(2001) 09 CAL CK 0038

In the Calcutta High Court

Case No : Writ Petition No. 1384 of 1992

Gujarat Ambuja Cements Ltd. and Another — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 25-09-2001

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2002) 2 CALLT 341

Hon'ble Judges : Mahemmad Habeeb Shams Ansari, J

Bench : Single Bench

Advocate : Anindya Mitra, for the Appellant;Biswarup Gupta, for the Respondent

Final Decision : Dismissed

Judgement

By the Court

1. The instant writ application was disposed of by an order dated July 14, 2000 holding, inter alia, that the price fixed for long flame coal, which was higher, was unauthorized and without the sanction and authority of law and directing the respondent to refund the excess price paid by the petitioner.

2. On an appeal filed by the South Eastern Coal Fields Ltd., the Division Bench by its order dated November 20, 2000 opined that the interest of justice demands that the supplementary affidavit filed by the appellant be treated as an application for additional evidence which was allowed and the matters remitted back to the appropriate Bench for consideration of the matter afresh. That is how the matter has appeared before this Court.

3. The writ petition has been filed mainly for the reliefs which are contained in prayers ''a'' and ''b'' and read as under :

"a) Writ of mandamus be issued commanding the respondents to desist from levying and realizing extra charge in respect of particular grade of coal by describing the coal of any colliery as ''long flame coal'' and commanding them to charge uniform price for any grade of non-coking coal irrespective of the colliery from which the coal is raised;

b) Writ of prohibition be issued prohibiting the respondents from charging Rs. 25/- per M.T. of coal or any extra amount in respect of listed colliery as mentioned in the Notification dated December 27, 1991 and from charging any extra amount by describing any coal as ''long flame coal''."

4. The other reliefs are consequential. Prayer ''g'' is for refund on the ground, that this extra amount has been realized without any authority of law.

5. The background facts of the case briefly stated are as under :

The writ petitioner is a cement manufacturer and requires coal for making clinkers. Clinkers are obtained by burning limestone by using coal.

6. There is Linkage Committee comprising, inter alia, the Central Electricity Authority and the Development Commissioner of Cement Industries. This committee considers the application of the parties for supply of coal. The linkage committee grants linkage of coal with the coal companies to the source of supply of coal viz., collieries and consumers are linked to the collieries according to their requirements of both quality and quantity of coal. The supply of coal is made thereafter at the price fixed by the Central Government. The linkage can be changed the said Committee.

7. The main grievance of the petitioner appears to be that it is being given "Long flame coal" and is charged Rs. 25/- extra per ton of coal and this according to the petitioner is unauthorized and beyond the powers of the respondents.

8. Coal is an essential commodity u/s 3(1) of the Essential Commodities Act (for short the Act). The function of securing availability of essential commodity at a fair price has been delegated to the Central Government. u/s 3(2)(e) of the Act, the Central Government is delegated with the power to control, the price at which the essential commodities may be sold. The delegated power has to be exercised by the Central Government by issue of an order to be notified in the official gazette, if the order is of a general nature.

9. In the instant writ application, petitioner has questioned the notification dated December, 1991 in so far as it fixes the extra amount of Rs. 25/- per M.T. for long flame coal.

10. According to the petitioner, the impugned notification of 1991 differs substantially from the earlier notification of January 8, 1986. By the said notification of 1986, the extra amount of Rs. 25/- per M.T. for long flame coal was prescribed but according to the petitioner, the list of collieries producing long flame coal was set out in the notification itself. It is, therefore, contended that the earlier notification of 1986 was a case of fixation of different prices for different collieries under Clause 4(ii) of the Colliery Control Order in respect of specified collieries producing non-coking coal of long flame and premium quality

coal. It must be stated here that the fixation of extra amount of price by way of premium by the notification of 1986 was upheld by the Madhya Pradesh High Court in its judgment dated May 4, 1999 and SLP filed against the said judgment was dismissed by the Supreme Court.

