(2015) 03 JH CK 0070

In the Jharkhand High Court

Case No : Writ Petition (C) No. 6545 of 2011

Kunj Iron Products APPELLANT

Vs

The Coal India Ltd. and Others RESPONDENT

Date of Decision : 25-03-2015

Acts Referred:

Citation : (2015) 2 AJR 591

Hon'ble Judges : S. Chandrashekhar, J.

Bench : Single Bench

Advocate : Ajit Kumar and M.K. Sinha, for the Appellant; Ananda Sen and A.K. Verma, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Chandrashekhar, J.—Challenge in this writ petition are to the termination of Fuel Supply Agreement and the consequent forfeiture of security deposit and also to levy of compensation by the respondent-Coal India Limited.

2. The petitioner-Company, registered under Companies Act, 1956, is a manufacturer of high quality sponge iron. In terms of New Coal Distribution Policy, 2007, the petitioner furnished bank-guarantee to the extent of 6% to the value of annual coal requirement and Fuel Supply Agreement (FSA) was accordingly, entered on 30.04.2008. Under the Fuel Supply Agreement, only 75% of the normative requirement of coal of a linked consumer is supplied and the consumer is required to source the remaining 25% through E-auction or other sources. The Sales Manager, ECL vide letter dated 18.12.2009 sought clarification from the petitioner for non-utilisation of coal during September-October, 2009 and asked the petitioner to arrange survey of the entire stock of coal. The survey certificate of coal stock was submitted to the Sales Manager, ECL vide letter dated 23.02.2010 in which the Survey Company certified the availability of entire coal stock to the tune of approx. 13550 M T. In view of the repairing work and rectification as directed by the Jharkhand Pollution Control Board, the petitioner vide letter dated 17.05.2010 informed the General Manager

(SandM), ECL that it would not lift coal for the month of May, 2010. However, vide letter dated 03.06.2010, the Sales Manager informed that there is no provision for non-booking of coal on repairing ground or any other ground except, the "Force Majeure" clause. Vide letter dated 21.07.2010 further allocation of coal to the petitioner was put under suspension. Immediately thereafter, vide letter dated 23.07.2010, the petitioner was directed to arrange payment of Rs. 15,37,268.18 as compensation for the financial year, 2009-10. The petitioner submitted its reply dated 04.10.2010 explaining the reason for not lifting coal between the period May, 2009 and October, 2009 and though, compensation clause is not attracted in the case of petitioner, the respondent-Deputy Finance Manager(R.S.) vide letter dated 11.11.2010 directed the petitioner to arrange payment of compensation amount. Though, the petitioner deposited the compensation amount, it made further request for reconsideration of the plea for not lifting the coal on the ground of heavy maintenance and modernisation of plant taken by the petitioner. A show-cause notice dated 21.01.2011 was issued to the petitioner for non-booking of coal during 2010-11, which was replied by the petitioner on 10.02.2011. However, the FSA dated 30.04.2008 was terminated on 25.07.2011 for breach of Clause 3.4, 3.5 and 15.1.4 of FSA and the security deposit amounting to Rs. 43,41,520/- was forfeited. The petitioner has been directed to make further payment of Rs. 50,07,600/- on account of compensation for the financial year, 2010-11.

3. Heard the learned counsel for the parties.

4. Mr. Ajit Kumar, the learned counsel for the petitioner submits that though, the survey report certified availability of the entire quantity of non-utilized coal and no charge of misutilisation of coal supplied to the petitioner-company has been levelled, supply of coal to the petitioner was suspended vide order dated 21.07.2010. The coal supply to the petitioner remained suspended till the FSA dated 30.04.2008 was terminated by the respondents however, for the period during which the coal supply remained suspended, the respondents have levied compensation on the ground of non-booking of coal by the petitioner. It is further submitted that before issuing letter dated 23.07.2010 directing the petitioner to pay Rs. 15,37,268.18/- in terms of clause 3.4 of FSA, no notice was issued to the petitioner. Contending non-applicability of Clause 3.4, 3.5 and 15.1.4 of FSA, order dated 25.07.2011 terminating the FSA has been challenged, as arbitrary and illegal.

5. As against the above, Mr. Ananda Sen, the learned counsel for the respondents submits that the Fuel Supply Agreement provides that, if the level of delivery falls below 30% or the level of lifting falls below 30%, the purchaser or the seller as the case may be, shall have the right to terminate the FSA within 60 days of the end of the relevant year, after giving 30 days notice to the other party. It was found that the coal drawn during the period May, 2009 to October, 2009 was not utilised by the petitioner. The petitioner-company did not lift coal for the period between November, 2009 and March, 2010 and thereafter, for April-

May, 2010 and therefore, the FSA was terminated. It is submitted that in terms of Clause 3.4 of FSA, the petitioner was required to furnish additional security deposit to match the change in the basic price notified by the Eastern Coalfields Limited and since, the petitioner did not furnish additional security deposit, it failed to comply with Clause 3.4 of FSA. Accordingly, in terms of the agreement, the FSA was terminated and security deposit was forfeited.

