
(2016) 05 CAL CK 0008

In the Calcutta High Court

Case No : AST No. 7 of 2016 and ASTA No. 3 of 2016 [Stay & Injunction] and
CAN No. 529 of 2016 [Leave to intervene & addition of party]

EMTA Coal Ltd. & Anr.

APPELLANT

Vs

West Bengal Power Development Corporation

RESPONDENT

Date of Decision : 12-05-2016

Acts Referred:

Coal Mines (Special Provisions) Act, 2015 — Section 11, 11(1), 11(2)

Citation : (2016) 2 CalLJ 424 : (2016) 6 WBLR 307

Hon'ble Judges : Nishita Mhatre and Rakesh Tiwari, JJ.

Bench : Division Bench

Advocate : Mr. S.K. Kapur, Mr. Jishnu Saha, Mr. Sanjib Mal, Mr. Ravi Kapur, Mr. Atanu Roychaudhuri, Mr. Pushan Majumder, Mr. A. Bose, Mr. Suvam Sinha and Mr. Ishan Saha, Advocates. Mr. Anindya Mitra, Mr. Saptangshu Basu, Mr. Pran Gopal Das, Mr. Anirban Roy, Mr. Sara

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—These three appeals have been preferred against the decisions of the learned Single Judge dated 9th December, 2015 and 11th January, 2016 in Writ Petition 27907(W) of 2015. EMTA Coal Limited had filed the writ petition against the West Bengal Power Development Corporation and others. Aggrieved by the order dated 11th January, 2016 the writ petitioners have filed AST 7 of 2016. The West Bengal Power Development Corporation has challenged both the aforesaid orders in separate appeals, namely, AST 10 of 2016 and AST 11 of 2016.

2. For the sake of convenience the petitioners and the respondents in the writ petition will be referred to as "EMTA" and "Power Corporation" respectively.

3. EMTA and the Power Corporation entered into a joint venture agreement on 28th April, 1995 to develop coal blocks which were allocated by the Union of India to the Power Corporation for captive consumption of the Power Corporation. Under the joint venture agreement, a new company was formed for mining

operations in Pachhwara (North Coal Mines), known as Bengal EMTA Coal Mines Limited (hereinafter referred to as "BECML") which had stake with EMTA holding 74 per cent shares and the rest owned by the Power Corporation. Similarly, a joint venture agreement was entered into between the Damodar Valley Corporation and EMTA. The new company is known as Damodar Emta Coal Mines Limited (hereinafter referred to as "DECML"). This company was floated for the mining operations in Barjora (North Coal Mines).

4. There is no dispute between the parties that the mining operations were conducted by the BECML and DECML till the Supreme Court's judgments dated August 25, 2014 and September 24, 2014 in *Manohar Lal Sharma v. Principal Secretary & Ors* reported in (2014) 9 SCC 516 and (2014) 9 SCC 614. The Supreme Court struck down the allocations of coal blocks made by the Central Government from 1993 to 2011 as arbitrary and illegal in these judgements. The Central Government and the Coal India Limited were afforded a period of six months to take over the management of the de-allocated coal blocks. Pursuant to these judgments, the Coal Mines (Special Provisions) Act, 2015 was enacted and received Presidential assent on 30th March, 2015. Allotment letters were issued in respect of Pachhwara Coal Block and Barjora North Coal Mines by the nominated authority in favour of the Power Corporation. In consonance with the provisions of the Act, the request for proposal for selection of a mine developer and operator in respect of the two coal blocks was published on 5th October, 2015 and 17th October, 2015. Montecarlo Ltd. bid for Barjora North Coal Block whereas NCC Ltd. bid for Pachhwara Coal Block. There is no dispute that EMTA also bid for being selected as the mine developer and operator in respect of both these coal blocks. Simultaneously, EMTA filed the present writ petition in this Court on 19th November, 2015.