11. Assailing the impugned notification 1991, Mr. Anindya Mitra, learned counsel for the petitioner contended that the notification of 1991 does not specify any colliery producing long flame coal. Therefore, it is contended by Mr. Anindya Mitra that it is not a case of fixation of price of different collieries under Clause 4(ii) of the Coal Control Order. According to Mr. Mitra, the only other enabling provision of power for price fixation is Clause 4(i) under which the Central Government prescribes classes and grades of coal. Unless long flame is a grade of coal is contended that the Central Government will have no competence to fix a price for long flame coal separately or differently.

12. Elaborating the said contention, Mr. Mitra admitted that in spite of categorical assertion in the writ application that long flame coal is not a grade of coal, the respondent authorities in the various affidavits-in-opposition submitted by them have not denied the same except by way of general denial. Thus, according to Mr. Mitra that on affidavits, it is uncontroverted position that long flame coal is not a grade of coal.

13. It is contended that now coking coal has been categorized on the basis of criterion of useful heat value (UHV) to be measured in its specified manner. The highest price has been prescribed at the rate of Rupee 1/- for every 100 kilo calorie by which actual useful heat value (UHV) exceeds 6400 kilo calorie per kg. It is the contention of Mr. Anindya Mitra that the extra amount of Rs. 25/- per M.T. for long flame coal is made payable not on the ground that long flame coal have higher UHV than other non-coking coal of grades ''A'' to ''D''. According to Mr. Anindya Mitra useful heat value of long flame is not even measured in terms of kilo calorie per kg. It is measured with reference to calorific value (CV). The Central Government has not prescribed any separate grades for long flame coal and have merely graded long flame coal as non-coking coal in grades ''A'' to ''D''. The description of long flame is not a grade of coal. Long flame is a description and not any grade of coal, it was urged.

14. It is further contended that the extra charge of Rs. 25/- per M.T. for long flame coal was being charged by collieries by declaring coals as long flame coal, which is impermissible delegation to the collieries. The Central Government being itself a delegate cannot sub delegate the function and duly under Clause 4 of the Coal Control Order to the coal companies empowering them to decide which of their collieries will be entitled to charge different and higher prices. Reliance has been placed upon the judgments of the Supreme Court in Ganapati Singhji v. State of Ajmer and Anr., reported in AIR 1955 SC 188 and District Collector, Chittoor and Others Vs. Chittoor District Groundnut Traders Association and Others, . It is further contended that fixation of different prices for different collieries by the colliery owners themselves and that too without gazette

notification is contrary to the procedure prescribed by law. Reliance has been placed upon the judgments of the Supreme Court in Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, .

15. Mr. Biswarup Gupta, learned senior advocate appearing along with Mr. Alok Banerjee and Mr. Prodyut Das for SECL submitted that the trading pricing and distribution of coal are all governed and controlled by the Coal Control Order. The relevant provisions being Clauses 3, 3A and Clause 4 of the Control Order.

16. It is the submission of Mr. Gupta, learned senior advocate for the respondent that the Government has in exercise of the power vested in it given. The specification for the long flame coals as also the price thereof in the impugned notification. The colliery owners have merely declared the coals produced by them conforming to the specifications prescribed by the Government as long flame coal. The fixation of price for various coals including long flame coal has been made by the Central Government taken into account the UHV (Useful Heat Value) of coals. The UHV itself, it was submitted, is derived from the gross calorific value. The impugned notification, it was urged does not suffer from any legal infirmity not afflicted by the vice of sub delegation.

17. Mr. Gupta relied upon the averments made in the affidavit-in-reply of Darshan Singh Rajput affirmed on December 12, 2000 pursuant to the direction/ liberty given by the Appeal Court. Attention of the Court was also drawn to some of the analysis reports of coal annexed to the same affidavit at pages 48 to 51. Some declarations by respondent No. 3 which are to be found from pages 52 to 60 and sample of acceptances by the Coal Controller of the grade declaration which are at pages 62 to 64.

18. Mr. Gupta, learned senior advocate also drew attention of this Court to the declarations made by the collieries which are annexures at pages 66 to 169 of the same affidavit. Mr. Gupta contended that several notifications have been issued and long flame coal has been mentioned in such notifications. In the notification dated July 4, 1986 which amended the notification dated January 8, 1986 long flame coal is included in Table ! giving specification for long flame coal from IS:770-1964. The Table II was also amended and the Note after Table 6, not only deleted the list of collieries but added the following as item 1.

