

(1993) 08 PAT CK 0013
In the Patna High Court
Case No : C.W.J.C. No. 1875 of 1993 (R)

Industrial Fuel Company Private Ltd.

APPELLANT

Vs

Heavy Engineering Corporation Ltd. and Others

RESPONDENT

Date of Decision : 19-08-1993

Acts Referred:

Citation : (1993) 08 PAT CK 0013

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—In this application, petitioner has prayed for issuance of an appropriate writ directing the Respondent-Corporation to forbear from giving effect to or acting in pursuance of the letter dated 11-6-1993 issued by Respondent No. 2 as contained in Annexure-22 to the writ application and other incidental reliefs.

2. The fact of the matter lies in a very narrow compass.

3. The Respondent-Corporation invited tender for sale of 20, 000 Metric Tonne of Slack coal on or about 30-12-1992 which is contained in Annexure-1 to the writ application and pursuant thereto the petitioner along with others submitted tenders, In the said tender the respondents asked for an offer of price for selling Slack coal left over after meeting the requirement of coal (ID" Grade non-coking long flame). In the said tender it was further mentioned that sales tax and other levies, excise duty etc, shall be payable extra as applicable on the date of delivery.

4. According to the petitioner by reason of a letter dated 20th February, 1993 as contained in Annexure-10 to the writ application, a request was made to the respondents to provide the specification of coal and in reply thereto by letter dated 23-2-1993 as contained in Annexure-11 to the writ application, result of analysis of coal was supplied. According to the petitions although in the counter affidavit initially the respondents denied the said fact but when the petitioner filed photostat copies of the original was marked as Annexure-27, the

respondents admitted the same in rejoinder to the counter affidavit. It is, therefore, the contention of the petitioners that the conduct of the Respondent-Corporation did not be have the Corporation which is a State within the meaning of Article 12 of the Constitution.

5. Petitioner has contended that when it started lifting coal, it was found that the same was of inferior quality and thus, the matter was discussed with the authority of the respondents resulting in holding of two meeting, the minutes whereof are contained in Annexures-13 and 14 to the writ application. According to the said minutes of meetings, samples of coal were sent and according to the petitioner upon analysis thereof the same was found to be of "C grade whereas according to the respondents it was found to be of further inferior quality, namely, "D" grade.

6. Petitioner, in this connection, has relied upon the minutes of the meetings which are contained in Annexure-13 of the writ application (Annexure-1 to the counter affidavit), wherein it has been stated thus:

The T. C. members then decided to take further action in this matter only after obtaining the result of the samples of slack coal which have been sent to Coal Survey Laboratory, Namkon on 15-4-1993 and to Central Fuel Research Institute, Dhanbad on 7-5-1993 which are expected on 25-5-1993 and convene the T. C. on 26-5-1993.

7. It has further been contended that in Annexure-F which is another minutes of meetings held on 1-5-1993, 22-5-1993, 26-5-1993 and 29-5-1993, inter alia, it was resolved to follows:

to give rebate of 15% on the current selling rate of Slack Coal which is Ks. 679.20 P.M.T. (after escalation) which comes to Rs. 577.32, say Rs. 578 P.M.T. i.e. now selling price will be calculated @ Rs. 578 P.M.T.

8. Mr. S. B. Gadodia, learned Counsel appearing on behalf of the petitioner submitted that from a perusal of tender notice as would appear from Annexure-1 to the writ application, it will be evident that the respondents promised to supply Grade "B" Coal to the petitioner but was in fact supplying inferior quality of coal and thus it being the "State" within the meaning of Article 12 of the Constitution of India, its action of charging more than the actual price of the coal must be held to be arbitrary. It was further submitted that in view of the fact that Respondent-Corporation has been purchasing coal from the Government-Company, no further sales tax is payable and thus tax sought to be realised from the petitioner must be also held to be illegal.

It was further contended that the respondents are also invoking the escalation Clause which has no application in the facts and circumstances of the case.

It was lastly contended that apart from the fact that the action of the Respondent-Corporation is arbitrary, it is one of those cases, where the doctrine of legitimate expectation should be invoked inasmuch as when the petitioner

entered into a contract it had an expectation that the Respondent-Corporation shall abide by the quality of coal which was meant to be supplied.