5. Before the learned Single Judge, EMTA principally raised one issue, namely, Section 11(1) of the Act of 2015 had not been complied by the Power Corporation as it had not explored the possibility of adopting and continuing the joint venture agreement between themselves and EMTA and to carry on the mining operations through EMTA, before floating the tenders. The learned Single Judge observed that the Power Corporation was empowered to discontinue their existing contract with EMTA under Section 11(2) of the aforesaid Act, and that the agreement would automatically stand terminated by operation of law. However, the learned Single Judge was of the view that the Power Corporation had not applied its mind to Section 11 of the Act for deciding whether or not to continue with the contract with the EMTA. The Power Corporation was therefore directed to pass an order in accordance with law, fairly and reasonably, within two weeks from the date of the order. Though the tender process had commenced, the learned Single Judge permitted EMTA to submit its Techno Commercial Bid without a consortium with an undertaking to furnish the name of the consortium within a week thereafter. EMTA was permitted to exercise the first right of refusal to match the lowest financial bid. A further direction was passed that no work order should be issued for the time being without the leave of the

Court and that the tender process should be otherwise completed.

6. An order was accordingly passed by the Managing Director of the Power Corporation on 23rd December, 2015. The learned Single Judge observed that the order did not indicate the exact reasons as to why EMTA's application for novation of the contract was being rejected. He also found that the order did not indicate as to why the Power Corporation did not want to continue with the allotment. The Court, therefore, directed the Chairman and Managing Director of the Power Corporation to reconsider his order dated 23rd December, 2015 and to pass a reasoned order after giving a short hearing to the petitioners, i.e. EMTA. The Court did not modify its earlier order regarding the tender process and the issuance of the work order with the leave of the Court. It also directed that the financial bids would be considered without prejudice to the rights and contentions of EMTA in the writ petition and would not be revealed by the respondent authorities to any one in any manner.

7. Aggrieved by this order, the EMTA has approached the Appeal Court. The Power Corporation is aggrieved by both the orders passed by the learned Single Judge and has filed its appeals.

8. The controversy before us is whether the interim relief granted by the learned Single Judge is required to be modified or vacated. Can EMTA insist that under Section 11 of the Coal Mines (Special Provisions) Act, 2015 (hereinafter referred to as "the Act of 2015") the contract between the Power Corporation and the joint venture companies must be novated because it has invested huge amount of money into the mining operations which they were conducting since 1995 till the coal block allocations were found to be illegal by the Supreme Court? Is it the bounden duty of the Power Corporation to novate the contract between themselves and the erstwhile mining operator and to continue the mining operations as agreed earlier?

9. Mr. S. K. Kapur, the learned Counsel appearing for the EMTA, has argued that the learned Single Judge ought not to have allowed the tender process to continue even after observing that EMTA had the first right of refusal. He submitted that when the learned Judge had observed that under Section 11 of the Act of 2015 the allottee had the power to renew the contract or novate the contract with the mining operator there was no reason to permit the bidding process to continue and to direct that the work order should be issued only with the leave of the Court. He urged that EMTA is entitled to continue the mining operations in view of the agreement of the Power Corporation was for 20 years and it had performed its part of the contract without any cause for complaint by the Power Corporation.

10. While opposing the appeals filed by the Power Corporation, Mr. Kapur has argued: (i) the appeal challenging the first order dated 9th December, 2015 is not maintainable because the Power Corporation had not objected to the direction for postponing the issuance of the work order or the direction to the

Chairman to pass a reasoned order after considering Section 11 of the Act of 2015; (ii) the Power Corporation's appeal was barred by limitation as it has been filed on 18th January, 2006 whereas the impugned order is dated 9th December, 2015; (iii) the appeal filed against the order dated 11th January, 2016 was not maintainable as the State had accepted the order regarding novation of the contract and the direction to the Chairman to reconsider his decision in the light of the provisions of Section 11 of the Act; (iv) the balance of convenience lay in continuing the contract with EMTA as the Power Corporation was duty bound to honestly consider EMTA's case for novation of the contract; (v) irretrievable damage would be caused to EMTA if the mining operations are handed over to other entities.