"Long flame coal are coals which are declared as Long flame coal by the coal producers and which satisfy the definition of Long flame as per Note No. 6 under Table-I of this notification."

19. The Note No. 6 under Table I is relevant and reads as under :

"Long flame" coals shall be defined by the parameters as laid down in Table 2 of Indian Standard No. 18:770-1964 -- "General Classification of Coals (Revised)". The relevant part is extracted below :-

Group

Volatile matter present (unit coal basis)

Range of gross C.V. in coal/kg (unit coal basis)

Range of dried Moisture percent at 60 percent RH at 40 (mineral free coal basis

B4

Over 32

8060 to 8440

3 to 7

B3

Over 32

7500 to 8060

7 to 14

20. It was contended that the said position continued in the fourth notification dated December 22, 1987 and fifth notification dated December 30, 1988 (effective from January 1, 1989). In the fifth notification, note 20 was introduced for the first time fixing premium of 10% over and above Table II prices of coals of grades A, B, C and D from collieries listed therein. It is this Clause 20 of the notification dated December 30, 1988, which was the subject matter of challenge before the Madhya Pradesh High Court.

21. The impugned notification viz., sixth notification dated December 27, 1991, it was submitted by Mr. Gupta is similar in all respects except prices to the notification dated December 30, 1988.

22. Reference was made by Mr. Gupta to that of the judgment of the Madhya Pradesh High Court which reads as under :

".....the question in essence is whether there is any benefit for the consumer who purchases the coal from the premium collieries and whether while charging premium any irrelevant or extraneous factors have been taken into consideration. On a close scrutiny of the affidavits it is clearly discernible that it has some extra quality, which is not in the other colliaries. It has the different characteristics, like combustibility, less ash content, less pollution at the time of use of the coal and hence, more advantageous to the consumers. Mr. Dipankar Gupta, learned senior counsel has pyramided his argument by emphasising that while fixing the extra premium the authorities, have concentrated on various attributes of coal and no attribute can be regarded or treated as foreign or alien to the concept of fixation of price. Per contra, Mr. Anindya Mitra has urged giving stress on the logically that once Useful Heat Value has been considered as a yardstick or a parameter or standard for fixing a grade which determines the price any deviation therefrom has to attract the concept of extraneous or irrelevant in its basic eventuality. We are not persuaded by the submission of Mr. Anindya Mitra for the simple reason, we are of the considered view that a particular grade of coal has different things to offer and its characteristics become useful to the consumers. It cannot be said that it is irrelevant or extraneous because it becomes useful not at a later stage. The stage is not the base. Time is not the criteria. Moment is not the logical foundation but the essence is the attribute of a particular coal which in its usefulness engulfs various qualities which eventually helps a consumer....."

23. The ''long flame'' is thus an attribute of coal and long flame coal has been defined in the impugned notification as also it was defined in the earlier notifications starting with the notification dated July 4, 1986 by reference to the parameters as laid down in Table 2 of the Indian Standard No. IS: 770-1964 and is based upon the range of gross calorific value. Because of its said attribute or characteristics, which are useful to the customer, it is a relevant consideration for fixation of price and in the case on hand price of long flame coal has been fixed higher than other coals.

24. Apposite at this juncture is to refer to some of the conclusions arrived at by the Madhya Pradesh High Court, which are as under :

"B. The Useful Heat Value (UHV) is not the sole criteria for fixation of the price.

C. The grading of coal is not the sine qua non for determination of price fixation.

F. Attributes of coal, namely, loss of ash percentage, ignition value, reflectance value are also requisites attributes which are causative of the difference between the coals of premium collieries and coals of other collieries."

25. The price notifications including the impugned notification of 1991 have several Tables specified therein. In each case, Table I gives the class and grades into which coal and coke has been categorized. Tables II, III, IV, V and VI fixes the sale price at which the coal or coke may be sold by the colliery owners at pit-heads. As already noticed supra, the first of this notification dated January 7, 1984 mentions long flame coals in Table II and fixes different prices of long flame coals for A, B, C and D grades. Therein, after Table VI names of collieries have been mentioned which produce long flame coals of grades A, B, C and D.

