

(2010) 09 JH CK 0118
In the Jharkhand High Court
Case No : L.P.A. No. 238 of 2010

Maha Laxmi Enterprises

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Citation : (2010) 09 JH CK 0118

Hon'ble Judges : Sushil Harkauli, J;D.N. Patel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

D.N. Patel, J.—All these Letters Patent Appeals have been preferred challenging a common judgment and order, passed by the learned single Judge dated 19th May, 2010 in various writ petitions. All these Letters Patent Appeals, involving common questions, have been heard together at length for their final disposal and are being disposed of by this common judgment.

2. Dispute between the parties:

The Respondents suspended supply of coal to the Appellants-industrial units and terminated the Coal Supply Agreement with effect from November, 2009 and, therefore, writ petitions were preferred by the present Appellants for getting supply of coal and for quashing the letters whereby Coal Supply Agreements were terminated.

3. Factual Matrix:

? The Appellants are S.S.I. Units situated at Daltonganj Industrial Estate in Palamau district.

? The Jharkhand State Mineral Development Corporation Ltd. has been nominated as State Nodal Agency by the Government of Jharkhand for distribution of coal under N.C.D.P., 2007 of MOC/UOI.

? The Respondent JSMD C executed an agreement to sell on 15.07.2008 for sale of coal to the Appellant unit @ 4200 MT per annum.

? The clause of termination i.e. Clause-11 of the Agreement dated 15.07.2008 lays down the conditions for termination of the Agreement and Clause-12(ix) prescribed for Arbitration in case of any dispute.

? The Meeting of a High-level committee was held on 15th October, 2009, attended by Secretary, Department of Industries, Director, Industries, Managing Director, JSMD C and In-charge, Coal trading, JSMD C and as per the outcome of the meeting, directions were issued on 22.10.2009 that the supply of coal shall be suspended till the inquiry against the Appellants-industrial units is completed. The details of these directions are at Annexure A to the counter affidavit, filed by Respondents 2, 3 and 4 in L.P.A. No. 238 of 2010.

Thereafter, impugned letter dated 17.11.2009 was issued to the Appellant-industrial unit in the first L.P.A. No. 238 of 2010, arising out of W.P.(C) No. 5385 of 2009, which reads as under:

To

M/s Mahalaxmi Enterprises

Nimia, Sudana

Palamau (Jharkhand)

Sub.: Order terminating Agreement No. 131 dated 10.08.2009 for sale of coal between M/s Jharkhand State Mineral Development Corporation Ltd., Doranda, Ranchi and M/s Mahalaxmi Enterprises District Palamau.

Sir,

M/s Jharkhand State Mineral Development Corporation Ltd., Doranda, Ranchi has been entrusted with the duty of sale and distribution of coal to small/medium scale industrial units on the recommendation of District Level Committee and State Level Committee under New Coal Distribution Policy, 2007 vide resolution of the Dept. of Mines & Geology dated 13.05.2008 Published in Jharkhand Gazette No. 395 dated 15.05.2008.

In the Jharkhand Gazette No. 395 dated 15.05.2008, it has been clarified that the District Level Committee is to verify the consumption and utilization of coal allocated to these units and the State Level Committee will examine the utilization of coal on the report by the District Level Committee.

The Director of Industries, Jharkhand, Ranchi vide its letter No. 1653 dated 6.7.08 sought for utilization report in the prescribed format from 181 industrial units. As per the report received from the Dept. of Industries it was found that 64 units are working while 14 units have not been established. Letters sent by the Industries Department in respect to 62 units have returned undelivered while in respect to 41 units no utilization report could be received by the Industries

Department as is evident from the above mentioned letter.

The Secretary, Dept. of industries, Govt. of Jharkhand, Ranchi has therefore directed the Managing Director JSMDC Ltd. to cancel the allotment of coal if being made in respect to 62 units whose where about are not known.

The Director Industries Govt. of Jharkhand by her letter No. 2633 dated 11.11.09 has forwarded a list containing names of 62 units with a direction to (comply with the decision taken in the meeting held on 15.10.09 and communicated to the Corporation vide letter No. 2492 dated 22.10.09 where by the Managing Director JSMDC Ltd. has been directed to cancel/terminate allotment of coal and report compliance to the said Directorate.

Now, therefore, in view of the orders and the directions passed by the Secretary, Industries Department. The Director of Industries, Govt. of Jharkhand, Ranchi and Clause 11(V) of the Coal Supply Agreement No. 131 Dated 10.08.2009 is hereby terminated.

