(2013) 09 GAU CK 0014

In the Gauhati High Court

Case No : Writ Appeal No. 237 of 2010

Calcom Cement India Ltd. APPELLANT

Vs

The State of Assam RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 1 GLD 363

Hon'ble Judges : Adarsh Kumar Goel, C.J;Ujjal Bhuyan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—This writ appeal is directed against the judgment and order dated 21-07-2010 passed by the learned Single Judge in W.P. (C) No. 3397/2009 dismissing the writ petition filed by the appellants questioning the Memorandum of Understanding (MOU) entered into between Assam Mineral Development Corporation (AMDC) and Jayprakash Associates Limited (respondent No. 8) relating to utilization of limestone and coal deposits available in the mines of AMDC at New Umrangshu and other places of North Cachar Hills District and seeking other related reliefs. Case of the appellants as projected in the writ petition is that appellant No. 1 is a public limited company incorporated in terms of the MOU dated 08-09-2004 between Assam Industrial Development Corporation Limited (AIDC), a Government of Assam undertaking and Vinay Cements Limited for the purpose of setting up a large cement manufacturing plant with equity participation from both. Vinay Cements limited is also a public limited company engaged in the business of manufacture and sale of cement for the last more than 2 decades.

2. An agreement was entered into on 06-05-2005 between Government of Assam, represented by the Additional Chief Secretary, Department of Industries and Commerce, and appellant No. 1. As per the said agreement, AIDC would be the co-promoter of the proposed project to the extent of 10% of equity participation, necessary fund for which would be provided by the Government of

Assam. Suitable land would also be provided by the Government of Assam/AIDC for the project, location of which would be decided as per techno-economic feasibility and other related reports. It was also provided that mining lease held by AIDC at Umrangshu would be transferred to appellant No. 1, who would compensate AIDC for the past expenditure incurred by the AIDC on the said mining lease. It was also provided that Government of Assam would extend cooperation in granting additional mining leases to the appellants in New Umrangshu area in order to enhance production capacity of the proposed plant to 5 million metric tonnes and to sustain the quality of cement manufactured. Thereafter, on payment of the assessed amount, mining lease of AIDC was transferred to appellant No. 1.

3. According to the appellants, AMDC has a deposit of high grade limestone located next to the deposit of AIDC, which has since been transferred to appellant No. 1. While the limestone in the AIDC mines is of medium grade, those in the AMDC mines is of a higher grade. Use of such high grade limestone would result in production of better quality cement making it more market competitive. Based on the above assessment, appellants submitted proposal before the Government of Assam to make productive use of the AMDC deposits on a long term basis which would lead to production of better quality cement so as to make it competitive with the new plants coming up in neighbouring Meghalaya. Request was made to allow appellant No. 1 to work out a partnership with AMDC. In this connection, a number of correspondences took place between the parties, which have been placed on record by the appellants. Discussions were also held between the parties at various levels in this regard.

4. In the meanwhile, a notification was issued by the Government of Assam in the Mines and Minerals Department on 12-06-2007 inviting expression of interest from investors for setting up of mineral based industries as a joint venture with AMDC. Mineral blocks involved were coal, cement grade limestone, caolin (China clay), granite, iron-ore and glass sand. It was stated that parties interested in exploration/exploitation of mineral deposits and setting up of mineral based industries shall form joint venture companies with AMDC, who shall hold share in the joint venture company in lieu of the mining leases held. Appellants moved the authorities including the Chief Secretary to the Government of Assam, requesting withdrawal of the said notification in respect of limestone and coal as appellants were in the midst of discussion with the authorities for effective utilization of the higher grade limestone from AMDC mines and also for purchase of coal therefrom. This was followed by a series of letters and representations wherein it was contended that appellant No. 1 had already invested substantial amount of money in the project and that it is in need of higher grade limestone which is available in AMDC mines to make its project competitive.