26. In the second notification dated January 8, 1986, same procedure is to be found. Long flame coal is mentioned in Table II with list of coal mines producing long flame coals of grades A, B, C and D. This notification was amended by a notification dated July 4, 1986. By this amendment, long flame coal is included in Table I. A new Clause 6 of the notes was included in Table I (extracted supra).

27. The same position as noticed supra, continues with respect to the fourth and fifth notification.

28. Significant in this connection are the provisions contained in Clauses 3, 3A and 4 of the Coal Control Order. Clause 3 confers power upon the Central

Government to prescribe the classes, grades or sizes into which coal may be categorized and the specification for each class, grades and/or size coal.

29. Clause 3A, (1), (2), 2(C) and 5 to the extent relevant read as under :--

"3A :(1) The coal of any seam or section of a seam occurring in a colliery shall be categorized into grades or sizes under this Order by the owner, agent or manager of the colliery, in accordance with the standards laid down by the Coal Controller. Initially, a provisional grade on the basis of seam sample shall be fixed. As soon as may be thereafter, such owner, agent or manager shall cause wagon samples to be drawn. On the basis of the wagon samples drawn on at least three different days, the final grade of seam or seams of a particular colliery shall be fixed by such owner, agent or manager.

(2) The final grade fixed for a seam or section of a seam may be altered by the owner, agent, or manager from time to time on the basis of analysis Of wagon samples if such owner, agent or manager is satisfied that the trade so fixed could not be maintained.

*** *** *** (2-C) If on physical verification, the grade does not conform to the grade as declared by the owner, agent or manager of the Colliery or if the Coal Controller has reasons to believe that the grade of coal, as declared by the owner, agent or manager of the colliery, is not correct or the grades declared by the owner, agent or manager of the Colliery are not sustainable, he may determine the grade as obtained by physical verification and direct the owner, agent or manager of the Colliery to revise the grade to be effective form a date as directed by the Coal Controller.

*** *** *** (5) If any dispute arises out of the declaration of grades and sizes of coal, the same shall be referred to the Coal Controller whose decision shall be binding on the owner, Agent or Manager of the Colliery. A memorandum of reference to the Coal controller regarding such dispute shall be accompanied by such fees not exceeding Rs. 100 and in such manner as may be notified by the Coal controller from time to time in the Official Gazette."

30. Under Clause 4 of the Control Order, power is conferred upon the Central Government to fix the sale price subject to which coal may be sold. Such prices may be fixed for different classes, grades and sizes of coal and for different collieries.

31. The scheme envisaged under the above provisions of the control Order for price fixation, briefly summarized, is as follows :--

(i) The Central Government is to prescribe the classes grades or sizes into which coal may be categorized as also the specification for each such class, grade or size of coal.

(ii) The Coal Controller is required to lay down the standards for categorising/ declaring grades or sizes of coal by the owner, i.e., the colliery.

(iii) The colliery categorizes and /or declares the grades or sizes of coal in accordance with the standards laid down by the coal Controller.

(iv) The Coal Controller physically verifies whether the grades declared by the colliery conform to the standard specified by the Coal Controller. The Coal Controller either approves the grades or dis-approves and in the case of disapproval, regards.

(v) Any dispute regarding declaration of grades etc. is decided by the Coal Controller upon reference to him and the said decision is final and binding.

32. The Central Government fixes the price of coal for different classes, grades and sizes and for different collieries.

33. The classes and grades have been prescribed by the Central Government and the sale price has also been fixed by the impugned notification. Also, by the impugned notification, the price for various grades including those of long flame coals of grades A, B, C and D have been declared by the Central Government. Long flame coal has been defined by the impugned notification and higher price has been prescribed for such long flame coal than other coals keeping in view the characteristics and attributes of such long flame coal, based upon its calorific value (CV) and dependant upon the range of its CV. The coals having same UHV/ grade can have different gross calorific value (CV). Thus long flame coal can be regarded as a grade of coal based upon its gross calorific value.