You are directed to collect amount if any, due to you from the Corporation, upon reconciliation of account within a period of 15 days from the date of receipt of this order.

By order of the competent authority.

Yours faithfully,

(Pravir Kumar)

I/c Coal Trading Cell

The aforesaid letter of termination, of Coal Supply Agreement is under challenge in the writ petitions.

? During hearing of writ petitions, learned single Judge by order dated 4th December, 2009 called for report from the Sub Judge-I, Palamau at Daltonganj, about existence of Petitioners industrial units and whether they were working. This report is dated 15th December, 2009.

? Copy of this report of Sub Judge-I, Palamau at Daltonganj, was given to the parties. Objections were invited.

? Respondents objected the report on the ground, that the Petitioners units are not working, but, they got sufficient time, to manage their show, by window-dressing. Order passed by the learned single Judge is dated 4th December, 2009 and inspection was carried out on 13/14th December, 2009.

? Being satisfied by this objection, another report was called secretly and without giving any time to the Petitioners by learned single Judge about existence of the industrial units and whether they are working, from Vigilance Bureau, State of Jharkhand, Ranchi, who gave report dated 3rd April, 2010.

? As per Vigilance Bureau's report, the Appellants-industrial units are closed since long. Several statements have also been recorded of the witnesses by Vigilance Bureau.

? Now there being Arbitration clause in Coal Supply Agreement and looking to disputed question of fact, whether Appellants-industrial units are working and whether coal was used for specified end-product or not, learned single Judge dismissed writ petitions, vide judgment and order dated 19th May, 2010. Against this common judgment, these Letters Patent Appeals have been preferred by the Appellants, who are original Petitioners.

4. Arguments:

On behalf of the Appellants, it is submitted that the Appellants are working factories and, therefore, the coal supply, which has been terminated by the Respondents, is illegal. Even there is a report of the learned Sub Judge-I, Palamau at Daltonganj, dated 15th December, 2009 and in pursuance of this report also, the Appellants are working units and hence the supply of coal, which has been discontinued from October, 2009, must be revived and resumed. It is further submitted that another report given by the Vigilance Bureau, Jharkhand, Ranchi, is absolutely a wrong report and no reliance can be placed upon it. This aspect of the matter has not been properly appreciated by the learned single Judge and hence the impugned judgment and order, passed by the learned single Judge dated 19th May, 2010 in the writ petitions, deserves to be quashed and set aside.

5. We have heard learned Counsel appearing for the Respondents, who has submitted that the Appellants were initially supplied 350 MT coal per unit per month from April, 2009 and in July, they were asked to submit Utilization Report along with other documents and informations. These details were called in a prescribed format from 181 Industrial units by the Directorate of Industries. The Department of industries has given a report to the effect that 64 units were working while 14 units have not been established. The letter sent by the Department of Industries in respect to 62 units have returned undelivered, while in respect to 41 units, no Utilization Report could be received by the Department of Industries and therefore, a decision was taken by the Secretary, Department of Industries, Government of Jharkhand, Ranchi, to cancel the allotment of coal in respect of 62 units whose whereabouts were not known. Thereafter, as per Clause 11(V) of Coal Supply Agreement No. 1 dated 15th July, 2008, the Coal Supply Agreement was terminated. This letter was issued on 17th November, 2009 in case of one of the Appellants, namely, M/s Shiv Coke Briquettes and MFG. Company [W.P.(C) No. 5369 of 2009]. This letter was challenged in the writ petition. It is further submitted by the learned Counsel for the Respondents that after receiving the report of Sub Judge-I, Palamau at Daltonganj, a detailed counter affidavit was filed by the Respondents and it was brought to the notice of this Court that the Appellants are, in fact, not working units and they got the time of nine to ten days to manage the show by window dressing, because the

order, passed by this Court dated 4th December, 2009 for inspection by Sub Judge-I was, in fact, carried out on 13/14th December, 2009 and, therefore, the learned single Judge rightly got a confidential report done through the Vigilance Department and a letter was issued on 19th March, 2010 to the Director General of Police, Vigilance Bureau, Jharkhand, Ranchi. This report was given by the Senior Deputy Superintendent of Police, Vigilance Bureau, Ranchi, Jharkhand, on 3rd April, 2010. The report was given in two sealed cover to this Court. Copies of these reports were also given to the original writ Petitioners. Looking to this report, it appears that the Appellants are not using the coal for manufacturing. Moreover, looking to the arbitration clause in the agreement, it appears that the dispute can be raised before the arbitrator. Further looking to the report given by the Vigilance Bureau, it appears that the Appellants-units are not working and, thus, no error has been committed by the learned single Judge in dismissing the writ petitions. When both the parties are claiming breach of contract and whenever there is existence of arbitration clause in the agreement, arbitration clause ought to have been invoked by the Appellants and, therefore, rightly their petitions have been dismissed by the learned single Judge.

