
(2016) 08 JH CK 0036

In the Jharkhand High Court

Case No : Writ Petition (C) No. 3946 of 2012

M/s Ashirwad Steels and Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 4 JLJR 175

Hon'ble Judges : Mr. Aparesh Kumar Singh, J.

Bench : Single Bench

Advocate : M/s Rajiv Ranjan, Senior Advocate and Mukesh Kr. Sinha, Advocate, for the Petitioner; M/s Anoop Kr. Mehta and Nikhil Ranjan, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Mr. Aparesh Kumar Singh, J. - Heard counsel for the parties.

2. Petitioner's request for change of grade of coal from B/C to C/D/E under the Fuel Supply Agreement entered into with the Respondent Central Coalfields Limited (Annexure-2/1) dated 29.04. 2008, on a direction passed in the writ petition WPC No. 2823/2011 dated 21.09.2011, has been rejected by the impugned order dated 25.06.2012 (Annexure-18 to the writ petition) for the following reasons.

"It is regretted that you have submitted the process description on the letter pad of M/s A.V.R. Engineering and Consultancy Limited which does not establish that there is a change of technology, thereby requiring a change of grade in coal being supplied/agreed to be supplied in the Fuel Supply Agreement.

In view of above, your request for change of grade from B/C to C/D/E is hereby rejected. It may kindly be noted that the erstwhile system of gradation based on UHV has been replaced by GCV based system."

3. During pendency of the writ application, the Fuel Supply Agreement itself was terminated with effect from 30.04.2013. Prayer to challenge the termination order through I.A. No. 3082/2013 was allowed by order dated 15.05.2013. Respondent had indicated however on the said date that they are not going to invoke the Bank Guarantee in view of the interim order passed earlier on 22.01.2013. However, an amount of Rs. 1,14,09,500.81 was adjusted towards dues payable to the Central Coalfields Ltd. before order dated 21.01.2013 itself. The letter of termination dated 30.04.2013 and other letter dated 21.01.2013 are part of I.A. No. 3082/2013. Petitioner has therefore pursued the original prayer and the amendment allowed subsequently during pendency of the case. He has also made a prayer to direct the Respondent to supply C/D/E grade of coal to him as it would be economical and financially viable to the petitioner's Sponge Iron Plant which has suffered due to sharp increase in input costs, power costs, increased burden of higher salary, wages and other operating expenses, etc. It has also made a prayer to allow him to lift the back log quota of coal upon such change of grade of coal being permitted.

4. Change of grade of coal from B/C to C/D/E is being sought invoking the provisions of Clause 2.3 and 2.4 of the Fuel Supply Agreement which is also quoted hereunder:

"2.3. After completion of three (3) years from the Effective Date, either Party may, by prior written notice to the other Party for period not less than thirty (30 days), seek a review of this Agreement. Notwithstanding, the ACQ shall be revised to the highest of the early quantities booked by the Purchaser in such three (3) years for the remaining two (2) years of the Agreement subject to average Level of Lifting (LL) by the Purchaser (as calculated in accordance with Clause 4.6.2) in the last three (3) years being less than eight percent (80%). It is expressly clarified that no such revision in ACQ shall take place if the average Level of Lifting (LL), as per the foregoing, is greater than eighty percent (80%).

2.4. Notwithstanding the provisions of Clause 2.1 and 2.2 above, in the event of any change in the grade structure of Coal, the Seller shall within seven (7) days of introduction of such change provide a written notice to the Purchaser calling for a joint review and upon such joint review this Agreement shall be duly amended in writing to bring it in full conformity with such change."

5. Petitioner has stated that after completion of three years from the effective date of the Agreement, such a review for change of grade of coal originally allotted, can be made, whereupon the Agreement shall be duly amended in writing to bring it in full conformity with such change.

