(2022) 04 J&K CK 0037

In the Jammu And Kashmir High Court

Case No : Others Writ Petition No. 1452, 1552 Of 2010, Civil Miscellaneous No. 127 Of 2022, 8497 Of 2021, IA No. 1945, 2062 Of 2010

M/s Jai Ganesh Disposals — APPELLANT

Vs

Union Of India And Others — RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 19(1G), 162, 226

Citation : (2022) 04 J&K CK 0037

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : Surinder Kour, Sunil Kumar, Dheeraj Nanda

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. Since the issues involved in both the writ petitions are similar, the same have been heard together and are being decided by this common judgment.

2. In the petition, bearing OWP No. 1452/2010, filed under Article 226 of the Constitution of India, the petitioner seeks indulgence of this Court in granting him the following reliefs:

i) to quash order No. BTPS/SM (S)/10-I 1/632 dated 28.09.2010 issued by the Senior Manager by which the Senior Manager has directed the petitioner to lift the balance quantity otherwise the full amount deposited by the petitioner will be forfeited and the petitioner will be barred for further lifting of Coal Mill Reject, by issuance of writ of Certiorari;

ii/ to issue directions to the respondents to rehabilitate the petitioner under N.T.P.C. Rehabilitation and Resettlement Policy thereby providing the alternative land for dumping and Segregation of Coal Mill Reject by issuance of writ of mandamus;

iii/ to issue directions to the respondents to shift the C.M.R.at a place by providing alternative land just to save the environment and from causing noise and air pollution, by issuance of writ of mandamus;

iv/ to declare the act by which the respondents are not providing the alternative land to the petitioner, as ultra virus, unconstitutional, arbitrary and contrary to the provision of law by issuance of writ of mandamus;

3. The petitioner claims to be a businessman and dealing with the business under the Name and Style of Jai Ganesh Disposals and having head office at 115/6Transport Nagar Narwal, Jammu.

4. The factual background of the case as stated in the writ petition is that in November 2008, a lot of Coal Mill Reject was purchased by the petitioner-firm situated at Badarpur, New Delhi, which was along with the Pebbles and stones; the same was sold to the Brick Kilns and lime units, thereafter, petitioner-firm received number of complaints from the purchasers. The petitioner approached the NTPC Limited a number of times requesting latter to make former about the constituent material and quality of Coal Mill Reject, so that petitioner was able to explain the same to the borrowers. The petitioner-firm also made a complaint to the Minister on 22nd September 2009, thereby requesting for intervening in the matter and for issuing necessary orders and instructions to the NTPC Limited to give proper awareness about the constituent material and quality of Coal Mill Reject. The petitioner-firm claims to have requested the NTPC for extension of time to life the stock but Senior Manager informed the petitioner vide communication dated 10th February 2010 that he has lifted only 1052.625 quantity against 2nd instalment and that his performance of lifting the material was very poor. Thereafter, vide communication dated 28th September 2010, three months' time was granted by the Senior Manager to lift the balance quantity, failing which the full amount deposited by the petitioner was to be forfeited. On receipt of the said communication, petitioner made a representation to the Senior Manager specifically mentioned that this happened due to non-gradient of advertisement through M.S.T.C and requested that he be permitted to shift the snail speed Coal Mill Reject within the jurisdiction. A technical team suggested the land of Khudh near Jaitpur which was five kilometres from the stockyard, and requested for providing the land within jurisdiction. The petitioner claims to have approached the respondents a number of times for providing alternative land for stocking the material of segregation, but his request was not accepted. It is stated that respondent-corporation has provided the land for stocking the material for the purposes of lifting the same to save the environment because presently the land is near the place where it affects the environment and also causing pollution. It is stated that the quantity of 15,000/- Metric tons was allotted by M.S.T.C, M.S.T.C. and N.T.P.C. Limited are as owners and N.T.P.C. has made resettlement and rehabilitation Policy by which they have issued specific guidelines wherein it is specifically mentioned that the green field has to be saved, so as to win the confidence of local population and under this