6.. Reasons:

(missing text)

record, it appears that Jharkhand State Mineral Development Corporation ("JSMDC" for the sake of brevity) entered into Coal Supply Agreement, looking to the requirement of the Appellants-industrial units and it recommended allotment of 350 MT coal per month per unit. The Appellants-industrial units started lifting coal from April, 2009. In July, 2009, the JSMDC asked the Appellants-industrial units to submit Utilization Reports along with other documents and informations. The details were asked in prescribed format from 181 industrial units. As per the report, received from the Department of Industries, it was found that 64 units are working while 14 units have not been established. Letters sent by the Department of Industries in respect to 62 units have returned undelivered while in respect to 41 units no Utilization Report was received by the Department of Industries and, therefore, a decision was taken by the Secretary, Department of Industries, Government of Jharkhand, Ranchi, to cancel the allotment of coal in respect to 62 units, whose whereabouts were not known and, therefore, a letter dated 17th November, 2009 was issued to the present Appellant (original Petitioner in W.P.(C) No. 5385 of 2009), whereby, Coal Supply Agreement No. 131 was terminated.

7. Thereafter, a writ petition was preferred by the Petitioner/Appellant bearing W.P.(C) No. 5385 of 2009 and the learned single Judge on 4th December, 2009 has been pleased to pass the following order:

All these writ petitions involve similar controversy and therefore this common interim order is being passed in all these petitions.

These are in all 14 writ petitions of "tiny" industries, as they are known whose

supply/allocation of coal under the F.S.A. has either been cancelled or suspended. The cancellation/suspension is due to the suspicion on the part of the State Government that these industries do not exist on the spot. This suspicion has been generated because letters sent to some of these industries were returned with the endorsement that the unit was not found on the spot. This in turn led to a suspicion that in the entire district there has been some large scale fraud by showing non-existent industries to be working on the spot and thereby obtaining allocation of coal through F.S.A.

Having regard to the nature of controversy, instead of wasting time in obtaining lengthy affidavits from the parties, hearing lengthy arguments only for deciding the question of fact whether the industries actually exist on the spot or not, it seems to be more appropriate to require a dependable officer to conduct a spot inspection and to submit a report regarding existence of each of these 14 industries on the spot and either their running or their ability to run upon supply of fuel, along with photographs taken on the spot to corroborate the report. For this purpose, the Sub-Judge of the district Palamau or if the Sub-Judge, Palamau is not available for any reason, another civil judicial Officer to be nominated on or before 10.12.2009 by the District Judge, Palamau is hereby appointed for the above purpose. The Petitioners will produce a certified copy of this order along with a list of names and complete addresses of each industry involved in these petitions before the District Judge, Palamau on or before 9th December, 2009 to enable him to issue necessary direction to the concerned Civil Judicial Officer. Because on 12.12.2009 there are elections in the district of Palamau, therefore, the Judicial Officer will conduct his inspection on 13.12.2009 and if the inspection cannot be completed on 13.12.2009 he may continue the same on 14.12.2009. If the inspection is continued on 14.12.2009 the Officer will be treated to be on duty for that day. The report will be sent through the District Judge, Palamau in sealed cover via special messenger so as to reach this Court by 16.12.2009. The photographs taken by a digital camera may be sent in the form of a memory card which is normally used in such cameras so that time is not wasted in getting them printed in Palamau.

The Deputy Commissioner, Palamau will for this purpose arrange a proper vehicle with appropriate security escort for the Judicial Officer at 9.00 A.M. on 13.12.2009 at the residence of the Judicial Officer. The learned Counsel for the State will intimate this order to the Deputy Commissioner, Palamau by FAX by 09.12.2009.

The learned Counsel for the Petitioners undertakes to supply a good quality digital camera to the Judicial Officer for this purpose along with a photographer for the period of two days.