5. While Government of Assam and its authorities did not take any steps pursuant to above letters and representations of appellant No. 1, AMDC signed MOU with respondent No. 8 on 31-07-2009 for setting up a 2 million tonne per

annum capacity cement plant at Umrangshu. This MOU was signed in response to Government notification dated 12-06-2007 inviting expression of interest for setting up of mineral based industries as a joint venture with AMDC.

6. Aggrieved, appellants had filed W.P. (C) No. 3397/2009 seeking quashing of MOU entered into between AMDC and respondent No. 8 relating to utilization of limestone and coal deposits in the mines of AMDC at New Umrangshu and in other areas of North Cachar Hills District. Further prayer made was for a direction to the respondents to restrain them from giving effect to the said MOU without first making available limestone and coal from the mines of AMDC at New Umrangshu and other places of North Cachar Hills District to the appellants on requirement basis.

7. Appellants had contended that the State had given assurance that limestone from AMDC mines would be made available to appellant No. 1 and based on such assurance, appellant No. 1 had altered its position by making substantial investment involving men and material to produce good quality cement by mixture of limestone from AMDC mines and AIDC mines. Appellants thus based their case on the doctrine of promissory estoppel.

8. Writ petition was contested by the respondents by filing affidavit.

9. Respondent No. 2 in his affidavit had taken the stand that as per technical report, quality of cement grade limestone available in the AIDC mines, which were leased out to appellant No. 1, is at par with the quality of limestone available in the AMDC mines. Respondent No. 2 had averred that total reserve of limestone available with appellant No. 1 at the lease hold area of AIDC mines can sustain the proposed cement plant of 5 million tonnes per annum capacity for a period of about 40 years. Respondent No. 2 stated that in response to the notification dated 12-06-2007, a total of 23 parties had submitted their expression of interest for different mineral blocks including limestone blocks which included respondent No. 8 expressing interest especially in AMDC limestone mines. As per the said affidavit, State Government constituted a High Level Committee to make comparative assessment and evaluation of the bids submitted in response to the notification dated 12-06-2007. The Committee after detailed comparative assessment and evaluation of the bids received in respect of limestone mines of AMDC, found the bid submitted by respondent No. 8 to be the best for the said block. Accordingly, respondent No. 8 was selected as the joint venture partner of AMDC for the limestone block in question. Selection of respondent No. 8 as joint venture partner of AMDC for setting up of cement plant had the approval of the cabinet. Pursuant to cabinet approval, AMDC and respondent No. 8 entered into MOU on 31-07-2009 in terms of which respondent No. 8 had deposited the earnest money with AMDC. Respondent No. 2 had stated that while State Government had given approval in principle to make available limestone from AMDC mines to appellant No. 1 on requirement basis and on mutually agreed terms, no promise was ever made by the Government to appellant No. 1 to allot AMDC mines for extraction of limestone, more specially

the block of mines settled with respondent No. 8.

10. AMDC in its affidavit supported the stand taken by respondent No. 2. AMDC had asserted that no assurance was given by the Government of Assam or by it to the appellants for providing limestone from limestone mines of AMDC. Government of Assam had only agreed to supply limestone from AMDC mines to appellant No. 1 on requirement basis and on mutually agreed terms.

11. AIDC in its affidavit had stated that it had transferred mining lease of its limestone mines to appellant No. 1 immediately on receipt of necessary approval from the competent authority. Although clause 6.5 of the MOU signed between the Government and appellant No. 1 provided that Government of Assam would extend necessary cooperation by granting additional mining lease in New Umrangshu area in order to enhance production capacity to 5 million metric tonnes, no commitment as such was given that limestone from AMDC mines would be made available to appellant No. 1. However, the project report indicates that the first phase of appellants project is to be commissioned on the basis of the existing mines of appellant No. 1 as well as from the mines leased from AIDC.