Scheme they have to provide also alternative land to the petitioner where he can dump the material for segregation and lifting purposes, because it is a Coal Mill Reject and it causes pollution. It is contended that the respondents are giving discriminatory treatment to the petitioner and depriving him from the right of business and causing stigma on his reputation. The petitioner approached the respondents, but the respondents instead of accommodating the petitioner issued a letter dated 28th September 2010, threatening the petitioner that in case balance quantity was not lifted within three months, the full amount deposited by the petitioner would be forfeited and the petitioner barred from lifting further Coal Mill Reject and that their sale order would be cancelled, and security deposited forfeited under clause 11.9 terms and conditions.

5. Clause 11.9 of the Special Terms & Conditions reads as under:-

11.9 Ground Rent @ 2 % per week or part there of beyond 30 Days will be levied and up to 2 weeks maximum, provided written request is received before the expiry of 30 days free lifting period, if no such request for extension is received, the sale order stands cancelled & security deposit forfeited on completion of 30 days of free lifting period."

6. It is stated that the aforesaid condition does not apply in case of petitioner as it applies only to those cases where amount of sale proceed is deposited and it is to be deposited in installments and while in the present case, the petitioner has deposited full amount along with security and it is admitted by the respondents in their letters and there is no question of application of these terms and conditions. The respondents have wrongly interpreted their own terms and conditions, harassing and pressurizing the petitioner to lift the material, while it is difficult for the petitioner to lift the full quantity at a short span of time.

7. It is further contended that the respondents are under obligation to rehabilitate the petitioner under resettlement and rehabilitation Policy, thereby providing alternative land where he can dump the material for segregation and lifting purposes, because under the Scheme it is obligatory on the part of the respondents to rehabilitate the petitioner thereby providing alternative land to complete their project of lifting.

8. The impugned order dated 28.09.2010, passed by Senior Manager is being challenged by the petitioner on the following grounds:-

"i/ That the order and act is against the law and rules, so the same is not sustainable.

ii/ That lot of 15,000 Metric ton Coal Mill Reject was allotted to the petitioner and the petitioner has deposited the full sale proceed amounting to Rs. 16 Lac and Rs. 1,56,000/- as security amount. The Constitution of Coal Mill Reject was in the communicated to the petitioner firm to make aware about its constituent material and quality and the petitioner's firm will not able to make the units to whom this Coal Mill reject has to be sold to aware about its constituent material and quality. The petitioner made a number of complaint and because of this only the petitioner out of 50,000/- metric ton only able to lift to 20,000 Metric ton. In spite of the fact numbers of complaints were made, but nothing was mentioned rather the petitioner was pressurized to lift the material, ignoring the fact that the respondents are under obligation to rehabilitate the petitioner by providing alternative land. The respondents are depriving the petitioner from doing the business and have not given equal treatment to the petitioner. So it violates the provisions of Article 14 and 19 and 1 (G) of the Constitution of India and it also violates the provisions of principle of natural Justice; iii/ That the order dated 28th September, 2010 is also illegal on the ground that under provisions of law or under no provisions of terms and conditions when the full amount of sale proceed along with security has been received by the respondents, the respondents forfeited the amount and barred the petitioner from lifting Coal Mill Reject while as per a condition of 11.9 it is only when the sale proceed has to be deposited in installment and a person failed to pay the installment otherwise when the full amount has been paid this condition has not applicable because as per this condition if somebody fails to pay the installment then he is not permitted to lift the material . The respondents thereby wrongly interpreting terms issued the order which is against the provisions of law. So it violates the provisions of Article 14 and 19 and 1(G) of the Constitution of India and it also violates the provisions of principle of natural justice.