A certified copy of this order will be issued on payment of requisite charges by 05.12.2009.

8. In pursuance of this order, a report from Sub Judge-I, Palamau at Daltonganj

dated 15th December, 2009 was received. The Sub Judge opined that the industries were in existence and were able to run upon supply of fuel and they were found in running condition.

9. On 27th January, 2010 parties were given photo copies of the relevant documents/reports for filing their objections, if any, and the objections were raised and the counsel for the Respondents submitted that the order was passed on 4th December, 2009 and the inspections were carried out on 13/14th December, 2009 and, thus, within nine to ten days, the Petitioners got time to manage to show by window dressing, which is evident from stereo type report of the learned Sub Judge.

10. It further appears that being satisfied by this objection, the learned single Judge thought it proper to get a confidential inquiry done through Vigilance Department without indicating anything in the Court. Accordingly, the only order was passed on 24th February, 2010, as under:

Heard the parties. Order is reserved

11. A confidential letter dated 19th March, 2010 was issued to the Director General of Police, Vigilance Bureau, State of Jharkhand, Ranchi. Thereafter, the Vigilance Bureau gave its reports in two sealed covers for 14+3 units, because the petitions were initially filed by 14 industrial units and subsequently three more industrial units preferred writ petitions. Thus, the Sub Judge-I, Palamau at Daltonganj, gave report for 14 units whereas the Vigilance Department has given report for 14+3 units in two sealed covers. Copies of this report were supplied to the parties and objections were also invited. This report of the Vigilance Department is given on 3rd April, 2010 by Senior Deputy Superintendent of Police, Vigilance Bureau, State of Jharkhand, Ranchi. As per this report, the industrial units were not working since long and, therefore, they have not utilized the coal for the specified end-use. Thus, in these matters, there are two reports; one is given by the Sub Judge-I, Palamau at Daltonganj and another by Vigilance Department, State of Jharkhand, Ranchi.

12. It is contended by the learned Counsel for the Appellants that the second report given by the Vigilance Department is behind the back of the Appellants and there was no need to call for this second report.

13. This contention is not accepted by this Court mainly for the reason that objections were raised by the Respondents about the first report, given by the Sub Judge-I that the Appellants-units were knowing and prior to inspection, they have managed their show and what is apparently noted by the Sub Judge-I was not in existence, in reality and, therefore, the learned single Judge simply adjourned the matter, and vide confidential letter dated 19th March, 2010 directed the Vigilance Bureau, Jharkhand, Ranchi, to get the report for 14 Petitioners-units. Subsequently, three more petitions were filed. Thus, report about the existence of these units was called. Copies of both the reports were given to the Petitioners-industrial units. For both the reports, objections have

been invited by the learned single Judge. The only difference between the two reports is that while carrying out first inspection, the Petitioners industrial units got sufficient time whereas for carrying out second inspection, confidential letter was written to the Vigilance Department and, thus, the Petitioners-industrial units could not get anything to manage their show. The second report shows that the units are not in working condition and detailed report has been given about the condition of the units. Statements of several witnesses have also been recorded by the Vigilance Bureau as stated in the report and it is found that the units are closed since long. Some have done trial production and thereafter they are closed.

14. While these two reports are in existence, now the Court has to decide a highly disputed question of fact whether the Appellants (original Petitioners) - industrial units are working or not.

15. It further appears that an agreement has been entered into between the Appellants (original Petitioners)-industrial units and JSMD. There is an arbitration clause in this Coal Supply Agreement. Relevant clauses are 10, 11 and 12(iv) of the Agreement, which reads as under:

10. End User Clause:

(i) The purchase hereby declares that the CIL coal to be purchased by them from the Seller in pursuance of this agreement shall not be diverted for any use other than the end-use as mentioned herein or traded in any other way and that the same will be used only for the purpose indicated in this agreement. In other words all coal to be supplied to the Purchaser shall be utilized as fuel/raw material for further processing in Mahalaxmi Enterprises Company/plant of the purchaser situated at Nimia, Sudna, Aurangabad, Medinagar, Palamau, Jharkhand.

(ii) The Purchaser has submitted/undertakes to submit an affidavit to the effect that the coal to be supplied to them shall be used only for the purpose specified herein.

(iii) The Seller, the Government of Jharkhand or any of their authorized officer shall be free to visit the Purchaser's plant for verification of end-use of coal and the Purchaser shall be bound to facilitate the same extend all help and assistance and produce all documents and records which may be necessary for the purpose of such verification.

