

(2011) 11 AHC CK 0112
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 38984, 43736 of 2011

M/s. Nishant Industries and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-11-2011

Acts Referred:

Constitution of India, 1950 — Article 19(1)

Citation : (2011) 10 ADJ 283

Hon'ble Judges : V.K. Mathur, J;Amitava Lala, J

Bench : Division Bench

Judgement

Hon"ble Amitava Lala, J.—The case of the petitioners in Civil Misc. Writ Petition No. 38984 of 2011 (in short called as the "first writ petition") is that they are smart scale industrial units registered with the Director of Industries, Uttar Pradesh, Kanpur. The Coal India Limited and its subsidiary companies enjoy the monopoly of production, distribution and sale of coal under the provisions of the nationalization Act. The Supreme Court in Ashoka Smokeless Coal Ind. P. Ltd. and Others Vs. Union of India (UOI) and Others, held that all the small scale industrial units would get the supply of coal on notified prices from the subsidiary companies of Coal India Limited on the basis of the erstwhile linkage and a policy would be notified in this regard pertaining to distribution of coal by the Central Government. Thereafter the Government of India, Ministry of Coal issued a new coal distribution policy dated 18th October, 2007. Since the petitioners were linked units and were holding their erstwhile linkage for supply of coal from South Eastern Coalfields Limited (hereinafter in short called as "SECL"), they were allowed to execute Coal Supply Agreement with SECL and the same was executed on 30th April, 2008 as per the policy. After execution of such agreement, supply of coal as per MPQ quantity was resumed to the petitioners regularly every month and it continued upto January, 2011, for which the petitioners submitted end-use details of coal in Format-I and II, as prescribed by SECL. On 27th January, 2011 a circular was issued by the Chief General Manager (S&M), SECL and thereby in terms of Clause 4.4 of the Coal Supply Agreement

required the petitioners to furnish the desired information, alongwith supporting documents (photocopies duly authenticated, signed and sealed by the officials of District/ State Industries Department) in the prescribed Format-I and II alongwith a certificate from the official of the District/State Government, certifying therein the working status of the unit. It was further provided therein that said information is to be submitted for release of coal every month under an affidavit duly notarized by notary public as per the proforma circulated earlier. For necessary action, such circular was also sent to the Director of Industries, Uttar Pradesh, Kanpur, who sent a reply dated 30th March, 2011 to the Principal Secretary, Small Scale Industrial Units, Government of Uttar Pradesh, Lucknow stating its inability to authenticate, sign and seal the end-use documents of units getting more than 4200 MT Coal. A copy of such reply was also sent to the Chief General Manager (S&M), SECL for information and necessary action. However, by virtue of circular dated 27th January, 2011 the authorities of SECL have stopped the supply of coal to the petitioners with effect from February, 2011 on the ground that the end-use submitted by the petitioners for the month of January, 2011 has not been duly authenticated, signed and sealed by the officials of the District/State Industries Department. Against such action of the respondent authorities, the petitioners submitted objection dated 08th June, 2011 alongwith complete data sheet of all the months and stated that end-use has already been submitted, but the same has not been authenticated and verified by the concerned authorities. Petitioners have already submitted the payment for the month of February, 2011 for supply of coal, but the same was refused and not accepted by the authorities of SECL due to non-authentication of the end-use documents, whereas due to non-supply of coal the petitioners are facing great hardship. In such circumstances, the first writ petition has been filed.

2. At the threshold, by an order dated 18th July, 2011 this Court was pleased to protect the interest of the petitioners in the first writ petition to the extent that SECL should accept the draft prepared by the petitioners to lift the coal since in the month of July, 2011 the quota of lifting coal will expire. Such order was passed strictly without prejudice to the rights and contentions of the parties. But we find that since the authority of SECL refused to accept the draft, the Court was pleased to direct the counsel for the respondents to accept the bank draft, which was accordingly done under the order dated 10th August, 2011. However, at this final stage, we are only concerned about the applicability of new coal distribution policy and effective implementation of the Coal Supply Agreement/s.

