
(2014) 04 JH CK 0089
In the Jharkhand High Court
Case No : L.P.A. No. 159 of 2013

Draeger Safety Asia Pvt. Limited

APPELLANT

Vs

The Central Coal Fields Limited

RESPONDENT

Date of Decision : 23-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 4 AJR 150 : (2014) 3 JLJR 44

Hon'ble Judges : R. Banumathi, C.J;S. Chandrashekhar, J

Bench : Division Bench

Advocate : Delip Jerath, Manoj Kumar, Shweta Bharti, Alok Anand and Ashok Kumar Singh, Advocate for the Appellant; Anoop Kr. Mehta and Amit Kr. Das, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S. Chandrashekhar, J.—Aggrieved by impugned order dated 09.04.2013 in W.P. (C) No. 6860 of 2012 in and by which the learned Single Judge found the writ petition not maintainable holding that there are serious disputed questions of fact involved in the matter and also declined to order re-testing of Self Contained Self Rescuer (SCSR) units contained in the batch numbered as ARAL, the appellants have approached this Court by filing the present Letters Patent Appeal.

2. The appellant No. 1 has claimed that it is a leading manufacturer of safety products such as Self Contained Self Rescuer (SCSR) which is an emergency system for escape from hazardous areas containing smoke, toxic gases, oxygen deficiencies etc. The appellant No. 2 is a subsidiary of M/s. Draeger Safety Asia Pvt. Limited (appellant No. 1 herein). The respondent No. 1-Central Coalfields Limited (C.C.L.) floated a global tender for supply of Oxygen Type Self Contained Self Rescuer and in response thereof, the appellant No. 1 submitted its offer in Offer No. CCL/T & C/303/08-09 dated 12.03.2009. The Supply Order dated 14.09.2009 was issued in favour of the appellant No. 1 for supply of 5000 units of DGMS approved SCSRs of 30 minutes duration with quick starting system and

5000 units of carrying belt for the said equipment and also 25 Rapid Leak Tasting Machine. The appellant No. 1 thereafter, submitted the performance bond/ performance bank guarantee for an amount of INR 1,09,36,623/- issued by ABN AMRO Bank, Singapore branch which was subsequently kept operational till 15.08.2020. In terms of the Supply Order dated 14.09.2009, the appellant No. 1 supplied materials in 3 batches numbered as ARAN, ARAM and ARAL, all containing SCSR units. As required under the contract the samples totalling 77 in number from the 3 batches being ARAN, ARAM and ARAL were sent to Indian School of Mines, Dhanbad for laboratory testing and these 77 samples cleared the test conducted at I.S.M., Dhanbad. Thereafter, 74 samples of SCSRs from the batches of ARAN, ARAM and ARAL were sent for conducting the Practical Performance Test at Mines Rescue Station, Sitarampur, Eastern Coalfields Limited. It is stated that the sample from the batches of ARAL failed the Practical Performance Test and subsequently respondent No. 1 issued letters dated 29/30.07.2011 and 16.08.2011 directing the General Manager (MM) to separate the 2541 number of SCSRs in batch of ARAL and further directed the General Manager (MM) to advise the appellant No. 1 to replace the entire quantity of batch ARAL. Thereafter, the respondent No. 1 vide letter dated 02.09.2011 directed the appellant No. 1 to replace 2541 numbers of SCSRs contained in batch ARAL. The appellant No. 1 vide letter dated 04.02.2012 responded by offering re-testing of the samples at the cost of appellant No. 1 and vide letter dated 24.04.2012 appellant No. 2 also proposed a schedule for re-testing of the samples of batch ARAL. However, by letter dated 04.07.2012 the offer of the appellant No. 1 for re-testing of batch ARAL was rejected by respondent No. 1 stating that there is no provision in the Supply Order for re-testing and on 10.07.2012, the respondent No. 1 invoked the performance bond/bank guarantee amounting to INR 1,09,36,623/- for not replacing the 2541 SCSR units of ARAL batch. Thereafter, the respondent No. 1 issued a letter to Singareni Collieries Co. Ltd. to hold back the payment of the appellant No. 1 and also issued a letter dated 28.08.2012 directing the appellant No. 1 to replace the defective materials. Aggrieved, the appellants approached this Court by filing W.P. (C) No. 6860 of 2012.