6. Brief facts relevant for consideration of the background controversy, are being narrated herein-after. Petitioner has established Sponge Iron Plant which was accorded linkage of non-coking coal by Ministry of Mines and Minerals, Department of Coal, Government of India on 10.03.2000. After change of the policy by the Ministry of Coal, Government of India and introduction of a New

Coal Distribution Policy replacing the linkage system with a bilateral commercial arrangements of enforceable Fuel Supply Agreement, a fresh Fuel Supply Agreement was executed with Central Coalfields Ltd. for lifting 39,750 MT of B/C grade of coal on 29.04.2008 for five years. According to the petitioner, an unprecedented increase in the price of A/B grade of coal by Central Coalfields Ltd. with effect from 01.03.2011 reportedly to the tune of 130% persuaded it to approach the Respondent Ministry of Coal and Central Coalfields Ltd. also to amend the Fuel Supply Agreement by change of grade of coal from B/C to C/D/E on 08.04.2011. Ministry of Coal through its letter dated 16.09.2011, asked the Respondent Central coalfields Ltd. to take appropriate action as per norms regarding change of grade of coal. Due to delay in decision making process, petitioner had to approach this Court in WPC No. 2823/2011 with a prayer for directing the Respondent to take a decision on the request of change of grade of coal. By order dated 21.09.2011, the writ petition was disposed of with a direction to the Respondent General Manager (S&M), Central Coalfields Ltd., Ranchi to take a decision in the matter of change of grade of coal within a period of six weeks. Petitioner however further made a request through another letter dated 14.11.2011 (Annexure-14) for ad-hoc allotment of at least 5000 tonnes of grade D/E coal so that plant can keep running. Petitioner was asked to furnish the technology adopted by it along with the corresponding Gross Calorific Value (GCV) of coal required by the Unit through letter dated 08.02.2012 by the General Manager (S&M). Petitioner furnished its original Technical Report on 12.03.2012. However, the request for change of grade of coal was rejected by a reasoned order dated 25.06.2012, quoted herein-above. Thereafter, the writ petition was filed. Petitioner received a letter dated 15.12.2012 in the nature of notice of termination of the Agreement for violation of Clause 15.1.4 for failure to pick up the minimum of 30% of coal allocated annually. This was replied by the petitioner. Thereafter, an order of termination of Fuel Supply Agreement was passed which has been also impugned in the present writ application, as referred to herein above.

7. Learned Senior Counsel for the petitioner after taking through the relevant chronology of facts, detailed herein-above, has essentially blamed the decision of the Respondent CCL to refuse change of grade of coal as the underlying basis for termination of the Agreement itself as the petitioner was not in a position to lift the allocated B/C grade of coal being wholly uneconomical/financially unviable and for other cogent grounds taken in the pleadings. It is the petitioner's case that even "C" grade coal was not allocated to the petitioner to enable it to lift the minimum guaranteed quota, as per Fuel Supply Agreement. Petitioner has tried to make out a case that it is capable of running and surviving with D/E grade of coal. It has referred to the instances of other Sponge Iron Plants who have been allowed change of grade of coal to C/D/E such as Bihar Sponge Iron Industries Ltd. after coming into force of New Coal Distribution Policy on 18.10.2007 by the Ministry of Coal. It has also cited examples of sponge iron industries such as Jharkhand Espat (P) Ltd., Ramgarh, Samridhi Sponge (P) Ltd., Jamshedpur, Sai

Sponge (I) Ltd., Jai Maa Manglam, Lall Iron and Steel Limited, Giridih, Maa Chinnmastike Sponge Iron, Palash Sponge Iron (P) Ltd., Balmukund Sponge Iron (P) Ltd, etc. It has also tried to set up a case that the petitioner's own sponge iron plant at Andhra Pradesh has been permitted change of grade of coal from B/C to D/E vide order dated 01.04.2008. It is their case that another Unit of the same petitioner Company known as Chandil Industries has been permitted to lift F grade of coal to run the similar Sponge Iron Industries with the same technology. Petitioner contends that it had submitted a Technical Evaluation Report of AVR Engineering and Consultancy Service (Annexure-17) along with its representation before the Respondent General Manager (S&M) which certified that the petitioner Unit can use lower grade of coal having GCV from 4800 to 5800 in the process of manufacturing sponge iron. Learned Senior Counsel for the petitioner submits that the impugned decision rejecting the petitioner's request for change of grade of coal, suffers from non application of mind to the relevant material factors. Respondent could have also directed the petitioner to get certification from an independent consultant agency of their choice relating to viability of the technology used by the petitioner Unit for change of grade of coal to C/D/E. It is submitted that the Respondents have not been able to justify the decision on any count in the aforesaid background of facts and the reasons advanced by the petitioner. Therefore, they may be directed to accord reconsideration to the request for change of grade of coal. In the event of a fresh decision being taken by the Respondent in his favour, the very question relating to revocation of termination of Fuel Supply Agreement could also be open for reconsideration by the Respondent themselves.