3. So far as Civil Misc. Writ Petition No. 43736 of 2011 (in short called as the "second writ petition") is concerned, the only difference is that in this matter Forms-I and II have been supplied to such petitioner till March, 2011 and thereafter verification has been stopped.

4. Mr. N.C. Gupta, Learned Counsel appearing for the petitioner in the second writ petition, has adopted the argument of Mr. C.L. Pandey, learned Senior Counsel appearing for the petitioners in the first writ petition, virtually on all

points except few distinguishing factual aspects like above. Therefore, we have taken both the writ petitions together for the purpose of analogous hearing and disposal.

5. Mr. S. D. Dube, Learned Counsel appearing for the contesting respondents i.e. SECL, has made various submissions with regard to his objection regarding lifting of suspension for supply of coal, but before going into such controversy we have to clarify one factual position. According to him, as per letter dated 22nd January, 2011 of Joint Director/ General Manager, District Industry Centre, Lucknow addressed to the Commissioner-cum- Director, Industry, U.P., Raw Material Anubhag-8, Directorate of Industry, Kanpur, no unit in the name of the petitioners in the first writ petition was found to have been established. However, from the later communications dated 24th March, 2011 between the same officers it appears that the petitioners of the first writ petition have their existence. There is a reason behind making such submission by Mr. Dube because he wanted to establish that unless and until end-use is known on verification, enquiry, inspection, etc. by an appropriate authority, there is every possibility of misuse of coal, being national property, and such misuse may lead to scarcity to the people at large. He has relied upon an interim order dated 19th September, 2011 passed by the Supreme Court in SLP Nos. 10836-10837 of 2011 (Western Coalfields and Another v. Hind Steel and Others), whereby the Chief Secretary, State of Maharashtra was directed to file an affidavit with an expectation that his involvement in the matter would help in finding a reasonable and practicable solution to the disputes between Western Coalfield (the coal company therein) and Industries Department of the State Government. Background of passing such order is an order of the Bombay High Court, Nagpur Bench, Nagpur in Writ Petition No. 1222 of 2011 (Hind Steel and Others v. Union of India and Others) and Writ Petition No. 1223 of 2011 (Vidarbha Industries Association and Others v. Union of India and Others) dated 24th March, 2011, based on respective supply agreements between the parties. However, before going into such judgment, we have gone through the New Coal Distribution Policy dated 18th October, 2007 and the Coal Supply Agreements, which are identical to each and every supply by the subsidiaries under the Coal India Limited to the small scale and medium entrepreneurs. Clause 3 of the Policy gives various indications about the role of the State Governments. Two important roles of the State Governments have been recognised by such policy of the Government of India. Firstly, the State Governments will work out genuine requirement/ consumption of the small and medium units and monitor use of the coal. Secondly, such units will be notified by the State Governments and would be required to enter into coal supply agreement with coal companies to be designated by the Coal India Limited. In any event, for the purpose of better understanding entire Clause 3 of the Policy is quoted hereunder:

3. Consumers in small & medium sector

3.1 The State Governments are requested to work out genuine requirement of

such units in small and medium sector like Smokeless fuel, brick kiln, coke oven units etc. on a transparent and scientific basis and distribute coal to them accordingly. The State Governments may take appropriate steps to evaluate the genuine consumption and monitor use of coal. The present cap is also enhanced to 4200 tonnes per annum for the targeted consumers under this category. In order to meet the enhanced cap fixed for such consumers, the quantity earmarked for distribution to these agencies would also be increased to 8 million tonnes annually, to start with. This quantity would be allocated for distribution to those units/ consumers in small and medium sector across the country whose requirement is less than 4200 tonnes per annum and are otherwise not having any access to purchase coal or conclude Fuel Supply Agreement (FSA) for coal supply with coal companies.

The earmarked quantity would be distributed through agencies notified by the State Government. These agencies could be State Government Agencies/ Central Govt. Agencies (National Co-operative Consumer Federation (NCCF)/ National Small Industries Corporation (NSIC) etc. or industries associations, as the State Govt. may deem appropriate. The agency so notified will continue to distribute coal until the State Govt. chooses to denotify it.