11. The learned Advocate General representing the Power Corporation submitted that it had to act in consonance with the judgment of the Supreme Court in Manohar Lal Sharma's case (supra) and the provisions of the Act of 2015. He then submitted that (i) the writ petition filed by EMTA was not maintainable as EMTA was not an allottee and the prior allottee was BECML and DECML; (ii) EMTA was never the mining operator and therefore the writ petition filed by it was not maintainable; (iii) since BECML was not a party before the Court, no relief could be given to EMTA; (iv) EMTA had no statutory right of novation of the contract under Section 11 of the Act of 2015; (v) the arguments regarding the losses which EMTA would incur if the agreement is not novated are not relevant as the Supreme Court has already noted this submission of the allottees in Manohar Lal Sharma's case (supra); (vi) EMTA can be fully compensated under Section 16 of the Act; (vii) EMTA is not entitled to a personal hearing before any order is passed by the Managing Director as to whether novation of the contract was possible as this aspect has been considered by the Supreme Court in Manohar Lal Sharma's case (supra).

12. The interveners also contended that under Section 11 of the Act of 2015 EMTA had no right to continue as the mining operator.

13. We are conscious of the fact that the writ petition is still pending before the learned Single Judge. Therefore, any observation that we may make in our order may be binding on the learned Single Judge. We will have to bear in mind the observations of the Supreme Court in Manohar Lal Sharma's case (supra) and the provisions of the Act of 2015 while dealing with the rival contentions raised before us.

14. The facts in this case are not disputed inasmuch as the joint venture companies, BECML and DECML, were the mining operators for the Pachhwara and Barjora Coal Blocks from 1995 onwards. Pursuant to the judgement in Manohar Lal Sharma (supra) the allotments in respect of these Coal Blocks have been cancelled. EMTA which is the largest shareholder in the joint venture companies claims that before any new mining operator is introduced in the place of these two companies it must be heard and the contract must be novated in view of Section 11 of the Act of 2015, considering the fact that a huge amount has been

expended by it to build the infrastructure to make the mines workable. Section 11 of the Act of 2015 reads as under:

11. (1) Notwithstanding anything contained in any other law for the time being in force, a successful bidder or allottee, as the case may be, in respect of Schedule I coal mines, may elect, to adopt and continue such contracts which may be existing with any of the prior allottees in relation to coal mining operations and the same shall constitute a novation for the residual term or residual performance of such contract:

Provided that in such an event, the successful bidder or allottee or the prior allottee shall notify the nominated authority to include the vesting of any contracts adopted by the successful bidder.

(2) In the event that a successful bidder or allottee elects not to adopt or continue with existing contracts which had been entered into by the prior allottees with third parties, in that case all such contracts which have not been adopted or continued shall cease to be enforceable against the successful bidder or allottee in relation to the Schedule I coal mine and the remedy of such contracting parties shall be against the prior allottees.

15. "Prior allottee" has been defined in Section 3(n) of the Act as follows:

3 (n) "prior allottee" means prior allottee of Schedule I coal mines as listed therein who had been allotted coal mines between 1993 and 31st day of March, 2011, whose allotments have been cancelled pursuant to the judgment of the Supreme Court dated the 25th August, 2014 and its order dated 24th September, 2014 including those allotments which may have been de-allocated prior to and during the pendency of the Writ Petition (Criminal) No. 120 of 2012.