6. Considering the submission of the learned counsel for the petitioner that notices dated 01.03.2011, 18.03.2011 and 29.04.2011 which were allegedly issued to the petitioner before terminating the FSA, were never served upon the petitioner-company, vide order dated 04.09.2014, the respondents were directed to produce letters mentioned in letter dated 23.07.2011.

7. In response thereof, a supplementary counter-affidavit dated 17.09.2014 has been filed stating as under:

"8. "That it is stated that out of those three letters, letters dated 01.03.2011 and 18.03.2011 are misplaced, but the letter dated 29.04.2011 is made available, which is annexed in this supplementary counter-affidavit.

9. That it is stated that because of the office shifting, the other two letters are misplaced and are not readily available."

8. The main issue which arises for consideration in the present writ petition is, "whether after 21.07.2010 when supply of coal to the petitioner-Company was suspended, can the respondent-ECL insist upon furnishing additional security deposit and whether the respondent-ECL can realise compensation for non-booking of coal after 21.07.2010?".

9. Clause 15 of the Fuel Supply Agreement deals with termination of agreement. The FSA dated 30.04.2008 has been terminated on the ground of breach of Clause 3.4, 3.5 and 15.1.4. Clause 3.5 of the FSA is extracted below:

3.5 " The purchaser shall ensure that the Security Deposit stands replenished within seven (7) days of drawl of funds by the Seller in accordance with the provisions of this Agreement. Failure of replenish the Security Deposit within such stipulated period shall entitle the Seller to suspend its Coal supplies without absolving the Purchaser of its obligations under this Agreement." 10. A reading of Clause 3.5 makes it apparent that the purchaser is required to replenish the security deposit within 7 days of drawl of funds by the seller. In the present case, the specific case of the respondents is that the purchaser failed to furnish additional security deposit to suitably match the increase in the base price and thus, violated Clause 3.4. It is not the case of the respondent that the seller had withdrawn the fund and therefore, the purchaser was required to replenish the security deposit within 7 days. Reference of Clause 3.5 in termination letter dated 25.07.2011 is thus, irrelevant. In so far as, applicability of Clause 3.4 is concerned, it is a matter of record that, vide order dated 21.07.2010 the allocation of coal to the petitioner was put under suspension. Before issuing letter dated 21.07.2010 no notice was issued to the petitioner rather, the petitioner was directed to furnish survey report regarding the quantity of coal lifted by the petitioner, which the petitioner furnished on 23.02.2010. In the counter-affidavit and in the notices issued to the petitioner, it has been stated by the respondents that the petitioner did not utilise the quantity of coal lifted by it. The specific case pleaded by the respondents is that in terms of Clause 3.4, the purchaser is required to furnished additional bank guarantee, if the notified rate of coal is varied. The petitioner has made a specific case in letter dated 17.05.2010 that due to repairing work in the Sponge Iron Plant it would not book the coal for the month of May, 2010. In the subsequent representations also, the petitioner took a plea that in view of maintenance and the repairing work and for complying with the direction of the Pollution Control Board, it was required to make certain changes/installations and therefore, it could not lift coal after September, 2009. Let me assume that in terms of Fuel Supply Agreement, the plea taken by the petitioner cannot be a ground for non-lifting of coal however, after the coal supply to the petitioner was suspended vide letter dated 21.07.2010, I am of the considered opinion that after 21.07.2010 insistence on furnishing additional bank guarantee in terms of Clause 3.4 of the FSA is, arbitrary and illegal. A clause in the agreement has to be read in the light of the purpose for which the said provision has been incorporated in the agreement. The provision of furnishing additional security deposit in an agreement is intended at suitably compensating the employer/seller in the event of non-performance of the agreement. After the coal supply to the petitioner-company was suspended on 21.07.2010, the petitioner was not required to furnish additional security deposit. It is important to note that the supply of coal to the petitioner remained suspended thereafter. The respondent-ECL is a "State" and it is under a duty to act fairly and reasonably and just because there is a provision in the FSA requiring the purchaser to furnish additional security deposit, the same by itself would not mean that the respondents would require compliance of Clause 3.4 in any manner what-so-ever, without meeting the requirements of law. On the one hand, the respondent-ECL while continued the supply of coal suspended and on the other hand, it insisted that in view of increase in the notified price, the petitioner has to furnish additional security deposit. The stand of the respondent-ECL defies logic and it must be ignored. The law enjoins upon a "State" a duty to act fairly and reasonably. In Daljit Singh and Others Vs. Union Territory Chandigarh through its Chief Administrator, U.T. Chandigarh and Another, , a case in which residential plot was purchased in an auction and possession was taken after depositing 25% of bid amount however, subsequently the same was surrendered by depositing penalty @ 2.5% at premium, the notice issued demanding additional penalty @ 2.5% after about 2 years 6 months on the ground that penalty was imposed under wrong provision was quashed by the Hon''ble Supreme Court. The Hon''ble Supreme Court observed that, "we feel that the High Court should have quashed the demand raised by the respondent No. 2 on the ground of arbitrary exercise of power and violation of the doctrine of fairness in the State action".

