

**(2016) 04 PAT CK 0170**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 17282 of 2011

M/S Bandana Fuel Industries

APPELLANT

Vs

Bharat Coking Coal Limited

RESPONDENT

**Date of Decision :** 18-04-2016

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2016) 3 BBCJ 274 : (2016) 2 BLJud 310 : (2016) 4 PLJR 35

**Hon'ble Judges :** Mr. Vikash Jain, J.

**Bench :** Single Bench

**Advocate :** Mr. Arbind Kumar Jha, Advocate, for the Petitioners; Mr. Vishwa Mohan Kr. Sinha, AAG 13, for the BCCL

**Final Decision :** Disposed Off

## Judgement

Mr. Vikash Jain, J.— Heard learned counsel for the petitioner and learned counsel for the Respondent - BCCL.

2. This writ petition has been filed for quashing the letter No. BCCL:S&M:C:F - 10/351 dated 03/05.09.2011 by which the petitioner was made to forfeit the security deposit lying with the Punjab National Bank in purported exercise of powers conferred under Clause 3 of Fuel Supply Agreement dated 30.06.2008 ("FSA" hereinafter) ; and for a direction to respondent No. 1 and 2 to restore the supply of coal forthwith in compliance of the directions of this Court in its order dated 12.07.2011 by which the order 09.11.2010 terminating the FSA was quashed.

3. The short facts of the case are that the petitioner being a proprietary concern certified as a "very small unit" and engaged in manufacture of soft coke, was allocated 4830 tonnes ROM Coal per month from Bharat Coking Coal Limited (for short "the BCCL") sources on a permanent basis. After discontinuance of the traditional linkage system by the Government of India on 18.10.2007, a new coal distribution policy was adopted, under which an FSA was required to be entered

into after furnishing a bank guarantee. The petitioner accordingly furnished its bank guarantee vide BG No. 9/08 dated 27.06.2008 issued by the Punjab National Bank in favour of the BCCL for Rs. 15,50,000/- .

4. It appears that in due course the FSA dated 30.06.2008 came to be terminated on 09.11.2010 by the respondent BCCL with reference to Clause 4.4 thereof. The matter was successfully challenged in CWJC No. 4460 of 2011 at the instance of the petitioner and the termination order was quashed by order dated 12.07.2011 passed by this Court. Soon thereafter, the respondent BCCL invoked the bank guarantee of the petitioner by issuing the impugned letter No. 351 dated 03/05.09.2011 requiring the Punjab National Bank to credit the amount of the bank guarantee to the account of BCCL as the petitioner had failed to abide by the terms of the FSA. The present writ petition was filed on 21.09.2011. However, during its pendency, the respondents passed a fresh Order No. 422 dated 01.10.2011, inter alia, holding that the earlier termination order dated 09.11.2010 in respect of the FSA had been further supplemented by the findings of a high powered fact finding committee and as such the earlier termination order stood unaltered. This order dated 01.10.2011 of the BCCL was challenged before this Court in CWJC No. 565 of 2012 by the petitioner, which was allowed on 10.12.2015 with the following observations :

"Another aspect which invalidates the impugned order is that even when the earlier termination order dated 9.11.2010 was quashed by this Court vide order passed in C.W.J.C.No. 4460 of 2011 as manifest from paragraph 5 of the judgement enclosed at Annexure-9, yet the respondent Coal Company in their enthusiasm to cancel the agreement have proceeded to uphold the said termination order dated 9.11.2010 which has been quashed and has ceased to exist.

For the reasons so explained herein above, it would be only a completion of formality to hold that the order of cancellation passed by the respondent General Manager (Sales and Marketing) as communicated vide letter dated 1.10.2011 as contained in Annexure-11, cannot be upheld and is accordingly set aside. Since liberty to proceed in accordance with law has already granted to the respondent - Company in the earlier round of litigation hence no fresh order needs to be passed in this regard.

The writ petition is allowed."

5. Learned counsel for the petitioner makes a short submission in support of his contention that the invocation of the bank guarantee and encashment of the same is contrary to the terms of the FSA and unauthorized in law. Clause 3 of the FSA deals with security deposit and contemplates forfeiture thereof in terms of Clause 3.6, which reads as follows :-

"In the event of termination of the Agreement by the Seller in accordance with Clause 15.1.4 to 15.1.8, the Seller shall be entitled to forfeit the Security Deposit of the Purchaser in addition to any other rights vested with the Seller upon such

termination."

6. It is pointed out that the petitioner was liable for forfeiture of the security deposit only in the event of termination of the agreement by the BCCL. It is a matter of record that the termination order dated 09.11.2010 had been quashed by this Court on 12.07.2011 whereas the bank guarantee was invoked thereafter on 03/05.09.2011. In other words, on the date when the bank guarantee was invoked, no order of termination was in existence at all. It is therefore, submitted that on the very terms of Clause 3.6 of the FSA, invocation of the bank guarantee is wholly illegal and unsustainable. Even if such invocation be tested with reference to the subsequent order of termination dated 01.10.2011, it is submitted that as a matter of fact it was not a fresh termination order at all, rather it merely sought to revive the earlier termination order dated 09.11.2010 by treating it as remaining unaltered. It is submitted that such action of the BCCL is thus wholly unauthorized as no termination order whatsoever was in force on the date when the bank guarantee was invoked.

7. Learned counsel for the respondent BCCL opposes the writ petition, primarily on the ground that the subsequent termination order passed on 01.10.2011 was based on the findings of a high powered fact finding committee. Its report dated 30.08.2011 contained specific findings against the petitioner and was prior in time to the invocation of the bank guarantee on 03/05.09.2011, even though the formal termination order may have followed shortly thereafter on 01.10.2011. Moreover, the order of this Court dated 10.12.2015 passed in CWJC No. 565 of 2012 has been taken up further in appeal in LPA No. 288 of 2016 which is pending before this Court.

8. Having heard the parties and on consideration of the materials on record, this Court finds force in the submissions of learned counsel for the petitioner. It is borne out from the records that the order of termination dated 09.11.2010 had been quashed by this Court on 12.07.2011, and hence, no termination order whatsoever was in existence when the bank guarantee was invoked on 05.09.2011. In such circumstances, the pre-condition laid out in Clause 3.3 of the FSA that the bank guarantee could be invoked only in the event of termination of the FSA by BCCL was not fulfilled. As regards the subsequent termination order dated 01.10.2011, it has already been observed by this Court in CWJC No. 565 of 2011 that the earlier termination order had already been quashed and ceased to exist, and thus there was no question of reviving the same or treating it as remaining unaltered. The fact that the bank guarantee was encashed much later on 03.03.2014 as stated in para 12 of the 2nd supplementary affidavit would make no difference, as on that date as well, no termination order can be said to have been in existence considering that the termination order dated 01.10.2011 had merely sought to revive the earlier non-existent termination order dated 09.11.2010.

9. The respondent - BCCL is accordingly hereby directed to refund the amount of Rs. 15,50,000/- towards the bank guarantee wrongfully encashed on

03.03.2014. The said amount shall be paid to the petitioner together with simple interest @ 9% per annum from the date of its encashment upto the date of its actual refund to the petitioner, within a period of eight weeks from the date of receipt/production of a copy of this judgment.

10. The writ petition stands allowed.

11. Interlocutory Application No. 9080 of 2013 stands disposed of.