12. Respondent No. 8 had filed affidavit. It had stated that it had offered its bid in terms of notification dated 12-06-2007 especially in respect of AMDC block of limestone mines. Bid of respondent No. 8 was found to be the most competitive and accordingly it was short-listed. After further scrutiny by the Government, respondent No. 8 was allotted the AMDC block of limestone mines in question. Such allotment was subsequently approved by the cabinet whereafter, MOU was entered into between AMDC and respondent No. 8 on 31-07-2009. In terms of MOU, amount of Rs. 3.15 crores was deposited by respondent No. 8 with AMDC. Appellants cannot claim monopoly right or preferential treatment for grant of mining lease of lime stone mines of AMDC. It is for the State to decide as to whom and in what manner mining lease is to be granted but the overriding concern has to be that of public interest. Documents relied upon by the appellants do not make out any case of promise being given by the State to the appellants to grant mining lease of the AMDC mines. On the contrary, appellant No. 1 failed to commission its cement plant even after 5 years of its agreement with AIDC.

13. Learned Single Judge on due consideration of the pleadings and other materials on record held that no case of any promise by the State or its instrumentalities could be made out giving preferential right to the appellants for supply of limestone and coal from any AMDC block of mines. Finding no merit in the writ petition, the same was dismissed vide the judgment and order dated 21-07-2010.

14. Heard Mr. A. Kashyap, learned counsel for the appellants and Mr. B.J. Talukdar, learned Government Advocate, Assam. Also heard Mr. M. Bhuyan, learned Standing Counsel, AMDC and B.D. Das, learned Standing Counsel AIDC. Mr. S.S. Dey, learned counsel appeared for respondent No. 8.

15. Learned counsel for the appellants submits that pursuant to the MOU dated 08-09-2004, an agreement was entered into between appellant No. 1 and the State whereby it was agreed that mining lease held in favour of AIDC would be transferred in favour of appellant No. 1. It was further agreed that respondent No. 1 would extend necessary support by granting additional mining lease to appellant No. 1 in New Umrangshu area in order to enhance production capacity to 5 million metric tonnes per annum and to sustain quality of cement manufactured. Series of communications took place between the parties thereafter regarding use of high quality limestone from AMDC mines by the appellants to enhance production and to improve quality. This ultimately led to the decision of making available limestone from AMDC mines to appellant No. 1 on requirement basis on mutually agreed terms, which had the approval of the cabinet. Appellant No. 1 quantified his requirement of limestone from AMDC mines. Plant of appellant No. 1 was designed to use high quality limestone from AMDC mines for which huge investments were made based on the promise made by respondent No. 1 to provide high grade lime stone from AMDC mines. Without fulfilling the promise made to the appellants, the State has created third party rights in favour of respondent No. 8 and granted monopoly to respondent No. 8 vis-a-vis the block held by AMDC at Umrangshu. This decision of the State is arbitrary and violative of Article 19(1)(g) read with Article 14 of the Constitution. Appellants have been subjected to an unfair and discriminatory treatment which requires interference by the Court. Learned Single Judge failed to consider the above aspect in the correct perspective. Learned Single Judge committed an error in proceeding on the premise that appellants are seeking monopoly right over AMDC limestone mines, which is not the appellants case.

16. Submissions made on behalf of the appellants have been resisted by learned counsel appearing for the respondents. Objection has been raised as to the maintainability of the writ petition itself as it is contended that under the MOU and the agreement, dispute between the parties should be resolved through mutual negotiation failing which dispute should be referred to arbitration. Without availing the alternative remedy of resolution of dispute as provided, writ petition was filed. On merit, it is contended that though expression of interest was invited on 12-06-2007, no challenge was made to it. On the contrary, writ petition was filed 2 years later after signing of MOU between AMDC and respondent No. 8. Clause 6.5 of the MOU between AIDC and appellant No. 1 only mentions that Government of Assam would extend necessary assistance for granting additional mining lease in Umrangshu to enhance production capacity to 5 million metric tonnes. This condition is also incorporated in the agreement executed on 06-05-2005. Appellants have got the lease for AIDC limestone mines which would be able to sustain a cement plant of 5 million metric tonnes per annum capacity for a period of 40 years. A reading of all the document placed on record do not indicate that any promise was made or assurance given by the State to the appellants that AMDC mining block would be transferred to the appellants. No fundamental or legal rights of the appellants have been

breached by signing of MOU between AMDC and respondent No. 8 to warrant any judicial interference. Judgment of learned Single Judge does not suffer from any infirmity and, therefore, should be upheld.