16. Now considering Manohar Lal Sharma's case (supra) it is evident that the Supreme Court has ruled that it is impermissible for the Central Government or the State Government to allocate the coal blocks without a fair, reasonable and transparent process being in place. As a consequence, the Court observed that allocation of coal blocks to the private companies pursuant to the recommendations made by the Screening Committee suffered from diverse infirmities and flaws. The Court also ruled that the allocation of coal blocks through the "Government Dispensation Route" was also illegal. The allocation of coal blocks is permissible to only those categories mentioned in Section 3(3) and (4) of Coal Mines Nationalisation Act. The joint venture arrangements with ineligible firms were also held to be impermissible. However, the Supreme Court held Government companies, Government corporations or companies or corporation which have been awarded power projects on the basis of competitive bids for tariff are exempted as allocations in their favour are not meant to be through the competitive bidding process. In its second judgment in Manohar Lal Sharma v. Principal Secretary & Others reported in (2014) 9 SCC 614 the Supreme Court considered arguments advanced on behalf of the allottees, which were similar to those advanced by Mr. Kapoor before us. It did not accept these

contentions and held that they were untenable. While dealing with the arguments, the Supreme Court has observed as follows:

24. The learned counsel for the allottees have essentially raised two contentions: Firstly, the principles of natural justice require that they must be heard before their coal block allotments are cancelled. Secondly, we should appoint a committee to consider each individual case to determine whether the coal block allotments should be cancelled or not. As far as the second contention is concerned, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. Since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible.

25. ? ? ?

26. The first contention relates to the applicability of the principles of natural justice. As far as this is concerned, it has specifically been recorded in the judgment (in para 10) to the following effect:

"10. Three associations viz. Coal Producers Association, Sponge Iron Manufacturers Association and Independent Power Producers Association of India have made applications for their intervention stating that these associations represented large number of allottees who have been allocated subject coal blocks. Accordingly, Mr. K.K. Venugopal, learned Senior Counsel was heard for Coal Producers Association and Mr. Harish N. Salve, learned Senior Counsel was heard on behalf of the Sponge Iron Manufacturers Association and Independent Power Producers Association of India. They commenced their arguments on 9-1-2014, which continue on 15-1-2014 and concluded on 16-1-2014."

27. Therefore, it is incorrect to say that these associations which represented the bulk (if not all), the allottees or beneficiaries of coal blocks were not heard. They presented their point of view, like any other party to a lis and it was only then that the judgment was delivered.

28. Similarly, several States were also heard as recorded in para 9 of the judgment. In this regard, it was said:

"9. The arguments re-commenced on 5-12-2013. On that day, arguments of the States of Jharkhand, Chhattisgarh and Odisha were concluded and the matters were fixed for 9-1-2014. On that day, arguments of the learned Attorney General were concluded."

29. In effect, therefore, all parties likely to be adversely affected were given a

hearing. The principles of natural justice, though universal, must be realistically and pragmatically applied.

17. While dealing with the allocation of Barjora North and Pachhwara North besides other coal blocks mentioned in Annexure 1 to the judgment, the Court observed as follows:

32. As far as the first category of coal block allotments is concerned, they must be cancelled (except those mentioned in the judgment). There is no reason to "save" them from cancellation. The allocations are illegal and arbitrary; the allottees have not yet entered into any mining lease and they have not yet commenced production. Whether they are 95% ready or 92% ready or 90% ready for production (as argued by some learned counsel) is wholly irrelevant. Their allocation was illegal and arbitrary, as already held, and therefore we quash all these allotments.

18. Acceding to the request of the learned Attorney General to defer the cancellation of the coal blocks, the Court granted a period of six months since the learned Attorney General had submitted that the Central Government and Coal India Limited would need some time to adjust to and cope with the changed situation. The 40 coal blocks mentioned in Annexure 1 include the two coal blocks with which we are concerned today.

19. The arguments of Mr. Kapur that the cancellation of coal blocks or the mining lease in favour of the EMTA could not have been done without following the principles of natural justice has been discarded by the Supreme Court in the decision of Manohar Lal Sharma's case (supra). Therefore, this argument of Mr. Kapur is untenable. As regards the argument that the prior allottee had expended huge amounts on developing the coal blocks, the Supreme Court has observed that these arguments cannot save the coal blocks which had been allocated contrary to the rules and without any transparency in the allocation of the coal blocks.