Learned Counsel in support of his contention strongly relied upon the decision in Food Corporation of India Limited v. Jagannath Dutta reported in 1993 SCC 71.

9. Learned Counsel further submitted that although lies between the parties arise out of a contract and qua-contract the power of this Court of judicial review stills also of this Court extend to the said field and whenever it is found that even in contractual matters the State has acted arbitrarily such action must be held to be violative of Article 14 of the Constitution of Indi and thus, amenable to the writ jurisdiction of this Court.

Learned Counsel in support of his contention relied upon Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , and Kumari Shrelekha Vidyarthi and Others Vs. State of U.P. and Others, .

10. Mr. Kameshwar Prasad, learned Counsel appearing on behalf of the Respondents on the other hand submitted that a writ jurisdiction cannot b, ? invoked to enforce 4 contract, qua-contract.

It was further submitted that decision of the tender committee is not binding upon the respondent-Corporation. Learned Counsel pointed out that the petitioner has been purchasing grade "B" Coal from the Government-Company and from a perusal of the tender notice it would appear that the coal was to be supplied on "as is where is basis". It was submitted that the res-pondent purchases slack coal "B" Grade from C.C.L. for its gas plant which cannot be run by any other quality of slack coal.

It is further stated that the slack coal left over in producer of gas plant after the operational process of the plant are stocked the same are sold to the successful dealers.

It has also been contended that in the schedule of the tender document it was stated that the respondents would be selling the left overs from the produces of gas plant.

In this view of the matter, according to the learned Counsel, no breach in condition of contract has been committed by the respondents.

11. It was further submitted that in any event this Court cannot exercise its power of judicial review under Article 226 of the Constitution of India.

Reliance is this connection has been placed on Pancham Singh v. State of Bihar reported in 1991 BLJR 352 Binod Kumar Srivastava, v. The State of Bihar and Ors. reported in 1992 BLJR 229 State of Haryana and Others Vs. Lal Chand and Others, : Usha Brecco Limited, Calcutta and Ors. v. State of Bihar and Ors. reported in 1993 BLJR 183 and Amrendra Kumar v. State of Bihar and Ors. reported in 1993 BLJ 409.

12. In this case, the Court is not concerned with the fact as to whether the petitioner and/or the respondent-Corporation has violated the terms of the contract. It is admitted that the petitioner entered into a contract pursuant to the tender invited by the Corporation for supply of grade "Bv coal. If according to the petitioner, respondents are not adhering to the terms of the contract, it is open to the petitioner to terminate the same and file a suit for damages. Admittedly, it is not a case where the contract was entered into under the provisions of any Statute. The Supreme Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, has clearly laid down three different areas with regard to breach of contract and held that only in a case where the contract was entered into under Statute, the writ jurisdiction of the Court can be invoked.

N.P. Singh, J., (in his Lordships then was) in Pratapur Sugar and Industries Ltd. Vs. State of Bihar and Others, , however, taken into consideration the later decision of the Supreme Court held that when a termination of the contract has taken effect by reason of arbitrary action on the part of the State or on some extraneous consideration or on the ground which was debarred the contract, the Court can exercise its jurisdiction under Article 226 of the Constitution of India.

13. In Binod Kumar Srivastava. The State of Bihar and Ors. reported in 1992 (2) BLJR 229, a Division Bench of which one of us (R.M.J.) was a member of this Court relying upon various decision held that writ of mandamus cannot be issued in favour of the Contractor for payment of his so-called outstanding bills.

This aspect of the matter has again been considered by a Bench of which one of us (S. B. Sinha, J.) was a member in Amrendra Kumar v. State of Bihar and Ors. reported in 1993 (1) BLJ 409.

This aspect of the matter has also been considered by a Division Bench of this Court in Mis. Usha Brecco Ltd. v. State of Bihar and Ors. reported in 1993 (1) PUR 183.