11. Considering the above facts, I am of the opinion that Clause 3.4 of the FSA is not attracted in the present case and on the ground that the petitioner failed to furnish additional security deposit, no action could have been taken against the petitioner.

12. Clause 15.1.4 provides that the purchaser or the seller has a right to terminate the agreement with 30 days notice, if the level of delivery or level of lifting falls below 30%. Since the supply of coal was suspended from 21.07.2010, the respondent-ECL cannot contend that, as a matter of fact, level of lifting has fallen below 30% and therefore, Clause 15.1.4 is attracted. It is well settled that if a decision can be taken on establishing a fact, for establishing the said fact a presumption cannot be raised. As noticed above, the respondent-ECL cannot have recourse to Clause 15.1.4 ignoring its own letter dated 21.07.2010 whereby, the coal supply to the petitioner has been suspended. It also cannot be ignored as a matter of fact, that the supply of coal was suspended on account of non-utilisation of the lifted quantity of coal and no notice under Clause 15.1.4 was given to the petitioner. The demand for additional security deposit was raised for the first time vide letter dated 27.02.2011 (a copy of which has not been furnished by the respondent-ECL). As would appear from the termination letter dated 25.07.2011, no notice under Clause 15.1.4 was issued on the ground that conditions under Clause 15.1.6 and 15.1.8 have been breached. Clause 15.1.6 provides for termination of agreement in the event of suspension of coal supply pursuant to Clause 13.1. Clause 13.1 refers to failure of purchaser to pay an amount including interest due to the seller under the agreement within a period of 30 days. The letter dated 23.07.2010 for compensation was not issued under Clause 13.1 of the FSA. Moreover, it is not denied that the petitioner has paid compensation in compliance of letter dated 23.07.2010. There is no question of payment of compensation by the petitioner after the supply of coal was suspended on 21.07.2010 and thus, Clause 15.1.6 is not attracted in the case of the petitioner. Clause 15.1.8 provides that,

"In the event that any Party commits a breach of term or condition of this Agreement (''Defaulting Party'') not otherwise specified under this Clause 15.1, the other Party (''Non-Defaulting Party''), shall have the right to terminate this Agreement after providing the Defaulting party thirty (30) days prior notice and the breach has not been cured or rectified to the satisfaction of the Non-Defaulting Party within the said period of thirty (30) days". 13. Thus, Clause 15.1.8 is also not attracted in the present case for the reason that specific case pleaded by the respondents is that the petitioner failed to book allotted quantity of coal and it failed to furnished additional security deposit. After the supply of coal was suspended the petitioner could not have lifted coal and consequently, it was not required to furnish additional security deposit. In the termination letter dated 25.07.2011, it is recorded that provisions under Clause 3.4, 3.5 and 15.1.4 of the FSA have been breached. I have already held that the petitioner cannot be said to have committed breach of these provisions. In the letter dated 25.07.2011, it is further recorded that in terms of Clause 15.1.6 and 15.1.8 of the FSA, the agreement stands terminated. As noticed above the aforesaid provisions are not attracted in the petitioner''s case. From the aforesaid facts, it is apparent that the termination of FSA dated 30.04.2008 by the respondent-ECL vide letter dated 25.07.2011 was illegal and arbitrary and accordingly, order contained in letter dated 25.07.2011 is hereby quashed. Subsequent forfeiture of bank-guarantee vide order dated 08.08.2011 is therefore, also quashed. Since supply of coal was suspended from 21.07.2010, the respondent-ECL cannot demand payment of compensation from the petitioner on account of non-lifting of coal and accordingly, demand notices issued for compensation after 21.07.2010 are also quashed. However, it is made clear that the petitioner would be liable to compensate the respondent-ECL in terms of the Fuel Supply Agreement for non-lifting of coal prior to 21.07.2010.

14. The writ petition is allowed in the above terms.

15. I.A. No. 1324 of 2015 stands disposed of with liberty to the petitioner to approach the respondents for execution of a fresh Fuel Supply Agreement. The application of the petitioner shall be considered in the light of coal company''s policy.