17. Submissions made have been considered. Also perused the materials on record.

18. Before proceeding further, let us briefly refer to the findings of the learned Single Judge.

19. Learned Single Judge had framed the following three issues for consideration:--

1. Whether the Respondent State had promised that the limestone mine of AMDC block which has now been settled in favour of the Respondent No. 8 on the basis of which the AMDC and the respondent No. 8 have entered into the MoU dated 31-07-2009 would be first made available to the writ petitioners?

2. Whether the MoU dated 31-07-2009 entered into between AMDC and the respondent No. 8 is liable to be interfered with as prayed for by the writ petitioners?

3. Whether the State Respondents are under any legal obligation to make available limestone and coal to the petitioners from the mines of AMDC at New Umrangshu and North Cachar Hills on requirement basis pursuant to any cabinet decision or commitment on its part?

20. After due consideration of rival contentions, learned Single Judge held as under:--

32. Even a most generous reading of the pleadings and documents pressed to service by the writ petitioner, as noted above, could not persuade the Court to read any word of promise from the Government of Assam or its instrumentalities including the AMDC so far as it relates the claim of the petitioners to get preferential supply of limestone and coal from any AMDC block of mines. The subsisting agreement of the petitioners with the AIDC for transfer of lease hold possession of AIDC mines has been already undisputedly fulfilled. So far as supply of limestone from AMDC mines are concerned, the best that can be deciphered is that "limestone from AMDC mines would be made available on requirement basis and on mutually agreed terms". There is no material on record to unambiguously project any promise by either any authority of the State Government or the AMDC to give any preferential or monopoly treatment to the petitioners in respect of AMDC owned mines, be it coal or limestone. No promise is discernable from any of the materials available on record so as to prompt this Court to enforce the principle of promissory estoppel against the State in the matter of settlement of the particular AMDC block of limestone mines which has now been settled in favour of the respondent No. 8. Rather mineral like limestone is a precious public property which has to be mandatorily used for public welfare and any process of settlement of such public wealth in favour of any private

party must necessarily be done by following the legally accepted process of distribution of public larges. It is important to be noted herein that although the notification inviting Expression of Interest for settlement of the particular AMDC block of limestone mines with a reserve of 157 million tonnes was issued on 12-06-2007, the petitioners opted to wait for long two years and come to Court only in the month of August, 2009, that too after the settlement process was finalized in favour of the Respondent No. 8 and the MoU was signed between the State authority and the Respondent No. 8 in pursuance whereof the Respondent No. 8 has also made considerable investment as quoted above. Other than submitting representations, some of which are not even related to the issue at hand or the prayers made in the writ petition, the writ petitioners have chosen to maintain an indolent attitude. In fact, estoppel, if any operates against the writ petitioners who had preferred not to participate in the process of settlement in terms of the notification dated 12-06-2007 inspite of having full knowledge of the same and keep on submitting representation and come to the Court at this belated stage in a round about manners with the prayers which if granted would amount to nullifying and quashing the settlement made in favour of the Respondent No. 8.

33. Accordingly, I decide issue Nos. 1 and 2 against the writ petitioners holding that no case of enforcement of promissory estoppel has been made out by the writ petitioners against the respondents in respect of the AMDC block of limestone mine which has been settled in favour of Respondent No. 8 and on the basis of which a MoU dated 31-07-2009 has been entered into between the AMDC and the Respondent No. 8.