iv/ That the petitioner is approaching the respondents and made a number of representations for extension of time for lifting the material and also requested the respondents for rehabilitate the petitioner under resettlement and rehabilitation Scheme but the respondents have not issued any terms and also not provided any alternative land when the petitioner already made a request for providing land at Khad Jaitpur which is under the jurisdiction of respondents. The petitioner has requested for this land only on the ground that while segregation and lifting process of Coal Mill Reject it affects the environment and also polluted atmosphere which is a health hazards, so the material has to be kept at place which is away from a residential area and away from bank of river and in the present case the land which is suggested by the petitioner is situated at place which will not become the cause of pollution and this also under control and jurisdiction of the respondents. The respondents under the provisions of Rehabilitation Scheme have to provide this land thereby fulfilling their object of resettlement and rehabilitation Scheme. So it violates the provisions of Article14 and 19 and 1(G) of the Constitution of India and it also violates the provisions of principle of natural justice;

v/ That every person has a right to do the business of his own choice and it is for the Government to up lift the method for achieving their Coal and in the present case when the petitioner fulfills the terms and conditions of the respondents and there is nothing outstanding against the petitioner. The respondents are depriving the petitioner from doing their business peacefully rather they are causing hardly in doing their business by not providing alternative land and thereby threatening the petitioner to lift the material from the land knowing fully well it is not possible for the petitioner to lift the material within short span of time. The act of the respondents is against the Constitution of India."

9. Respondent No.1 in his objections has contended that no cause of action has accrued to petitioner as there exists a dispute between NTPC Limited and petitioner, and that NTPC does not come under the administrative control of respondent and, therefore, the name of the respondent No.1 be deleted.

10. Respondents 2 and 4 have also filed objections, contending therein that since the instant petition involves disputed questions of fact and based on false assumptions with regard to the ambit and applicability of R&R Policy, as such, deserves to be dismissed outrightly. It is stated that there is pure contractual relationship of a Seller-Purchaser between the petitioner and respondent No.2 and, as such, no such fundamental or statutory right of the petitioner is involved in the present case, the writ petition is thus not maintainable. It is averred that the petitioner participated in the "e-auction", conducted by the respondent No.3 on 09.02.2009, for the sale of the One Lakh M.T. (+20%) of scrap "Coal Reject mixed with stones", from Badarpur Plant of respondent No.2, offered on "as is where is basis", wherein it is categorically stated that the said scrap was offered for sale through e-auction, the terms and conditions regarding the same were fully advertised on the website of respondent No.3. In the objections it is further averred that the petitioner was one of the bidders in the said e-auction and his bid of Rs.38/- Per Metric Ton for 100000 M.T. (+ 20%) of "Coal Reject mixed with stones" was accepted by for a total value of Rs.38,00,000/-; that the acceptance of the bid of the petitioner and the schedule of periodical payment in this regard was communicated by the respondent No. 3 to the petitioner, vide communication dated 13.02.2009, whereby the petitioner was directed to deposit the payment of the sale consideration so approved in 40 equal monthly installments of Rs.95,000/-from 27.02.2009 to 27.05.2012. It is stated that as per Clause 11.3 of the special terms & conditions governing the said sale, the petitioner was bound to lift "Coal Reject mixed with stones" from Badarpur Thermal Power Station scrap yard within 30 days of the date of issuance of sale release order by respondent no.2. The quantity of each Sale Release Order issued by NTPC was 2500 M.T. and for lifting partial quantity of 60,000 M.T.Coal Reject mixed with stones, total 24 numbers of Sale Release Orders were issued to the petitioner; that as per the terms and conditions of the said sale, the petitioner was under an obligation to remove the partial lot of 60000 M.T. of the Coal Reject mixed with stones, on "as is where is basis" from the BTPS scrap yard in 24 lots of 2500 M.T. each, latest by 28.02.2011. It is further averred that pace of removal/lift of the Coal Reject mixed with stones from the BTPS scrap yard was very slow and not in accordance with his covenants of timely removal of the same, constrained by fact the petitioner was served with series of memos/ reminders pressing upon him to lift the "Coal Reject mixed with stones" as per schedule and intimating the recourse to Clause 11.9 of the Special Terms & Condition, which the petitioner has failed in its contractual obligation to lift the