34. Looking at the matter from a different angle, as already noted supra and as held by the Madhya Pradesh High Court, UHV is not the sole criteria for fixation of the price. The gradation of coal is not the determination of price qua non for price fixation. Attributes of coal are also requisites, which are causative of the difference between the coals of premium collieries and coals of other collieries. Even if not graded, a different price can be fixed by the Central Government for long flame coal. The basic premise on which the contention of Mr. Mitra is based namely, unless Central Government prescribes a separate grade for long flame coal separate different or higher price cannot be fixed stands negatived by the aforesaid decision of the Madhya Pradesh High Court.

35. Looking at from any angle, I cannot accede to the contention of Mr. Anindya Mitra that the impugned notification is vitiated on the ground that the Central Government has not prescribed any separate grades for long flame coal or that higher price cannot be fixed for long flame coals, which conform to the definition and the standard prescribed therefore in the impugned notification.

36. In the earlier notification, the collieries producing long flame coal of grade A, B, C and D were specified. Non-mentioning of their flames in the impugned notification is not relevant as the collieries according to the standards prescribed for various grades including long flame coal declare that coal produced by them as falling under one or the other grade prescribed by the Central Government. Such declaration with regard to categorization/ grade made by the collieries is

subject to the check and supervision of the coal controller appointed under the Control Order. If the declaration made by the collieries is found to be incorrect or not conforming to the grades prescribed by the Central Government, the directions of the coal controllers in that behalf are final and binding upon the owners of the collieries. Such declarations have been made in the instant case by respondent No. 3 with whom we are concerned in the instant writ petition and acceptances made by the Coal Controller being annexures referred to supra. For the said reason, there is no substance in the contention of Mr. Anindya Mitra, learned senior advocate that there has been any sub delegation to the collieries in the matter of fixation of price.

37. Significantly, the petitioner has been granted the supplies through the linkage committee and is receiving the same through the same collieries. The link collieries in the case of petitioner were the same for Clause 20 (10% premium) and long flame coal (Rs. 25/- additional fee for every ton) as prescribed under the impugned notification.

38. In the light of the above, therefore, I cannot accede to the contention of Mr. Anindya Mitra that the impugned notification suffers from any legal infirmity or that it is vitiated on ground of sub-delegation.

39. Having decided the crux of the controversy, as above, certain ancillary contentions urged before Court by the respective senior counsels to be dealt with.

40. On behalf of SECL, it was submitted that the instant writ application suffers from unreasonable, unexplained delay and latches. The petitioner being a party before the Madhya Pradesh High Court where the challenge was in respect of the Colliery Control Order dated December 30, 1988, effective from January, 1, 1989, the impugned notification of 1991 was published during the pendency of the said matter before the Madhya Pradesh High Court, the petitioner ought to have raised the questions of challenge as in the instant writ petition before the Madhya Pradesh High Court. The question of maintainability of the instant writ application could have been raised by SECL in the appeal being APOT No. 624 of 2000. The same not having been raised or adjudicated in the said appeal and the matter having been remitted to this Court for hearing on merits, it was not considered necessary for this Court to deal with these questions, also in view of the fact that the arguments on merits of the matter were heard.

41. Mr. Anindya Mitra, learned senior advocate on behalf of the petitioner contended that the contentions raised on behalf of the respondents are contrary to the pleadings and based upon new material. I find no substance in the said submission as liberty was granted by the Appeal Court to the respondent appellant to file supplementary affidavit raising further or additional grounds. It is pursuant to the aforesaid liberty that the supplementary affidavit has been filed by the respondent and this Court has taken into account the averments and the supporting annexures based whereupon Mr. Gupta made his submission.

42. There can be no doubt that the judgment of the Madhya Pradesh High Court

is binding upon the parties inter se, as they were co-nominee parties before that Hon''ble Court. The conclusions arrived at by the said Hon''ble Court are binding upon the parties hereto and have to be given effect though not in the context of principles of res judicata or constructive res judicata.

In the result, the writ application is dismissed, however, without any order as to costs.

