

(2016) 03 KAR CK 0339

In the Karnataka High Court

Case No : Writ Petition Nos. 2995 to 2996 of 2016 (GM-MMS) and 2997 to 2998 of 2016 (GM-MMS)

Emta Coal Limited and Others

APPELLANT

Vs

Karnataka Power Corporation Limited

RESPONDENT

Date of Decision : 24-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 15
Penal Code, 1860 (IPC) — Section 120B, Section 420
Prevention of Corruption Act, 1988 — Section 13(1)(d)

Citation : (2016) 2 AirKarR 633 : (2016) ILRKarnataka 2025 : (2016) 4 KantLJ 43

Hon'ble Judges : Subhro Kamal Mukherjee, C.J. and Ravi V. Malimath, JJ.

Bench : Division Bench

Advocate : Sajan Poovayya, Sr. Advocate for Nalina Mayegowda, Advocate for Poovayya & Company, for the Appellant; Ajay J. Nandalike, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Subhro Kamal Mukherjee, C.J.

1. Writ Petition Nos. 2995 to 2996 of 2016 and Writ Petition Nos. 2997 to 2998 of 2016 are taken up for consideration together as similar questions of facts and law are involved in both the matters.

2. By filing these writ petitions, the writ petitioners challenge the adverse decisions against them by the Karnataka Power Corporation Limited ("KPCL" in short) concerning procurement of coal for the thermal power projects of KPCL in the State of Karnataka.

3. The facts relevant for consideration for deciding these writ petitions are summarised as under:

"(a) KPCL was allotted certain coal mines by the Union of India for the captive

consumption of coal in its thermal power projects in the State of Karnataka.

(b) By virtue of a tender process in the year 2002, KPCL selected EMTA Coal Limited ("EMTA" in short) for formation of joint venture for the development of the captive mines and, also, for supply of coal from the said captive mines to its thermal power projects in the State.

(c) On September 13, 2002, a joint venture agreement was executed by and between KPCL and EMTA, with a special purpose of mining of coal from the coal mines. Thus, Karnataka EMTA Coal Mines Limited ("KEMTA" in short) was formed.

(d) Subsequent to the allotment of the captive coal blocks to KPCL in the year 2003 and upon obtaining various clearances, a fuel supply agreement was executed by and between KPCL and KEMTA on May 9, 2007.

(e) The purpose of entering into such fuel supply agreement was for supply and delivery of coal from the captive coal blocks to the thermal power stations of KPCL in the State.

(f) On the said May 9, 2007, yet another agreement was executed between EMTA and KEMTA to implement the provisions of the joint venture agreement dated September 13, 2002, as aforesaid.

(g) Consequently, a tripartite relationship was established between KPCL, EMTA and KEMTA, inter alia, for development of captive coal blocks and for supply of coal to KPCL exclusively for the consumption by its thermal power stations in the State of Karnataka.

(h) EMTA in furtherance to such contracts executed multiple bank guarantees covering various sums of money to guarantee the obligation of EMTA and KEMTA in terms of the aforesaid tripartite agreement.

(i) All the parties to the tripartite agreement substantially and successfully performed their obligations under the various contracts leading to supply of coal to KPCL from the captive coal blocks.

(j) From the records it does not appear to us that ever any dispute cropped up between the parties until Comptroller and Auditor General of India ("CAG" in short) submitted a report for the year ending March, 2013.

(k) CAG observed in the said report that the total production of coal from one of the open cast mines between 2008-09 and June, 2012 was 82.78 lakh metric tones ("MTS" in short). It was, further, observed that a minimum quantity of coal rejects ought to be 10% per centum of the total production amounting to 8.28 lakh MTS.

(l) The quantification was arrived by the CAG relying upon the memorandum of understanding executed between KEMTA and Gupta Coalfields and Washeries Limited. The said washery provided the service of washing coal extracted from the mines.

(m) CAG noticed that the memorandum of understanding contained a stipulation that there could be rejection up to 10% per centum of the total coal washed and on that basis CAG arrived at a quantification of 8.28 lakh MTS. CAG valued it at Rs. 52,37,00,000/- (Rupees fifty two crore thirty seven lakh) only.