partial lot of 60000M.T, even after five months of the extended time period. It is stated that from the conduct of the petitioner that he has neither resources nor any intention to lift the Coal Reject mixed with stones partial lot of 60000 M.T., as till date, he could manage to lift only 5460M.T. approx. and rest of 54540 M.T. of Coal Reject mixed with stones, is still occupying the valuable space in the scrap yard of BTPS, which is required by the respondent-Company to meet its other pressing needs; that as per Clause No.12 of the Special Terms & Conditions of the said sale, the extension of taking delivery of the Coal Reject mixed with stones is the sole discretion of the respondent No.2, who is within its rights to resale the un-lifted Coal Reject mixed with stones at the risk and cost of the petitioner and the extension of time period both in respect of payment of sale amount and of taking delivery shall be at the sole discretion of the NTPC Limited, Badarpur Division, failing which goods or portion sold thereof shall be resold at purchaser's risk and cost, and the loss suffered, if any, will be recovered from the party. In the objections it is averred that that the Rehabilitation & Resettlement (R&R) Policy of the respondent is meant for Project Affected Persons only and for none-else.

11. Heard learned counsel for the parties and perused the material on record.

12 The contention of the appearing counsel for the petitioner is that vide communication dated 10th February, 2010 the petitioner was informed that his performance of lifting the material was very poor and he was directed to lift the material at early. On receipt of the said communication, a request was made to the N.T.P.C for extension of time for lifting the stock and three months was granted to the petitioner for lifting the balance quantity. Thereafter, petitioner filed a representation before the Senior Manager to provide alternative land for stocking the material of segregation, however, the respondents did not pay any heed to the representation of the petitioner.

14. On the other hand, learned counsel for the respondents contended that as per Clause 11.03 of the Special Terms and Conditions, the petitioner was bound to lift "Coal Reject Mixed with Stones' from the scrap yard within 30 days of the date of issuance of Sale Release Order. It is stated that as per the terms and conditions, the petitioner was under an obligation to remove the material from the BTPS Scrap yard in 24 lots of 2500 M.T. each, latest by 28.02.2011. It is further contended that despite serving series of reminders i.e., on 31.12.2009, 18.01.2010, 10.02.2010, 22.04.2010 and 04.10.2010, the pace of removal/lift of the material by the petitioner was very slow and he failed to life the material even after five months of the extended time period.

15. So far as issue regarding delay in lifting of the allotted material raised by the petitioner-firm is concerned, the case of the petitioner is that the delay in lifting the martial has occasioned due to the fault of the respondent-corporation as no alternative land was provided for shifting the material under the Rehabilitation and Resettlement Policy, whereas the case of the respondent-Corporation is that the policy is meant only for the Project Affected Persons unsettled by the

construction of a Plant, and the case of the petitioner does not qualify him to be considered for any conferment of benefit under the said policy.

16. Clause 12 explicitly provides that extension of time period both in respect of payment of sale amount and of taking delivery is the sole discretion of the NTPC Limited, failing which goods or portion sold thereof is to be resold at purchaser’s risk and cost.

In the present case, the petitioner was required to lift the materials, i.e., coal mill reject & stone boulders, within the free lifting period from the date of Sale Release Order issued by the respondent-corporation. In the terms and conditions, it is specifically mentioned that in case the material is not lifted within stipulated period, ground rent @ 2 % per week or part thereof beyond thirty days has to be levied and up to two weeks maximum, provided written request is received before the expiry of 30 days free lifting period; if no such request for extension is received, the sale order shall stand cancelled and security deposit forfeited on completion of 30 days of free lifting period. Therefore, the petitioner was bound to lift the total quantity of “Coal Mill Reject” (CMR) and stone boulders within the validity period, which he failed to do.