20. Mr. Kapur has placed reliance on the judgment of the Karnataka High Court in the case of Karnataka Power Corporation v. EMTA Coal Limited (Writ Appeal Nos. 92 & 281 of 2016 and other Writ Appeals) decided by the Karnataka High Court on 12th April, 2016. While considering the question of novating the contract between the Power Corporation and EMTA, the learned Chief Justice, Karnataka High Court, speaking for the Bench held thus:

40. This brings us to the question as to what would be relevant consideration for novating the contract that had been entered into by KPCL with EMTA/KECML. As indicated above, the actions of KPCL, as an instrumentality of the State, must, always, be informed by reason and should, always, meet the test of non-arbitrariness. Its decision, therefore, should be based on relevant considerations and should be informed by reason. Such relevant consideration shall be those that reflect on the past performance of the mine operator and its present ability to discharge its contractual obligations under the novated contract. In the event

a mine operator has competently discharged its obligations under the prior contract and has the necessary wherewithal to continue to do so, it would be unfair to import an extraneous consideration to refuse to novate the contract in its favour.

41. We find no substance in the contention of KPCL that a fresh allotment agreement regarding the captive blocks has, now, been executed between itself and the Union of India, which precludes KPCL from exercising the option to elect to adopt or continue the existing contract with the EMTA/KECML, particularly as such a contract can never override the provisions of the statute. We, similarly, find no substance in the argument that all joint venture companies have been frowned upon by the Supreme Court of India, particularly as it is evident that the Supreme Court of India commented on commercial exploitation of coal blocks by joint venture companies and not otherwise. In the instant case, it is not in dispute that the entirety of the coal mined was supplied exclusively to the power stations of KPCL.

42. The overwhelming material placed before us unequivocally point to the entitlement of EMTA/KECML to obtain continuation of their contracts. This is, further, buttressed by the fact that large quanta of monies have been invested by EMTA/KECML in the development of coal blocks and as admitted by KPCL, coal has been efficiently supplied to the thermal power stations of KPCL. Further, the developed coal blocks have been re-allotted to it. KPCL, as an instrumentality of the State, should therefore arrive at a decision regarding continuation of contracts, in a fair, reasonable and non-arbitrary manner by taking into consideration our observations and all relevant material that may be necessary for arriving at an informed decision in that regard.

21. The Advocate General has pointed out that this judgment has no relevance to the facts before us since neither BECML nor DECML are parties before us. He draws our attention to the fact that this is a distinguishing feature in the judgment of the Karnataka High Court where not only EMTA but the Karnataka EMTA Coal Mines Limited had challenged the action of the State. We are not prima facie convinced with the argument of Mr. Kapur that because EMTA was the largest shareholder of BECML and DECML, it had the locus to file the Writ Petition. However, we do not want to enter into this controversy when the Writ Petition is still pending and that aspect would be considered by the learned Single Judge when the Writ Petition is heard.

22. The Karnataka High Court speaks about the Power Company being an instrumentality of the State and its duty to arrive at a decision regarding continuation of contracts in a reasonable and non-arbitrary manner by taking into consideration the material which may be required to arrive at a uniformed decision. The Court has further directed the Karnataka Power Company Limited to consider the right of EMTA and the joint venture company to novation of their contract under Section 11 of the Act of 2015 with a personal hearing being afforded to the prior allottees.

23. A decision has been taken by the Managing Director of the Power Corporation under Section 11 of the Act of 2015 that there was no need to novate the contract between the prior allottee and the Power Corporation. The learned Single Judge has found that the reasons mentioned in the order were not sufficient and has directed that a further order be passed having afforded hearing to EMTA. This conclusion of the learned Single Judge has been called in question by the learned Advocate General on behalf of the Power Company. He submitted that the Managing Director of the Power Company has taken the view that the contract ought not to be novated when the agreement between the Power Company and the nominated authority of the Ministry of Coal, Government of India in respect of the Coal Blocks allotted to the power company stipulated that the appointment of the contract for coal mining must be through a competitive bidding process. The order reflects that the Managing Director has borne in mind the observations of the Supreme Court in Manohar Lal Sharma's case (supra) and found that EMTA which had been nominated for operating coal mines was under investigation of the Central Bureau of Investigation. Therefore, the Power Corporation did not deem it proper to novate the contract as the foundation of the contract was nomination and not through a bidding process. The order takes note of the fact that the Government of West Bengal Finance Rules mandate that the Power Corporation awards contracts of the present magnitude only through the process of e-auction or e-tender.

