

(2016) 07 PAT CK 0029

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 17287 of 2011

M/s Bihar Fuel Industries

APPELLANT

Vs

The Bharat Coking Coal Limited

RESPONDENT

Date of Decision : 14-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 3 BBCJ 97 : (2017) 2 PLJR 349

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

Bench : Single Bench

Advocate : Mr. Arbind Kumar Jha, Advocate, for the Petitioner; Mr. Vishwa Mohan Kr. Sinha, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Mr. Vikash Jain, J. (Oral)— Heard learned counsel for the petitioner and learned counsel for the respondent BCCL.

2. The instant writ petition has been filed for quashing the letter No. BCCL: S&M; C:F-10/336 dated 03/05.09.2011 issued by the respondents in purported exercise of power under Clause 3 of the Fuel Supply Agreement by reason of which the petitioner has forfeited its security deposit lying with the Union Bank of India; for restoration of supply of coal pursuant to the order of this Court dated 12.07.2011; and for connected reliefs.

3. Learned counsel for the petitioner submits that the matter stands squarely covered by a judgment of this Court dated 18.04.2016 passed in CWJC No. 17282 of 2011 (M/s Bandana Fuel Industries v. The Bharat Coking Coal Limited & others) which was allowed with the following observations and directions :-

"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."

4. Learned counsel for the respondents submits that the instant case differs from Bandana Fuel Industries (CWJC No. 17282 of 2011) in material aspects. It is pointed out that unlike in the case of Bandana Fuel Industries, in the instant case, the petitioner had earlier approached this Court also in CWJC No. 20039 of 2011 for quashing of a subsequent order of the BCCL dated 01.10.2011 by which the BCCL's earlier termination order dated 09.11.2010 had been declared to remain unaltered. It is pointed out that the said writ petition had been dismissed by this Court having declined to interfere in its writ jurisdiction, leaving it open to the petitioner to pursue his remedies before an appropriate forum. A review petition against such order was also dismissed by order dated 06.02.2013 in Civil Review No. 273 of 2012 after noticing the petitioner's reliance on the proposed procedure of verification of erstwhile non-coal sector as decided by the Board of Directors on 12.03.2012. It is therefore, submitted that the present writ petition should also not be entertained in view of the observations of this Court in CWJC No. 20039 of 2011 with regard to the existence of disputed questions of fact.

5. Apart from the above, it is submitted on behalf of the respondents that no fault can be found in the action taken by way of forfeiture of the petitioner's security deposit. Attention is invited to the terms of the Bank Guarantee provided towards the security deposit (Annexure R-16) which contains an unequivocal and unreserved undertaking for making the payment thereunder on demand. It is submitted that the petitioner cannot therefore be allowed to raise objections against the forfeiture of the Bank Guarantee in terms of the impugned letter No. 336 dated 03/05.09.2011 (Annexure-7) of the BCCL. Reliance is placed on the following decisions :

(i) AIR 2007 SC 2716 (Mahatma Gandhi Sahakara Sakkara Karkhane v. National Heavy Engineering Co. Ltd. & another).

(ii) AIR 2016 SC 92 (M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif and others).

6. Learned counsel for the petitioner submits in reply that the question before this Court in CWJC No. 20039 of 2011 was with reference to the validity of the subsequent order of the BCCL dated 01.10.2011 declaring its earlier termination order dated 09.11.2010 as unaltered, whereas the relief sought in the present petition is against forfeiture of the petitioner's security deposit by the respondent BCCL in the backdrop of this Court's order dated 07.12.2011 passed in CWJC No. 6754 of 2011 by which the aforesaid termination order dated 09.11.2010 had been quashed. It is accordingly submitted that the scope of the present writ petition is completely distinct from the issues involved in CWJC No. 20039 of 2011.

7. Moreover, learned counsel for the petitioner invites attention to the order dated 11.02.2013 passed in SLP (Civil) No. 10836-10837 of 2011 (Western Coalfields & another v. Hind Steel and ors.). It is stated that in similar

circumstances and in the backdrop of the approval of the procedure for verification of non-coal sector by the Board of Directors, the said SLP had not been pressed and was accordingly disposed of. It is submitted that the situation of the respondent BCCL is similar to M/s Western Coalfields and another being the petitioners in SLP (Civil) No. 10836-10837 of 2011 and hence the issue in question can no longer be permitted to be agitated by the respondents BCCL as well.

8. As regards the exercise of power by the respondents with regard to forfeiture of the security deposit in view of the unconditional terms contained in the Bank Guarantee, learned counsel for the petitioner submits that such action is wholly arbitrary and without jurisdiction. Attention is invited to clause 3.6 of the Fuel Supply Agreement dated 30.06.2008 entered into between the parties which provides for forfeiture of the security deposit in the event of termination of the agreement by the respondents in accordance with clauses 15.4 to 15.18 of the said agreement. It is submitted that in the absence of a valid termination of the agreement, the preconditions for forfeiture of the security deposit were not fulfilled and hence the Bank Guarantees could not have been invoked by the respondents.

9. Having heard learned counsel for the parties and on a careful consideration of the materials on record, this Court finds merit in the submissions of the petitioner. The decision of this Court dated 24.04.2012 in CWJC No. 20039 of 2011 was rendered after filing of the present writ petition on 26.09.2011 and in a different context involving challenge to the BCCL's letter dated 01.10.2011 by which the earlier termination order dated 09.11.2010 had been declared to stand unaltered. Moreover, the respondents have not disputed the stand of the petitioner that the situation of the respondent BCCL was in essence no different from that of Western Coalfields and another who had not pressed the SLPs before the Supreme Court in the backdrop of the approval of the procedure for verification of non-coal sector by the Board of Directors.

10. The submission made on behalf of the respondents that in absence of any clause contained in the Bank Guarantee, forfeiture of the security deposit was rightly adverted to, is devoid of any merit. The above referred clause 3.6 of the Agreement dated 30.06.2008 spells out the foundation for exercise of the respondent's right with regard to forfeiture of the security deposit of the petitioner and it is thus evident that such power is neither unbridled nor uncontrolled. The right to effect forfeiture is fettered with the pre-condition of termination of the agreement relatable to clause 15.14 to 15.18, which is completely absent in this case. It is a matter of record that on the date when the forfeiture of the security deposit was ordered in terms of the respondent BCCL's letter dated 03/05.09.2011 (Annexure-7), the termination order dated 09.11.2010 had already been quashed by this Court by its order dated 12.07.2011 in CWJC No. 6754 of 2011 (Annexure-5). In other words, there was no valid termination order operating on the date of forfeiture of the Bank

Guarantee, which thus violated the pre-conditions of the aforesaid clause 3.6 of the Agreement dated 30.06.2008 between the parties.

11. It may not be out of place to observe here that the subsequent order of the BCCL dated 01.10.2011 by which its termination order dated 09.11.2010 was held to remain unaltered, was also set aside by this Court as a matter of formality by judgment dated 10.12.2015 passed in CWJC No. 565 of 2012 in almost identical circumstances.

12. The present writ petition is accordingly allowed in line with and on the same terms as CWJC No. 17282 of 2011.