The agency/ association so notified by the State Governments would be required to enter into FSA with coal company to be designated by the Coal India Ltd.. The FSA will continue to remain in force till either the State Government denotifies the agency/ association or CIL shifts the obligation to some other coal company due to production, transportation, logistics etc. In the latter case, a fresh FSA would be signed with the new coal company. The FSA would be based on firm commitment and compensation for default in performance on either side. These State Governments/ Central Government agencies would be free to devise their own distribution mechanism. However, the said mechanism should inspire public confidence and should result in distribution of coal in a transparent manner.

The price charge to such agencies would be same notified price as applicable to other consumers entering into FSA. The agency would be entitled to charge actual freight and upto 5% margin as service charge. Over and above the basic price charged by the coal company, from their consumers. The concerned State Governments and Central Government Departments having administrative control over the agencies would be responsible to ensure that coal allotted for targeted consumer is distributed in a fair and transparent manner and appropriate action taken to prevent its misuse.

3.2 The quantity to be allocated to this sector may be reviewed on the basis of their performance in the beginning of every year. Allocation of this quantity amongst the States would be done on the basis of their consumption pattern in the past.

6. In compliance with such policy, respective agreements were executed between SECL and the present petitioner/s. Clause 4.4. of such agreement, which is

similar for all the petitioners, speaks as follows:

4.4 The total quantity of Coal supplied pursuant to this Agreement is meant for use at the [M/s. Nishant Industries, (LMS), Bindowa, Mohanlalgunj, Lucknow (U.P.) name & location of the Plant(s)] as listed in Schedule-1. The Purchaser shall not sell/divert and/or transfer the Coal for any purpose whatsoever and the same shall be treated as material breach of Agreement. In the event that the Purchaser engages or plans to engage into any such resale or trade, the Seller shall terminate this Agreement forthwith without any liabilities or damages, whatsoever, payable to the Purchaser. It is expressly clarified that the Seller shall reserve the right to verify including the right to inspect call for any document from the Purchaser and physically verify the end-use of Coal and satisfy itself of its authenticity. The Purchaser shall have the obligation to comply with the Seller's directions/ extend full co-operation in carrying out such verification/ inspection.

7. From the combined reading of the policy and the agreement we find that though the agreement speaks about verification, enquiry, inspection, etc. for the end-use of the coal keeping itself silent about the mechanism, but when such agreement based on the policy speaks about the evaluation of genuine consumption and monitor use of coal by the State Government, it implies that at times the subsidiaries of Coal India Limited can call upon the State to render assistance in connection with verification, enquiry, inspection, etc. about the end-use of the coal. The judgment of the Bombay High Court in Hind Steel and others (supra) says that Clause 4.4 of the agreement speaks about the permission for sale etc. by the purchaser, for which it has been purchased in other words, he cannot change the same. The Bombay High Court has relied upon paragraphs 188 and 189 of Ashoka Smokeless Coal India (P) Ltd. (supra) to justify that though mechanism for plugging the loopholes is necessary, but it appears that the Union of India or the Coal Companies have lost confidence in the State Governments and the Supreme Court in such judgment held that documents must be scrutinised by the authorities of the Coal Companies. In the event of any suspicion, inspection should be carried out by the officers appointed by the Chairman-cum-Managing Director of the company concerned, within whose jurisdiction the unit is situated. According to the Bombay High Court, if Ashoka Smokeless Coal India (P) Ltd. (supra) is followed, it is for the Coal Company to evolve modalities and ensure proper use of coal and eliminate misuse thereof by formulating policy, which they think fit and proper, rather than shifting their burden on the District Industries Centre of the State to do so without any authority of law and ultimately it was held that action of discontinuation of supply of coal by the respondent (Coal Company) for want of submission of documents is not only bad in law but the same is also unsustainable in nature.