3. In the writ proceeding, the respondents filed counter-affidavits and supplementary counter-affidavits raising objection as to the maintainability of the writ petition stating that, since the entire dispute between the parties are based on disputed questions of fact and the dispute has arisen out of contract therefore, the writ petition was not maintainable. It is stated that Clause 17 of the Supply Order specifically stipulates that in case of unsatisfactory test result even for a single sample either at the laboratory or in the Practical Performance Test, the entire batch of supply shall be rejected. The said provision was included in the Supply Order on the basis of the guidelines issued by the Director General, Mines Safety. The SCSR units supplied by the appellants are life saving equipments which are provided to the workmen in the mines for their safety. The equipments are procured on the direction of Director General, Mines Safety.

under the Mines Act and as per DGMS Circular and therefore, the respondents under any circumstances cannot compromise with the quality of the Self Contained Self Rescuers. In order to ascertain the quality of SCSRs supplied by the appellants, joint sample test was done on random basis and 38 samples were sent to the General Manager (rescue service), Mines Rescue Station, Sitarampur for the Practical Performance Test in presence of both the parties. Since, the test results did not conform to the prescribed standard and it was found that the samples from batch ARAL were defective pieces, the appellants were directed to replace the entire batch in terms of Clause 17 of the agreement. However, the appellants did not replace the defective batch and since, it had already realized excessive payment from Central Coalfields Limited, the respondents forfeited the dues and invoked the bank guarantee furnished by the appellants. It is also stated that under Clause 5(B) of the agreement, the respondents are entitled to claim liquidated damages besides invoking bank guarantee and therefore, it has filed money suit claiming the liquidated damages for deliberate breach of contract committed by the appellants.

4. A detailed counter-affidavit has been filed on behalf of the respondent No. 8 namely General Manager (Rescue Service) Mines Rescue Station, Sitarampur, Eastern Coalfields Limited stating that in response to letter dated 13.12.2010 of the Central Coalfields Limited, the samples of SCSRs were tested for Practical Performance with respect to the function of indicator, function of the quick starter system, User's comfort and rated duration. The test results of 38 numbers of ARAL batch disclose that three samples i.e. (i) Sample ARAL-2158 (ii) Sample ARAL-0062 and (iii) Sample ARAL- 2328 failed in the test as starter of the samples were not activated when tested for leak tightness indicator and 34 numbers of samples of ARAL batch did not change the colour even after considerable usage of the operator. It is stated that the User's Comfort with all the apparatus was tested by the individual users who were active rescue trained persons as per Mines Rescue Rule, 1985 and who practice regularly with a breathing apparatus and whose medical history is known to be satisfactory. Moreover, all the test subjects were medically examined immediately before the test and they were certified to undertake the test. It is also stated that the representative of the appellants was present at the time of the Practical Performance Test at ECL, Sitarampur, Bardwan. The practical test has been conducted as per applicable standard method in presence of authorized technical representative of the appellants namely, M/s. Joseph Leslie Drager Manufacturing Pvt. Limited. It is denied that there was any violation of the rules of natural justice and it was also denied that the claim of the appellants for re-testing SCSR from batch ARAL was bona fide.

5. We have heard the learned counsel appearing for the appellants and the respondents and perused the documents on record.

6. Mr. Delip Jerath, the learned counsel appearing for the appellants has submitted that the Writ Court has jurisdiction to entertain the writ petition even

if it involves some disputed questions of fact or when the dispute arose out of the contractual obligation and while so, the learned Single Judge erred in dismissing the writ petition as not maintainable. It is submitted that the respondents failed to conduct the Practical Performance Test in accordance with procedure prescribed in Clause B-3.3.4 of the BIS-IS 15803 (2008). The respondents committed procedural impropriety which was hit by Article 14 of the Constitution of India and therefore, re-testing of the samples as per BIS guidelines applying the correct test procedure should have been ordered by the learned Single Judge.

7. As against the above, Mr. Anoop Kumar Mehta, the learned counsel appearing for the respondent No. 8 has submitted that since the dispute has arisen out of a contract, parties are bound by the terms of the contract and any dispute arising out of the contract can be resolved only before the Civil Court. It is submitted that the writ petition involved disputed questions of fact therefore, the learned Single Judge has rightly dismissed the writ petition.