(n) Against the report of the CAG, KPCL submitted its audit objections on December 17, 2013. In the said objections dated December 17, 2013, KPCL asserted that the valuation of the rejects was erroneous. It was specifically contended that the assessment of washery rejects did not have any co-relation with the quantity of coal produced at the open cast mines. KPCL maintained that the rejects ought to have been assessed based on the quantity of coal sent to the washery from the mine and the quantity of coal actually despatched to the thermal power stations, after processing. KPCL not only furnished year-wise quantity details, but, also, demonstrated that quantification of 8.28 lakh MTS was erroneous. KPCL maintained that the rejects generated in the mining operations were only stones and boulders. The rejects were not consistent with the size of coal, which could be used in the thermal power stations. There has been an admission by the KPCL that all rejects were used for levelling and piling works within the mines to facilitate better mining operations.

(o) The audit report was, therefore, challenged as arbitrary and not based on the ground of geological realities and, further, that transporting such rejects to any other location would have only imposed an additional burden on KPCL. Therefore, it was contended that the rejects were abandoned or used for levelling and piling activities in the mines.

(p) In spite of such audit objection, CAG generated the report and it was made available to KPCL.

(q) The Board of Directors of KPCL unilaterally decided to demand reimbursement of cost of rejects from KEMTA. The first demand was made by the letter dated July 31, 2014, which was followed by another demand on December 24, 2014. KPCL, therefore, demanded reimbursement of Rs. 52,37,00,000/- (Rupees fifty two crore thirty seven lakh) only, as the cost of rejects, in terms of the report of CAG, from KEMTA. In default of payment, it was threatened that recovery would commence from the running bills of KEMTA.

(r) These demands of KPCL are assailed as arbitrary and illegal in the Writ Petition Nos. 2995 to 2996 of 2016."

4. Under the joint venture agreement dated September 13, 2002, and the fuel agreement dated May 9, 2007, coal of a particular calorific value was to be supplied to KPCL from the captive mines.

5. The fuel supply agreement, also, contemplated for price adjustments based on the variance in the properties of coal supplied compared to the guaranteed values specified in the contract. In other words, price adjustments were to be undertaken based on the variance in cross calorific value, ash content, size,

moisture content etc.

6. We do not find that there has been any stipulation either in the joint venture agreement or the fuel supply agreement that deductions could be made based on other activities. In the joint venture agreement and in the fuel supply agreement there has been no indication that Rs. 90/- (Rupees ninety) only per MT could be attributable towards washing charges nor the contracts provided any deductions from the coal price payable on the basis that the coals have not been washed in the washery.

7. The writ petitioners contend that although coal was washed initially in a third party washery, but with the establishment of dry washing facilities within the mine, the coals were dry washed in the mine and supplied to KPCL.

8. KPCL never alleged that the coal supplied to it did not meet with calorific value and other parameters as provided in the fuel supply agreement. Indeed, the supply was utilised by KPCL without any demur at its thermal power stations.

9. Nevertheless, KPCL on November 23, 2013, informed KEMTA that KPCL was deducting Rs. 90/- (Rupees ninety) only, per MT towards non-washing of coal based on the charges indicated in a memorandum of understanding executed between KEMTA and a third party.

10. The writ petitioners contend that the memorandum of understanding has no relevance either to the joint venture agreement or the fuel supply agreement executed between KPCL, EMTA and KEMTA.

11. KPCL on January 29, 2014, reiterated that it would continue to deduct Rs. 90/- (Rupees ninety) only, per MT towards washing charges. The writ petitioners contend that such actions of the KPCL are unilateral, arbitrary and illegal.

12. The writ petitioners contend that about Rs. 59,78,00,000/- (Rupees fifty nine crore seventy eight lakh) only, has been arbitrarily deducted by KPCL.

13. The letter of award in favour of EMTA specify that washing of coal would mean beneficiated coal, which satisfies the quantity parameters laid down in Annexure-II to the said letter of award. The fuel supply agreement, as aforesaid, also, indicated that coal would mean washed coal, which satisfy the parameters laid down in Annexure-I. The parameters in both the annexures are identical.