8. Learned counsel for the Respondent CCL submitted that the change of grade of coal is not done by a subsidiary company of Coal India Ltd. It can only be made by the authority who granted the linkage which, in the present case, is the Ministry of Coal. They contested the contention of the petitioner that there has been any change in the grade of coal by CCL since the New Coal Distribution Policy has been introduced by the Ministry of Coal on 18.10.2007. This statement of the Respondents have however been later on corrected by a supplementary counter affidavit dated 17.07.2014. Respondents have further stated that the petitioner had poor booking and lifting status in respect of its Unit for the financial years 2008-09 till 2013-14, as reflected in the chart enclosed to Annexure-A to the supplementary counter affidavit dated 09.05.2014. It is further stated that only after the direction of the Ministry of Coal dated 16.09.2011 and the direction passed by this Court earlier, the Respondent chose to examine the claim of the petitioner for change of grade of coal. Petitioner was asked to furnish the technology adopted by it along with corresponding GCV of coal required by the Unit. Change of grade of coal from B/C to C/D/E was possible only if there is a change in the technology. In the petitioner's case, the same technology was being used since about 10 years without any grievances necessitating change of grade of coal. It is further stated that the Technical Report prepared by M/s AVR Engineering and Consultancy Service

(Annexure-17/1) does not refer to the detailed specific technology being adopted by the petitioner, rather it is only a process description of the Unit i.e. how Sponge Iron is manufactured. No project report of the consultant has been submitted relating to the technology being utilised in the Unit. Taking note of the failure of the petitioner to explain the cause seeking for change of grade of coal and Report of consultant, the Respondent No. 7 has rejected the request by his reasoned order dated 25.06.2012, impugned herein (Annexure-18). Learned counsel for the Respondent have also contended that the contentions relating to sudden increase in the price of A/B grade of coal for necessitating change of grade of coal to C/D/E from B/C, is beyond the scope of the Agreement. Petitioner had undertaken to purchase 39,750 tonnes of B/C grade of coal from the CCL and/or from international sources. However, petitioner had failed to lift the total quantity of 28,980 MT of coal in 2011-12, 36,862 MT in 2012-13 and 3,312 MT in 2013-14. Therefore, Respondents are justified in terminating the Agreement of the petitioner.

9. On a previous date, this Court after considering the submissions advanced by the parties and the enclosures relied to support their case, passed the following order i.e. 13.05.2016 on the issue relating to change of grade of coal as it was felt that the guidelines prescribed for change of grade of coal by the Coal Company were not on record.

"The issue involved herein basically is relating to change of grade of coal. Petitioner's claim for change of grade of coal from B/C to C/D/E grade has been declined as he has not shown any change in technology adopted by it with the corresponding Gross calorific value required to its Unit. Petitioner's unit has been functioning for production of Sponge iron with coal linkage agreement initially entered into in 2002 and thereafter renewed in 2008 under the new Coal Distribution Policy. What are the guidelines prescribed for change in grade of coal by the coal company is not borne from the pleadings on record.

Learned counsel for the respondents, Coal India Limited and Central Coalfields Limited therefore is allowed 3 weeks time to bring on record such policy guidelines.

List the case after 3 weeks on the tied up day under the same heading."