8. Mr. A.K. Das, the learned counsel appearing for the respondent Nos. 1-7 has also questioned the maintainability of the writ petition and submitted that the Practical Performance Test was conducted as per the applicable standard method in presence of authorized technical representative of the appellants and therefore, the claim of re-testing made by the appellants was not genuine and in any event, in absence of an express provision in the contract providing re-testing of the samples, the request of the appellants for re-testing of ARAL batch was rightly rejected by the Central Coalfields Limited.

9. It is not in dispute that test procedure for the Practical Performance Test to be followed for testing the SCSRs supplied by the appellants is prescribed under BIS-IS 15803(2008). Mr. Delip Jerath, the learned counsel appearing for the appellants relied on Clauses B-3.1, B-3.3.3 and B-3.3.4 which are extracted below:

B. 3.1 General Satisfactory operation of the apparatus under practical conditions is checked by performing escape test. The apparatus under test is worn by test subject. The test subject performs at different work loads. The average minute volume shall be approximately 35l/min and at rest approximately 10l/min. At the start of the test, in case of an apparatus without starter, the wearer shall exhale 2-3 breaths into the apparatus. In case of an apparatus with starter the wearer shall wait to see the breathing bag inflated by starter or else by exhaling into it as directed in the instruction manual.

B.-3.3.3 Escape Exercise for Apparatus with Rated Duration of More than Thirty Minutes

Practical simulation of conditions that are expected to prevail during escape exercise shall be done in the test. Following activities shall be performed during the testing:

(a) Walking on treadmill for a total distance of 133 m at a speed of 8 km/h for 1

min,

(b) Walking on treadmill for a total distance of 220 m at a speed of 3.3 km/h for 4 min,

(c) Walking through training gallery for 23 min,

(d) Exercise in Training Gallery - Training gallery includes level and rising roadways of varying heights and climbs of 15 m on a ladder at rate of approximately 10 m/min. Using a fixed ladder it may be necessary to ascend and descend the ladder several times to cover the total distance of 15 m climb, and

(e) Walking on treadmill for a total distance of 80 m at a speed of 2.4 km/h and 20 percent inclined for 2 min. The number of exercises depends on the classes of apparatus. The final part of the practical exercise may be carried out on the treadmill (walking on level ground at a speed of 5 km/h).

B.-3.3.4 Escape Exercises for Apparatus with a Rated Duration of Up to and including Thirty minutes Following activities shall be performed during testing: (a) Walking on treadmill at speed of 8 km/h for 1 min, and (b) Walking on treadmill at speed of 2.4 km/h and 20 per cent inclined until the test is terminated.

10. It is submitted that in case of an apparatus without starter, the test-subject is required to exhale 2-3 breaths into the apparatus and in case of apparatus with starter the test subject is required to see the breathing bag inflated by starter and in case it is not inflated, the test-subject is required to exhale into it 2-3 times. It is thus submitted that, even in case of apparatus with starter the breathing bag may not inflate at the start and all that is required to do by the test-subject is to exhale 2-3 times and if this procedure is not followed and consequently breathing bag does not inflate, it cannot be said that the apparatus was defective. It is further submitted that the procedure to be followed for escape exercise for apparatus which are rated duration upto and including 30 minutes is specifically provided under the Clause B-3.3.4 however, Practical Performance Test dated 02.05.2011 of the sample ARAL-0078 clearly indicates that the procedure laid down under Clause B-3.3.4 was not followed and therefore, the respondents are not correct in saying that the sample from batch ARAL failed the Practical Performance Test. It is also submitted that the procedure to be followed at the start of the test was not correctly followed by the test-subjects and the samples from batch ARAL has wrongly been rejected on the ground that it has failed the Practical Performance Test.