14. The fuel supply agreement does not stipulate a particular process for washing of coal. It was neither suggested that coal washing should be necessarily water-washing nor it was provided that dry-washed coal could not be accepted as washed coal.

15. We do not find any stipulation in the joint venture agreement or the letter of award, which mandates that coal should, necessarily, be washed through the process of water-washing at washeries. Our understanding of the coal defined in those documents is that the coal would mean washed coal that meets certain stipulated parameters irrespective of the process that may be adopted in mining

and washing such coal.

16. We do not find from the materials on record that KPCL has ever alleged that the coal supplied by the EMTA did not meet with the parameters. On the contrary, the writ petitioners assert that their supply meet with the parameters contained in the fuel supply agreement.

17. Thus, the writ petitioners challenge the decision of deducting Rs. 90/- (Rupees ninety) only, per MT by KPCL towards washing charges in the Writ Petition Nos. 2997 to 2998 of 2016. They have assailed the communications dated November 23, 2013 and January 29, 2014.

18. Although, the learned advocate appearing for the respondents challenged the maintainability of the writ petitions, we find that he did not seriously urge such threshold objections at the time of final hearing. Moreover, the writ petitions against the State or an instrumentality of the State is maintainable even in disputes arising out of contractual obligations.

19. Reference could be made to the decision of the Supreme Court of India in *ABL International Limited v. Export Credit Guarantee Corporation of India Limited* reported in , (2004) 3 SCC 553, which was followed in *Karnataka State Forest Industries Corporation v. Indian Rocks* reported in , (2009) 1 SCC 150.

20. It is the settled law that when an action of the State is arbitrary or discriminatory and, thus, is violative of Article 14 of the Constitution of India, a writ petition is certainly maintainable, although ordinarily in the writ jurisdiction the High Court does not enforce the terms of a contract qua contract.

21. The KPCL being an instrumentality of the State, it is expected to act reasonably or in an unarbitrary manner.

22. The Supreme Court of India in *Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay* reported in , (1989) 3 SCC 293 held that every action of the authority must be subject to rule of law and must be informed by reason. If the State action, even in contractual matters, fails to satisfy the tests of reasonableness, it would be unconstitutional.

23. The Supreme Court of India in *Food Corporation of India v. Kamdhenu Cattle Feed Industries* reported in , (1993) 1 SCC 71, held that in contractual sphere, as in all other State actions, the State and all its instrumentalities have to conform to the requirements of Article 14 of the Constitution of which non-arbitrariness has a significant facet.

24. In *ABL International Limited* (supra), it was held that a writ petition involving consequential relief of monetary claim was, also, maintainable. Therefore, the writ petitioners are entitled to recover the sums that have been arbitrarily deducted.

25. We, therefore, hold that these writ petitions are maintainable.

26. It appears to us that the agreement between the KPCL, EMTA and KEMTA is tripartite and an agreement of multiple contracts in the form of the joint venture agreement, the fuel supply agreement and the mining operation agreement.

27. With regard to the merits of the claim of recovery regarding unilateral deduction of Rs. 90/- (Rupees ninety) only, per MT, we find no material from the side of KPCL to substantiate their action to such deductions. The quantum is not available either in the joint venture agreement or the fuel supply agreement. There is no stipulation that the activity of washing coal should, necessarily, be the traditional process of washing through water.

28. The fuel supply agreement stipulates that coal that satisfies particular parameter ought to be supplied irrespective of whether it is washed through the traditional water-wash or the modern dry-wash process.

29. The coal supplied by the writ petitioner to KPCL met the parameters stipulated in the fuel supply agreement and such coal has been utilised in the thermal power stations of KPCL. We feel that it was not proper for KPCL to unilaterally effect deduction of Rs. 90/- (Rupees ninety) only, per MT towards washing charge against KEMTA. No adjudication has been undertaken by a competent judicial authority. In the absence of adjudication, it is impermissible for KPCL to unilaterally effect such withhold and deductions.