17. The record further tends to show that the petitioner was required to make arrangements for lifting, requisite transportation, loading labour, etc. for removal of coal mill reject and screened dust. However, perusal of the documents annexed with the objections reveals that the petitioner was taking permission of 05 trucks daily but was deploying only one truck. He was advised a number of times by the respondent-Corporation to mobilize his full resources to lift the balance material, but he failed to do so. Thus, the pace of removal/lift of the said material from the beginning was very slow and despite a number of reminders issued by the respondent- corporation, petitioner failed in its contractual obligation to lift the material, even after five months of the extended time period.

18. So far as the preliminary objection raised by the respondents regarding maintainability of the present writ petition is concerned by stating that the instant petition involves disputed questions of fact and based on false assumptions with regard to the ambit and applicability of R & R Policy is concerned, it would be appropriate to go through the judicial pronouncements of the Apex Court, whereby the principles have been laid down to deal with the matters involving contractual dispute under Article 226 of the Constitution of India. In the case of ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd., reported in (2004) 3 SCC 553, the Apex Court has held as under:

"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

19. In the case of Karnataka State Forest Industries Corporation v. Indian Rocks reported in (2009) 1 SCC 150, the Apex Court has held as under: -

"38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. (See ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.).

39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless. Reliance placed by Mr Divan on G.J. Fernandez v. State of Mysore is not apposite. In that case itself it was held: (AIR p. 1757, para 12) "12. Thus under Article 162, the State Government can take executive action in all matters in which the legislature of the State can pass laws. But Article 162 itself does not confer any rule-making power on the State Government in that behalf."

20. In the case of Kisan Sahkari Chini Mills Ltd. v.Vardan Linkers, reported in (2008) 12 SCC 500, the Apex Court has held:-

"18. Ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. He will be entitled to the relief of specific performance, if the contract is capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a writ petition under Article

226 of the Constitution of India, is not available to seek damages for breach of contract or specific performance of contract. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 of the Constitution of India may be invoked.”

21. In the aforesaid judgments, the Apex Court has summarized the law with regard to the extent of interference by the writ court in the matters arising out of contractual disputes. It has been held that the power of the High Court under Article 226 is plenary in nature and involvement of contractual dispute cannot ipso facto be a ground for dismissing a writ petition.

22. In both the writ petitions, the petitioner has failed to lift the Coal Reject Mixed with Stones within the stipulated period as provided in Clause 11.3 of the special terms and conditions albeit a number of communications/reminders issued to him by respondents. Many a times, petitioner was asked by respondents to lift the material as the space where the material was lying was required for new gas project and the same therefore, needed to be evicted immediately. In the instant case, 24 number of Sale Release Orders were issued by NTPC/BTPS to the petitioner; the first such SRO was issued on 26.02.2009 and the last date of lifting of Coal Reject Mixed with Stones against 24th SRO was given till 28.02.2011, i.e., the petitioner had approximately 24 months’ time to lift 60000 M.T. of material from the scrap yard of BTPS, up to 28.02.2011. In terms of impugned order dated 28.09.2010, progress of lifting of Coal Mill Reject was very poor since issuance of 1st SRO dated 26.02.2009 petitioner had lifted only 2135.250 MT approximately against 15,000 MT. The petitioner was bound to lift the material in accordance with the terms and conditions of the respondent-corporation, which he has failed to do, therefore, respondent-corporation has the right to terminate the contract as per its special terms and conditions. The petitioner was well aware of the existing special terms and conditions issued by the respondent-corporation and he cannot now find fault with the respondent-corporation, and seek to cover its faults on the ground that he was not provided alternative land for lifting purposes of Coal Reject Mixed with Stones, which as per the stand of the respondent-corporation is meant only for the Project Affected Persons and the case of the petitioner does not qualify him to be considered for any conferment of benefit under the said policy.

23. In view of aforesaid facts and circumstances, both the writ petitions being devoid of merit and are, accordingly, dismissed. Interim direction, if any, shall stand vacated.