11. Per contra, Mr. Anoop Kumar Mehta, the learned counsel appearing for the Respondent No. 8, referring to test result of ARAL-0078 has submitted that whether the procedure prescribed under BIS-IS-15803 (2008) has been correctly followed or not and the claim of the appellants that the correct procedure has not been followed, cannot be decided merely on the basis of affidavits filed by the parties. Moreover, the test result which has been signed by the authorized

representative of the appellants would indicate that after 25 minutes oxygen supply was inadequate and after 28 minutes bearing the apparatus was not possible and therefore, the apparatus which is life saving instrument for the mines workers could not have been approved by the respondent-E.C.L. Since, the matter involved the safety of the mines workers as per the direction of the Director General of Mines Safety, Clause 17 has been incorporated in the contract which provides that in case even a single sample fails the laboratory test or the Practical Performance Test, entire batch would be rejected and thus it has to be replaced by the supplier. Referring to test result for ARAL-2158, ARAL- 2375, ARAL-2328 and ARAL 2446, the learned counsel appearing for the respondent-E.C.L. has submitted that the apparatus supplied by the appellants miserably failed the Practical Performance Test and therefore, the appellants were directed to replace the entire batch however, they did not replace the defective batch and realized excess payment from the respondents. In these facts, the respondents were constrained to invoke the bank guarantee however, since the amount of bank guarantee was not sufficient to compensate for the payment received by the appellants, a money suit has also been filed by the respondents.

12. From the aforesaid, it is apparent that serious deficiencies were experienced by the test-subjects during the testing of the samples from batch ARAL. Whether the correct procedure was followed during the testing of the samples from batch ARAL or not, from the materials brought on record cannot be ascertained. It is also true that on the basis of the affidavits filed by the parties whereunder the appellants have contended that the correct procedure was not followed whereas, the respondents have denied the same and asserted that applicable standard method was adopted in presence of authorized technical representative of the appellants, the dispute between the parties could not have been adjudicated by the Writ Court. The claim of the appellants can only be ascertained after oral evidence is taken and tested by cross-examination of the witnesses. The reliance placed by the appellants on decision in Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, and in case of M/s. Real Estate Agencies Vs. Govt. of Goa and Others, is misplaced in the facts of the present case.

13. In "Gunwant Kaur (Smt.) and Others (supra)", the High court had declined to interfere in the matter by observing that it would not determine disputed questions of fact in a writ petition and proceeded to dismiss the petition in limine. In this background the Hon"ble Supreme Court observed that what facts were in dispute and what are admitted could only be determined after an affidavit in reply was filed by the State and therefore, rejection of a petition in limine by the High court was not justified. It has further been held by the Hon"ble Supreme Court that,

14..... when the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be

tried in a writ petition, the High Court may decline to try a petition.....

14. The learned counsel for the appellants has relied on the decision in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, in support of the contention that it is not an absolute rule that if some disputed questions of fact arise for consideration, the writ petition cannot be entertained. In "ABL International Ltd. (supra)" though the Hon"ble Supreme Court has held that, in an appropriate case a writ petition arising out of contractual obligation is maintainable and merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule, however, the Hon"ble Supreme Court has finally held as under:

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

15. In the present case the learned Single Judge has rightly found that the writ petition involves serious disputed questions of fact and having regard to the facts and circumstances of the case, the Writ Court declined to exercise its discretion to entertain the writ petition.

16. The learned counsel for the appellants has next contended that, since the appellants have alleged the procedural impropriety and violation of rules of natural justice, the learned Single Judge was not right in dismissing the writ petition as not maintainable. It is contended on behalf of the respondents that since the Practical Performance Test was conducted in presence of the technical representative of the appellants, the appellants cannot contend that tests were conducted behind their back and procedure as laid down under BIS-IS-15803(2008) was not followed. Relying on Clause 17 of the Agreement, the respondents have further contended that since, there is no express provision for re-testing, the learned Single Judge has rightly declined the prayer for re-testing of the samples from batch ARAL. Clause 17 of the agreement is extracted below:

17. (a) INSPECTION:

No pre-dispatch inspection shall be carried out in case of FOB delivery. However final inspection will be carried out at the consignee end by the consignee.

Should any inspected or tested goods fall to conform to the specifications the purchaser may reject them and the supplier shall either replace the rejected goods and make all alternatives necessary to meet specification requirements free of cost to the purchaser.

The materials will be inspected on arrival at site by the consignee, which will be considered as final. This shall in no way be limited or waived by reason of the goods having previously been inspected, tested and passed by the purchaser or its representatives prior to the dispatch of Goods.