30. The Supreme Court of India in *Union of India v. Raman Iron Foundry* reported in , AIR 1974 SC 1265 observed that law has been settled that a claim for unliquidated damages did not give rise to a debt till the liability has been adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there has been a breach of contract, the party, who committed the breach, did not incur any pecuniary obligation, nor did the party complaining of the breach has been entitled to a debt due from other party. The only right, which the party aggrieved by the breach of the contract, is the right to sue for damages.

31. Admittedly, the KPCL has not initiated any process for adjudication for quantifying the damage, if any. Although, there is a stipulation at Article 15 of the fuel supply agreement that any dispute should be resolved by mutual discussions, failing which, it should be adjudicated in the Courts at Bengaluru.

32. We feel that in the absence of any adjudication, it was impermissible for the KPCL to issue the communications dated November 23, 2013 and January 29, 2014, asserting unilateral deduction of Rs. 90/- (Rupees ninety) only, per MT towards washing charges. It was arbitrary for KPCL to have effected such deductions from the bills submitted by the KEMTA. The demand for reimbursement of the cost of rejects by KPCL is solely based on the report of the CAG. Solely on the report of the CAG, the KPCL demanded Rs. 52,37,00,000/- (Rupees fifty-two crore and thirty-seven lakh) only, towards reimbursement of cost of rejects. It seems that KPCL forgot that in their response to the audit query by CAG, they admitted that such quantification of rejects was erroneous.

In their response KPCL stated that the rejects consisted of only stones and boulders used for levelling and other improvements in the mine.

33. In *Arun Kumar Agrawal v. Union of India* reported in , (2013) 7 SCC 1, the Supreme Court of India observed that reliefs could not be granted merely placing reliance on the report of CAG. Such report is, always, subject to parliamentary debates and it is possible that Public Audit Committee may accept the objection to the report of CAG and reject such report. The report of the CAG of 2013 was based on a third party contract that was executed with Gupta Coalfields and Washeries Limited. The report of CAG has not yet been accepted either by the Public Accounts Committee or by the Committee of Public Undertakings.

34. In *Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat* reported in , (2014) 4 SCC 156, the Supreme Court of India held that it would not be proper to refer to the findings and conclusions contained in the report of CAG, when such report has been subject to scrutiny by the Parliament.

35. The learned advocate for the respondents informs us that the Central Bureau of Investigation ("CBI" in short) has drawn up the First Information Report ("FIR" in short) solely relying upon the report of CAG. It was alleged that certain unknown officials of KPCL, EMTA, KEMTA and Gupta Coalfields and Washeries Limited have committed offences under Section 420 read with Section 120B of the Indian Penal Code and Section 13(1)(d) of the Prevention of Corruption Act, 1988.

36. We find that the report of CAG cannot be the sole basis for any liability being caused or for that matter the sole basis for the prosecution to be launched. However, mere drawing up of FIR by the CBI against unknown officials of KPCL, EMTA and KEMTA cannot provide legal basis or impetus for unilateral demand by KPCL for recovery of Rs. 52,37,00,000/- (Rupees fifty-two crore and thirty-seven lakh) only. We hold that such action is arbitrary and unsustainable in law.

37. Accordingly, the Writ Petition Nos. 2995 to 2996 of 2016 are allowed. The communications issued by KPCL dated July 31, 2014 (Annexure-A), December 24, 2014 (Annexure-B) and March 20/23, 2015 (Annexure-C) are quashed.

38. We direct the KPCL not to initiate recovery against the writ petitioners solely on the basis of the report of CAG of March, 2013.

39. The Writ Petition Nos. 2997 to 2998 of 2016 are, also, allowed. The communications dated November 23, 2013 (Annexure-A) and January 29, 2014 (Annexure-B) notifying deduction of a sum of Rs. 90/-(Rupees ninety) only, per MT of coal are quashed. Consequently, the writ petitioners shall be entitled to receive reimbursement that has been deducted by KPCL as intimated in the communications dated November 23, 2013 and January 29, 2014.

40. We, however, direct the parties to bear their respective costs in these writ petitions.