34. As regards the issue No. 3, it is the pleaded case of the Respondent Nos. 6 and 7 that it had never in any manner committed supply of any minerals from its mines or any unilateral demand or term set by the writ petitioners and that no agreement on mutually agreed terms and reasonable prices with delivery time schedule on requirement basis has been entered into by the AMDC and the writ petitioners. Even by not delving into the question of relative quality of the reserves of AIDC and AMDC mines and as to whether a prima facie appreciation of clause 6.5 of the agreement between the Government of Assam and the writ petitioner No. 1 would entitle the writ petitioners to claim any further grant of additional mining lease on its failure even to set up their promised cement plant for the initial envisaged production capacity, the writ Court is not a forum for adjudication of such canvassed rights which are neither contractual in the absence of an agreement to that effect nor statutory in nature. Accordingly, the issue No. 3 is also decided against the writ petitioners.

35. In view of the decision arrived at by this Court on the averments made in the pleadings and materials available on record as indicated above, the decisions cited by the learned counsel appearing for the petitioners have not been referred to elaborately, which even otherwise would not effect the merit of the case.

36. Under the facts and circumstances as mentioned above, this Court is not

inclined to entertain the writ petition by invoking power under Article 226 of the Constitution of India. Accordingly, the same is dismissed.

21. We are in agreement with the views expressed by the learned Single Judge.

22. In the agreement dated 06-05-2005 between Government of Assam and appellant No. 1 it was provided in clause 6.5 that Government of Assam would extend necessary cooperation by granting additional mining leases in New Umrangshu area in order to enhance the production capacity of the plant of appellant No. 1 to 5 million metric tonnes and to sustain the quality of cement manufactured. In the letter dated 18-02-2006 of the Additional Chief Secretary to the Government of Assam, Industries and Commerce Department, it was stated that grant of mining lease area of AIDC to the unit of appellants was noted and it was further stated that limestone from AMDC mines would be made available to appellant No. 1 on requirement basis and on mutually agreed terms. It was also provided that the unit may purchase coal from AMDC in the manner indicated by the Power Department. The letter disclosed that the above had the approval of the cabinet.

23. Since much emphasis has been laid on the letter of the Managing Director, AMDC dated 07-11-2006 in support of appellants contention, the relevant portion of the same is quoted hereunder:--

To,

M/s. Calcom Cement India Ltd. Regd. Office at Sonadhar Senapati Road, Silpukhuri, Guwahati-3.

Sub: Supply of limestone of coal to M/s. Calcom Cement India Ltd.

Ref: Your letter dated 21-08-2006.

Sir,

This is to acknowledge with thanks the receipt of your above letter dated 21st of Aug 2006. In this context, I would like to confirm that we would be able to supply your required quantity of limestone with an average quality of 46.5% of CaO which may be the best quality of manufacturing cement. As you are aware that the current base price of our ROM cement grade limestone is fixed at Rs. 140 per MT at pit head which you intend to procure at a landed price of Rs. 159.26 at your factory site that includes base price, loading charges, transportation from pit head, royalty and VAT. So, we are reassessing our rates considering those parameters with your bulk quantity requirement.

The rates being intimated to you after confirmation.

Thanking You,

J.P. Baruah, Managing Director Assam Mineral Development Corporation Ltd.

24. Law relating to promissory estoppel is well settled and needs no re-

statement. Suffice it to say that in order to invoke the said doctrine, three essential conditions will have to be fulfilled viz., there must be a promise or representation of an existing fact as distinct from a mere promise in future; the promise or representation must be clear and unambiguous and lastly, the party seeking enforcement of the doctrine, must have been induced to act and as a matter of fact has acted or altered his position on such promise or representation to his detriment.

25. A careful and conjoint reading of the above documents do not indicate that any promise or assurance was given by the State to the appellants regarding utilization of limestone and coal deposits available in the mines of AMDC at New Umrangshu or in any other place in North Cachar Hills District. No such promise as contended by the appellants is discernible from a reading of the above documents. No case for interference is made out. We thus find no merit in this appeal, which is accordingly dismissed. However, there shall be no order as to cost.