The supplier would be required to submit an assembly wise parts Catalogue to this office, in addition to other manuals as given in the Technical Specifications. Any terms and conditions of supply, not specified above, will be governed by the General Terms and Conditions of Supply of CCL.

(b) COMPLETION OF ACCEPTANCE TEST:

From every batch of supply of SCSR units, samples at the rate of three percent(3%) subject to minimum of nine units shall be drawn at random for the testing by a joint sampling team comprising of representative from manufacturer/supplier and user at user's site. Fifty per cent (50%) of the above drawn samples (subject to minimum six units) shall be sent to CIMER/ISMU for full bench test as per EN401 or equivalent Indian Standard and rest of the sample units (subject to a minimum of three) shall be subjected to practical performance test for the rated duration and the users comfort at the Mines Rescue Station.

The batch of supply for which all the test result of the samples (100%) are found satisfactory shall only be accepted and put to use. In case of unsatisfactory test result even for a single sample, either at the laboratory or in the practical performance test, the entire batch of supply shall not be accepted. Certified result of the above stated laboratory test as well as practical performance test shall be counter signed by the sample drawing team. The liability for testing including cost involved shall be on account of manufacturer/supplier. Payment shall be released only after inspection and completion of acceptance test successfully.

17. It is not in dispute that the products supplied by the appellants are life saving apparatus. The appellants themselves have claimed that they are globally renowned manufacturer and supplier of the safety products. It is claimed that SCSR products of the appellants is a proven life line for not only the underground mining industry but also other hazardous areas. The respondents have contended that as per direction of the Director General, Mines Safety Clause 17 has been inserted in the agreement and as per DGMS circulars and instructions the samples drawn from each of the batches of ARAN, ARAM and ARAL were to be sent to an approved/accredited laboratory for full bench test. Accordingly, 50% samples were sent to the Indian School of Mines, Dhanbad for laboratory test and rest of the 50% samples were subjected to Practical Performance Test for the rated duration and User's Comfort at the Mines Rescue Station,

Sitarampur. We find that in view of the vital importance of the SCSRs supplied by the appellants it has been specifically provided that in case even one single sample fails the test, the entire batch has to be rejected. It is thus clear that there is no scope for re-testing of the samples and that is the reason there is no provision incorporated in the agreement for re-testing of the samples. The contention of the appellants that the SCSRs from batch ARAL were arbitrarily rejected by the respondents also does not merits acceptance. It is a matter of record that samples from batches of ARAN, ARAM and ARAL were sent for testing and all the samples from these batches passed the laboratory tests and the samples from batch ARAN and ARAM passed the Practical Performance Test also. Only the samples from batch ARAL failed in the Practical Performance Test. The test results which were written and signed by the test-subjects and authorized representative of the appellants also, have been brought on record. Nothing has been indicated by the appellants to demonstrate arbitrariness on the part of respondents.

18. From the facts noticed herein-above, we find that the appellants' main contention is that the procedure as prescribed under Clause B-3.3.2 and B-3.3.4 were not observed while carrying out the tests of the apparatus supplied by the appellants and under Clause 17 of the agreement even though it is not expressly mentioned, re-testing of the apparatus can be done. It is thus, clear that for testing the rival claims, oral evidence would be required and whether the re-testing can be ordered or not is a question which would involve interpretation of Clause 17 of the agreement.

19. Mr. A.K. Das, the learned counsel appearing for the respondent Nos. 1-7 has relied on a decision of the Hon'ble Supreme Court in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, in support of the stand taken by the respondents that the disputes relating to contract cannot be agitated in a writ proceeding. It is further submitted that the contract signed between the parties was not a statutory contract as contended by the appellants. In "Rajasthan State Industrial Development & Investment Corpn. (supra)", the Hon'ble Supreme Court noticed the earlier decision in Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , whereunder it has been held thus,

10. We find that there is a merit in the first contention of Mr. Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.....

11..... Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract.

The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.....

20. In view of the aforesaid discussion, we are of the view that the learned Single Judge has rightly declined to entertain the writ petition. We find no error warranting interference in the matter and accordingly, the Letters Patent Appeal is dismissed.