the writ petitioners. It has also been stated that as a result of interim order dated 6.04.05 BCCL is losing its selling price to the tune of Rs. 600/- approximately per Metric Tonne on an average in view of the price notified on 20.04.05 on the basis of e-auction. It has been also stated that the personal indemnity bonds are of very little value and it is difficult to realise the difference in price in the event this writ petition fails. In paragraph 45 of the stay petition, BCCL further stated as follows:

BCCL being a commercial organization is in need of revenue for meeting running expenses and is entitled to realise the notified price as market price. Unless BCCL is allowed to do so, it is difficult to manage the affairs of the company to meet the expenses and continue commercial activity without realization of value of its products. BCCL have got 92,268 numbers of employees as on 31.03.2005 and is the owner of 86 numbers of collieries. Monthly expenses of BCCL on account of wage bill alone are Rs. 101.21 crores, apart from running expenses of operation of coalmines. The cost of production of coal in 2004-05 was Rs. 1103.08 per M.T., which was more than the realizable price. Last e-auction held from time to time have yielded higher revenue in respect of coal put up for e-auctions but the linked consumers of non-core sector are not paying such price, which is adding to the losses to the company.

20. The facts were not disputed before us by the learned Counsel for the writ petitioners. But these facts were not considered by the learned Judge as no affidavits were called for and His Lordship passed the mandatory interim order on 06.04.05 and reiterated on 06.05.05.

21. It is obviously in public interest that any public property, when sold publicly, must be sold at the highest price that it can fetch. Supreme Court had made it clear in Chairman and Managing Director, Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, , page 601, para 12 of the report. Apex Court reiterated these principles in Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , at para 14, page 507 of the report. The Apex

Court has also cautioned that in commercial matters the Court should not risk their judgments in preference to the views of the bodies to whom the task is assigned, see U.P. Financial Corporation and Others Vs. Naini Oxygen and Acetylene Gas Ltd. and Another, .

22. Following the aforesaid principles, as we must, this Court is constrained to set aside the interim orders dated 6.04.05 and 6.05.05 issued by the learned Judge of the Writ Court. This Court, on the other hand, directs, on the basis of undertaking given by BCCL before this Court, that in the event the writ petition succeeds, the writ petitioner will be entitled to the refund along with 9% interest per annum, of the excess price which it will pay for buying coal, namely the difference between the notified price on 01.01.05 and the e-auction price which it will have to pay at the time of taking delivery of the coal. And if the writ petitioners so demand, BCCL undertakes to adjust the said amount against the future price of coal which the writ petitioners will have to pay for buying coal from BCCL. This option lies with the writ petitioners.

23. The appeal is allowed and the interim orders, dated 06.04.05 and 06.05.05 about the price to be paid to be paid by the writ petitioners on furnishing indemnity bond, are set aside.

24. The hearing of the writ petition is expedited.

25. No order as to costs.

26. Urgent xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.

Tapan Kumar Dutt, J.: I agree.

Later:

27. Prayer for stay made by the Counsel for the writ petitioners/ respondent is considered and declined.

28. Urgent xerox certified copy of the order be made available to the parties, if applied for.