(iv) The Purchaser also hereby undertakes to furnish periodical certificates, as may be required by the Seller, from a practicing Chartered Accountant/Cost Accountant certifying end-use of coal to be supplied to them in terms of this agreement. The Purchaser further undertakes to supply such other information, and/or certificate as may be required by the Seller, during the term of this agreement.

11. Termination of Agreement:

This agreement shall be liable to be terminated by the Seller on the occurrence of the following events. However, such termination shall be without prejudice to the accrued rights or obligations of the either party as it stood immediately prior to the termination. The termination shall be duly communicated to the Purchaser in writing. The Seller shall bear no liability on account of such termination.

(i) If a material information furnished by the Purchaser before or after signing of this Agreement is found to be not true, this would also cause the security deposit to be forfeited.

(ii) On permanent closure of the end-use plant of the Purchaser or on shifting or relocating the same outside the State of Jharkhand.

(iii) If the Seller on its own motion or on the information furnished by others finds and is satisfied that the coal supplied under this agreement is put to a use other than the end-use specified in this agreement or is disposed of otherwise, this would also lead to forfeiture of the security deposit.

(iv) In the event of non payment of compensation for short-lifting of coal by the Purchaser within the permitted time or extension thereof if any, the security deposit would also be liable to be forfeited.

(v) On receipt of any order or direction of the State Government to that effect.

12. Miscellaneous:

(iv) Arbitration:A

In the event of any differences or dispute between the Seller and the Purchaser with reference to any matter arising out of this agreement such disputes or differences will be referred for arbitration to a Sole Arbitrator who will be nominated by the Managing Director, JSMD C in terms of the provisions of the Arbitration and Conciliation Act, 1996.

(Emphasis supplied)

16. Thus, in the event of any differences of disputes with reference to any matter arising out of the Coal Supply Agreement, it will be referred to arbitration.

17. Thus, here is a dispute between the parties whether the coal supply has been used for specified end-use or not; whether the Petitioners-units were working or nor and in pursuance of two reports; one which is given by the Sub Judge-I, Palamau at Daltonganj; and another given by Vigilance Bureau, State of Jharkhand, Ranchi, it is in dispute whether the industries are working or not. One report says that the industrial units are working and another report says that the Petitioners-industrial units are not working. Both the parties are alleging violation of contract. The contract has been terminated by the Respondent JSMD C. It has been held by the Hon''ble Supreme Court in the case of N. Srinivasa Vs. Kuttukaran Machine Tools Ltd., that the arbitration clause will survive even if an agreement ceases to exist. Paragraph No. 37 of the judgment reads as under.

37. It is well settled that even if an agreement ceases to exist, the arbitration clause remains in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the arbitration clause. Therefore, in our view, the High Court was not justified in setting aside the order of the trial court directing the parties to maintain status quo in the matter of transferring, alienating or creating any third-party interest in the same till the award is passed by the sole arbitrator.

(Emphasis supplied)

It has also been held by the Hon'ble Supreme Court in the case of *The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another*, that the Contractual dispute resolution clauses will remain intact and as it is even in the cases of termination of contract due to breach. Arbitration clause neither perishes nor becomes inoperative, despite the contract is terminated because of breach thereof. Arbitration clause survives for the purpose of resolution of disputes to the extent specified in the clause concerned. Paragraph Nos. 14 and 15 of the judgment read as under:

14 The statement of law expounded by Viscount Simon, L.C. in *Heyman* as noticed above, in our view, equally applies to the situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this Court, particularly as laid down in *Kishorilal Gupta*.

15. In the instant case, Clause 22 of the hire-purchase agreement that provides for arbitration has been couched in the widest possible terms as can well be imagined. It embraces all the disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire-purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, we hold, as it must be, that the arbitration Clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.

(Emphasis supplied)

18. In view of the aforesaid decisions, no error has been committed by the learned Judge in dismissing the writ petitions. Once there is disputed question of facts and since there are two reports in the present matters and there is existence of arbitration clause, it requires cogent and convincing evidences to prove the fact that the industrial units were working and they were using coal for the specified end-uses. It is submitted by the learned Counsel for the Respondents that per unit hundreds of MT coal was lifted by each Appellant-

industry. Thus, total coal supplied, to these industrial units comes to few thousand MT/per month.

19. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, there is no substance in these appeals and hence, the same are hereby dismissed.