10. Respondent CCL has thereafter filed a supplementary counter affidavit on 21.06.2016 categorically stating that apart from the Fuel Supply Agreement, there is no other Scheme/Policy in vogue for change of grade of coal in the event of any request by a consumer. Though ordinarily, change of grade of coal is considered by the Ministry of Coal who allocated the petitioner B/C grade of coal, but in the instant case, on the direction of Ministry of Coal itself, the Respondent proceeded to consider the request of the petitioner for change of grade of coal under the provisions of NCDP, 2007 and Fuel Supply Agreement entered with the petitioner. As of now, no valid Fuel Supply Agreement exist between the petitioner and the Respondent as the same having already been terminated.

11. In the foregoing paragraphs, relevant conspectus of facts have been noticed in order to come to a considered finding on the issue involved herein. From the sequence of facts, as above, it can be assumed that it is the question of change of grade of coal requested by the petitioner on 08.04.2011 for the reasons projected by it which formed the underlying basis for the inability of the petitioner to lift the guaranteed quota of coal under the Fuel Supply Agreement for three successive years i.e. 2011-12, 2012-13 and 2013-14. Its failure to lift the guaranteed percentage of quota of coal, forms the basis of termination of Fuel Supply Agreement. Petitioner had made a representation after three years of the Fuel Supply Agreement as provided under Clause 2.3 and 2.4 of the Fuel Supply Agreement for change of grade of coal. However, the reasons indicated in the impugned order do not show complete application of mind to all the relevant factors necessary for arriving at an informed decision. The Respondents have also not been able to meet the specific grounds and the instances urged by the petitioner relating to change of grade of coal to other similarly situated industries under the Fuel Supply Agreement with them. Specific cases of the petitioner's Chandil Industries, Bihar Sponge Iron Ltd. and such other cases are reflected in Annexure-9 where change of grade of coal have been permitted, have not been adequately explained. The Respondent General Manager (S&M) could have directed the petitioner to produce an independent report of an expert consultant about the viability of the technology adopted by the petitioner Unit necessitating such change in the grade of coal after continuous 10 years of consumption of the higher grade of coal i.e. B/C grade.

12. It also does not appeal to reason as to how when the Fuel Supply Agreement allowed B/C grade of coal, "C" grade of coal, requested by the petitioner, could not be allowed to be lifted which may have been comparatively cost effective. It is evident that there are no guidelines on the subject relating to change of grade of coal except the terms and conditions of the Fuel Supply Agreement in question or NCDP, 2007. Therefore, the issue of change of grade of coal is required to be examined on objective consideration and on uniform basis in a non - discriminatory approach. The Respondents were required to be satisfied whether the technology in question permits such change of grade of coal and whether such change of grade permissible after three years of Fuel Supply Agreement, has been allowed to any similarly situated industries or not? The impugned order therefore appears to suffer from non application of mind to all such relevant consideration which has vitiated the decision making process.

13. The matter requires reconsideration by the Respondent in accordance with law and taking into account all such relevant material factors noticed herein-above. Therefore, impugned order dated 25.06.2012 (Annexure-18) is quashed. The matter is remitted to the Respondent Central Coalfields Ltd. to take a fresh decision in the matter of change of grade of coal of the petitioner Unit. This was the original cause of action raised in the writ petition in 2012 itself where-after the Fuel Supply Agreement has been itself terminated by order dated 30.04.2013. Therefore, if the Respondent come to a decision on reconsideration

to permit change of grade of coal in favour of the petitioner, they should also consider the question relating to revocation of the termination of the Agreement itself, in accordance with law with such modification, if any, as may be required. Let such decision be taken on reconsideration within a period of sixteen weeks from the date of receipt of a copy of this order. Petitioner shall make a fresh representation with all supporting facts and documents in support of its claim for change of grade of coal and reconsideration of the matter relating to termination of the Fuel Supply Agreement itself. In view of the matter relating to change of grade of coal being remanded, the order of termination of the Fuel Supply Agreement dated 30.04.2013 shall not come into their way in taking a fresh decision. Needless to say, if the decision is taken in favour of the petitioner, necessary consequences which flow in accordance with law, would also be considered by the Respondent Company.

14. Writ petition is allowed in the manner and to the extent indicated herein above. Pending I.As stand closed.