14. The decisions relied upon by Mr. Gadodia have been considered by the Supreme Court of India in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, . In Sterling Computers Ltd. the Supreme Court was considering a matter relating to grant of contract. N. P. Singh, J. speaking for Supreme Court, *Utter alia*, held that a contract awarded for the publication of directories had not only a commercial object but had public element at the same time that is to supply the directories to lacs of subscribers of telephone in Delhi and Bombay within the stipulated time free of cost. In that situation, it was held that MTNL could not exercise a unfettered discretion after the repeated breaches committed by UPI/UOI, by entering into a supplemental agreement with the sterling for a fresh period of more than five years on terms which were only beneficial to UIP/UOI/Sterling with corresponding no benefit to MTNL, which they have realised only after the High Court went into the matter in detail in its judgment under appeal. It was held that as the supplemental agreement was a

new agreement, the respondents should have invited tenders.

15. In that case the contract was given without issuing any public tender. The Supreme Court, therefore, held:

The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that once the State decides to grant any right to privilege to others, then there is no escape from the rigour of Article 14 ; the executive does not have an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It had also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test on Article 14 of the Constitution, departure of the aforesaid rule can be made. This Court while upholding the contracts by negotiation in the cases referred to above has impressed as to how in the facts and circumstances of those cases the decisions taken by the State and the authorities concerned were reasonable, rational and in the public interest. The decisions taken in those cases by the authorities concerned on judicial scrutiny were held to be free from bias, discrimination and under the exigencies of the situation then existing to be just and proper. On the basis of those judgments it cannot be urged that this Court has left to the option of the authorities concerned whether to invite tenders or not according to their own discretion and to award contracts ignoring the procedures which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.

16. Such is not the position here. In this case, a contract has already been entered into. The questions which have been raised in this application are pure questions of fact as to whether quality of the coal which was agreed to be supplied conform to the standard or not.

17. The contention of the petitioner, however, is that as the respondent-Corporation is not supplying the same quality of coal, with it referred to sell it is bound to reduce the price therefore and thus, it should not have issued the impugned order dated 11-6-1993, whereby it has been asked to abide by the lifting of coal in terms of the agreement entered into by and between it and the respondent-Corporation. It is, therefore, one of the cases, where a dispute has arisen as to whether there has been breach of condition of contract on the part of one or the other contracting parties.

18. The Supreme Court times without number has pointed out that in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India, the High Court cannot embark upon enquiry in that regard. Such a question has to be adjudicated either by taking recourse to the arbitration agreement or by filing a suit for damages.

19. Mr. Kameshwar Prasad, learned Counsel appearing on behalf of the petitioner

has stated that there exists an arbitration agreement. On fact Clause 17 of Annexure-1 reads thus:

All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever shall be referred to the sole Arbitration of any person nominated by the Chairman-cum-Managing Director, Heavy Engineering Corporation Ltd., Ranchi-8 34004. The award of such arbitration shall be final and binding on the parties to this agreement.

20. It is now well-known that where there exists arbitration Clause a writ jurisdiction cannot be invoked.

Reference in this connection may be made to Zaffar Mohammad alias Z.M. Sarkar Vs. The State of West Bengal, .

21. Recently, the Supreme Court in Food Corporation of India and others Vs. Jagannath Dutta and others, held thus:

We are of the view that the High Court was not justified in quashing the impugned notice especially when the terms and conditions of the contract permitted the termination of the agreement by either of the parties. The High Court should not have gone into the question of contractual obligation in its writ jurisdiction under Article 226 of the Constitution.

22. In none of the cases referred to by Mr. Gadodia, the Court was concerned with the breach of the. condition of contract. The decisions referred to by Mr. Gadodia relate to dispute prior to the grant of contract. In view of" the established "principles of law" as noticed hereinbefore, no writ of mandamus can be issued for enforcing contract, qua contract and it must be held that this writ application is not maintainable.

23. So far as the submission of Mr. Gadodia on the doctrins of legitimate expectation is concerned, the same has no application in relation to a dispute arising out of a contract qua-contract. The said doctrine is applicable in the cases of "State action."

However the Supreme Court recently in Khuddu and others Vs. State of U.P., has clearly held that no enforceable right is created in terms of the doctrine of legitimate expectation, but the same only checks arbitrariness on the part of the State.

24. For the reasons aforementioned, there is no merit in this writ application which is dismissed accordingly.

25. However, the parties may for redressal of their grievances take recourse to alternative remedies.

Narayan Roy, J.

26. I agree.