24. With the judgements in Manohar Lal Sharma (supra) cancelling the allocation of coal blocks of the Barjora and the Pachhwara coal blocks made in favour of the Power Corporation, the mining operations in those two blocks came to a grinding halt. The Power Corporation has been allocated the coal blocks by the nominated authority constituted under Section 6 of the Coal Mines (Special Provisions) Second Ordinance, 2014 which is now reflected in Section 6 of the Act of 2015. The allotment order has been made in terms of Clause (c) of the Sub-Rule (2) of Rule 7 and Sub-Rule (1) of Rule 13 on 31st March, 2015 both in the case of Barjora and Pachhwara. The nominated authority while making this allocation has imposed certain conditions including that the allottee does not intend to adopt and continue with any of the contracts with the prior allottee if the allocation has been made on the basis of nomination and not through the tender process.

25. The overwhelming material on record prima facie indicates that after the judgment in Manohar Lal Sharma (supra), the Union of India and the allottees have attempted to act more transparently for conducting the mining operations. The submission that the Managing Director's order does not disclose the reasons for not novating the contract is, in our opinion, incorrect. The order reflects that the authority has taken into account all aspects of the matter and has only thereafter passed an order that the Power Corporation would not novate the contract with the prior allottee. The decision of the Managing Director is not expected to be a judicial decision. It is a business decision which must be made. Since the Power Corporation is an instrumentality of the State the decision must reflect that its Managing Director had made an informed choice for not novating

the contract, without being arbitrary or capricious. The learned Single Judge has directed the Managing Director to pass a further order after affording a personal hearing to EMTA. In view of the judgment of the Supreme Court in Manohar Lal Sharma (supra) the Power Corporation is not bound to afford a hearing to the prior allottee. With respect, we are unable to agree with the observations of the Karnataka High Court on this aspect. The learned Single Judge, in our opinion, was not right in his view that reasons have not been disclosed by the Managing Director for refusing to novate the contract. Therefore, there was no need to direct the Managing Director to pass a fresh order.

26. The decision of the Power Corporation not to novate the contract, does not leave the prior allottee without a remedy. It is entitled to compensation under the Act. Moreover, it can enter into a contract with the person whose bid has been accepted by the Power Corporation. Therefore, we are not of the view that irreparable damage would be caused to the prior allottee if the tender process is permitted to continue and the work order is issued in accordance with law. Indubitably EMTA developed the mines on the basis of an arbitrary nomination made in its favour. On the cancellation of the allotment by the Supreme Court under the Act of 2015 the contract in favour of the prior allottee may be novated, but at the election of the allottee, i.e., the Power Corporation. There is no indefeasible right in EMTA to have the contract novated. Even the Karnataka High Court has not held that the prior allottee has such a right. It has observed that the Power Corporation must take a reasonable decision while considering whether to novate the contract with the prior allottee. Prima facie the decision of the Managing Director appears to be reasonable. However, that issue will be open for the learned Single Judge to consider.

27. We do not therefore find any reasons to stop the bidding process or to accept the learned Judge's direction that the work order should not be issued without the leave of the Court. If a work order is issued by the Power Corporation for mining operations that shall be subject to the result of the writ petition.

28. Accordingly, the appeals filed by the Power Corporation are allowed. The appeal filed by EMTA is dismissed.

29. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.

Rakesh Tiwari, J.—I agree.

1. Later: Mr. Jishnu Saha, the learned Counsel appearing for EMTA, seeks a stay of the order.

2. We are not inclined to grant such a stay for the reasons mentioned in the judgment.