8. The respondents have relied upon two recent judgments of the Supreme Court in Coal India Limited and Others, Vs. Alok Fuels (P) Ltd., th. Director, etc. etc., and Sushila Chemicals Pvt. Ltd. and Another Vs. Bharat Coking Coal Ltd. and

Others, So far as first judgment i.e. Coal India Limited (supra) is concerned, it is arising out of an interim order passed by the learned Single Judge of the High Court of Jharkhand and the final order of the Division Bench of such High Court. It relates to lodging of First Information Report (in short called as "FIR") containing the allegations of misutilization of allotted coal and sale of the same in the open market where investigation by the Central Bureau of Investigation (in short called as the "CBI") was also involved. Against this background, the Supreme Court held that the learned Single Judge and the Division Bench of the High Court were not right in directing the subsidiary company to resume the supplies of coal to the respondents. So far as the second judgment i.e. Sushila Chemicals Private Limited (supra) is concerned, the Supreme Court held that Coal India Limited and its subsidiaries are bound by the policy decisions of the Government of India, Ministry of Coal, and since under the new coal distribution policy formulated pursuant to the observations of the Supreme Court in Ashoka Smokeless Coal India (P) Ltd. (supra) misutilization of the allotted coal and blackmarketing of such coal by any party was to be checked, therefore, any action on the part of Coal India Limited and its subsidiaries cannot be said to be arbitrary and unreasonable in suspending the supplies of coal under the fuel supply agreement, if they entertained a serious doubt on the basis of any FIR lodged by the CBI that the supplies of coal, if made, to that party may be misutilized and may be sold in the open market. Therefore, both the above referred cases are based on certain facts where FIR was lodged and the matter was proceeded not only to the police authorities but also to the CBI. However, in the second judgment liberty has been granted to challenge the suspension of coal supply. Another Division Bench judgment of this Court in Civil Misc. Writ Petition No. 72707 of 2010 (M/s. Ashutosh Industries and Another v. Union of India and Others) dated 3rd March, 2011 has been cited by the respondents, whereby the writ petition was disposed of by saying that if the petitioners supply the additional papers/reply, the respondent authority will pass the reasoned and speaking order in accordance with law.

9. According to us, though the petitioners' initial stand was that verification of the end-use of coal and satisfaction of its authenticity will be made only by the subsidiary of the Coal India Limited, but at the time of final hearing they submitted that they have no objection in conducting any verification, enquiry, inspection, etc. by the SECL, being subsidiary of the Coal India Limited, and/or by any State authority. They will render full co-operation. The only anxiety of the petitioners is that if supply of coal is suspended indefinitely then the unit will face civil consequences. It is true to say that suspension of supplies of the coal cannot be said to be arbitrary and unreasonable, provided serious doubt regarding end-use is available particularly when coal is a national property and if it is not equally distributed, the people at large may suffer. Hence, public interest will be edging over private interest of the petitioners. But at the same time we shall not forget that when private interest is protected under Article 19(1)(g) of the Constitution of India permitting the petitioners to carry on their business as per

the agreement, the authorities are not expected to pass routine orders in the name of suspension for an indefinite period to create an obstruction. In the above referred cases i.e. Coal India Limited (supra) and Sushila Chemicals Private Limited (supra), the Court negated the contention of the petitioners when found a genuine case of misutilization of allotted coal as per the FIR that too by the CBI unlike the present cases where certain authenticated documents were called upon as per the circular of SECL dated 27th January, 2011 and consequential act of the State authority. In this context, the ratio propounded by the Supreme Court in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Tata Cellular Vs. Union of India, is that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentalities in dealing with citizens. Even though the right of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action. The dichotomy between rights and remedies cannot be obliterated by any strait jacket formula. It has to be examined in each particular case. The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. If we reconcile both the ratios, the writ petitions can be disposed of and are hereby disposed of with a direction upon the authorities to complete the course of verification with regard to end-use and authenticity of the petitioners positively within a period of one month from the date of communication of this order and if found genuinity of the causes of the parties, there should not be further delay in withdrawing the suspension and resumption of supply of coal to the petitioners. Since the petitioners volunteered to co-operate in all sorts of verification, enquiry, inspection by any of the authorities, we have no hesitation in our mind to pass such order.

10. No order is passed as to costs.