
(2004) 09 OHC CK 0024
In the Orissa High Court
Case No : Writ Petition (C) No. 1463 of 2004

Noble Resources Ltd.

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 14-09-2004

Acts Referred:

Constitution of India, 1950 — Article 299

Citation : (2005) 99 CLT 737

Hon'ble Judges : Sujit Barman Roy, C.J; L. Mohapatra, J

Bench : Division Bench

Advocate : Jayant Das, for the Appellant; Additional Government Advocate (For O.P. No. 1) and Jitamitra Mohanty, (For O.P. No. 2), for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—The petitioner has filed this Writ Application for the following reliefs :

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"(b) issue a writ of mandamus and any other appropriate writ, order or direction to the Opposite Party No. 2 directing it to comply with the terms of its promise to forthwith supply the remaining 60,000 MT (= 10%) of "B" grade Iron ore fines and 120,000 MT (" 10%) of "A" grade Iron ore fine to the petitioner in accordance with the terms and at the price promised in the contract without any further delay;

(c) issue any other appropriate Writ, order or direction as may be deemed fit and proper in the bona fide interest of justice; and

(d) pass such further and other orders so as to give complete justice to the petitioner inter alia by allowing the Writ Application with exemplary cost...."

2. The petitioner is a company incorporated in Hong Kong with its registered office at Hong Kong and it is a part of Noble Group Limited. Its core business is

physical merchanting of a broad selection of industrial raw materials and it has also diversified its business by offering ancillary services to third party clients such as vessel chartering, finance, insurance, investment products and environmental services. An advertisement was published in "The Economic Times" on 1st of February, 2003 by the Opposite party No. 2 inviting tenders for purchase of an aggregate of 360,000 MT

(" 10%) of iron ore fines of Daitari Origin for export from India. In response to the said advertisement, the petitioner submitted its tender on 14th February, 2003 along with all required documents as mentioned in the advertisement. The Opposite Party No. 2 intimated the petitioner on 28th of February, 2003 (Annexure-3) that the tender submitted by the petitioner has been accepted and the relevant contents of the letter run as follows :

"We would like to intimate you that your subject offer has been accepted by OMC for export sale of tendered quantities of all the three grades of Iron ore fines. Therefore, OMC confirms to supply 1.2 lakh MT (" 10% each of A, B, & C grade Iron ore fines of Daitari Origin for export sale by Sept., 2003 at your quoted prices as under at our tendered norms.

Grade-A : US\$ 16.66 PDMT FOB Paradip (63.99 - 63% Fe) basis 63.99% Fe
Grade-B: US\$ 14.96 PDMT FOB Paradip (63 - 62% Fe) basis 63% Fe
Grade-F: US\$ 13.86 PDMT FOB Paradip (62 - 60% Fe) basis 62% Fe
The contract for each shipment will be signed before shipments as per mutually agreed shipment schedule. As per production plan and stock of Iron ore available, it has been decided to supply full tendered quantities of each grade iron ore fines in the sequence of C, B, and A grade Iron ore fines"

3. In the said letter the petitioner was also requested to send a tentative shipment schedule for shipments " 60,000 MT each, month. It was also stated that in addition to the 3.6 lakh MT (" 10%) of Iron ore fines the said opposite party was holding a stock of 25,000 MT of A Grade iron ore fines at Paradip Port Plot which was ready for shipment and requested the petitioner to arrange a vessel for part shipment of said A Grade Iron ore fines. The petitioner responded to the said letter of acceptance of tender and confirmed that it could work out the arrangements for shipment of 60,000 MT (" 10%) as per mutually agreed lay can. Referring to the A Grade Iron ore fines it was intimated by the petitioner that it was not viable to ship a parcel of 25,000 MT of iron ore fines and it would need a parcel of 60,000 MT and requested the Opposite Party No. 2 to get ready for first shipment in early April, 2003. The petitioner in its offer dated 14th February, 2003 had intimated the Opposite Party No. 2 the destinations / ultimate consumers of the Iron ore fines. The following are the consumers with whom the petitioner is stated to have promised for supply of different grades of iron ore fines at the destination mentioned therein.

Grade A : 120,000 MT(" 10%) Consumer: (1) Quingdao Iron & Steel Imports Export Corporation, 3/F Taisham Building, 8 Sharidong Road, Qingdao-

266071, People's Republic of China. Grade B : 120,000 MT (" 10%) Consumer: (1) Jinan Gengehen Iron & Steel Co. Ltd., No. 70, The Third Quarter Guodian Town of Licheng District Jinan, People's Republic of China. Grade C : 120,000 MT (" 10%) Consumer: (1) Hejin Taixing Coking Co. Ltd., Remaining Village Senglou Township, Hejin City, Shanxi 043300 (2) Qingdao Iron & Steel Import & Export, Corporation, 3/F Taishan Building, 8 Shandong Road, Qingdao - 266071, People's Republic China."

4. The further of the petitioner is that by the end of August, 2003 the following quantity of C and B grade Iron ore fines were supplied by the Opposite Party No. 2 and were also sent to different consumes as indicate earlier. The following is the chart of quantity of Grade C and B Iron ore fines which had been supplied by the end of August, 2003 :

Vessel Bill of B/L Grade Formal Contractual Name Loading Quantity of Ore Sale Quantity to Date Loaded Contract be lifted "Uttarkashi" 13 May, 46.280 C 27 Mar, 60.000 m/t 2003 MT 2003 (" 10%) "Pasir I" 24 June, 61.901 C 29 May, 60.000 m/t 2003 MT 2003 (" 10%) "Susan S" 25 Aug, 64.236 B 11 Aug. 60.000 m/t 2003 MT 2003 (" 10%)

5. After supplying the aforesaid Iron ore fines, by fax message dated 5th September, 2003 the petitioner intimated the Opposite Party No. 2 for supply of balance 60,000 MT of B-Grade Iron ore fines in the month of September, 2003 so that they could arrange a suitable ship for shipment. There was no response from the Opposite Party No. 2 for supply of the balance B and A Grade Iron ore fines, there was no response from Opposite Party No. 2. While the matter stood thus, another advertisement was published in "The Economic Times" on 8th of September, 2003. The petitioner also responded to the said advertisement. The tender was scheduled to be opened by 20th of September, 2003, but by subsequent successive corrigenda published in "The Economic Times" the said advertisement calling for tender was cancelled. The further cases of the petitioner is that so far as the first advertisement dated 1.2.2003 is concerned, even though the Opposite Party No. 2 had promised to supply the different grades of Iron ore fines, it could only supply in full C grade and 50% of B grade Iron ore fines. In spite of the earlier fax messages and the letter there was no response, the petitioner again started making correspondence with the Opposite Party No. 2 for supply of the balance B and A grade iron ore fines. In spite of several letters written to the Opposite Party No. 2 in this regard, there was no response and only by letter dated 13.11.2003 the petitioner was intimated that the matter was being looked into. After receipt of the said letter, the petitioner has filed this Writ Application for the reliefs as mentioned earlier.

6. A counter affidavit has been filed by Opposite Party No. 2. The case of the Opposite Party No. 2 is that in response to the tender call notice dated 4.2.2003, 12 bidders participated out of whom the petitioner having quoted the highest bid in respect all the three grades of iron ore fines, the matter was referred to tender committee for a decision and the committee recommended as follows :

"A. Letter of intent to M/s Noble Resources Ltd. Hong Kong indicating acceptance of their tender in respect of the three grades of Iron ore fines of Daitari origin export Sale on or before Sept., 03 at their quoted price at OMC tender norms and as per shipment schedule to be decided mutually.

B. The contract may be signed for each shipment separately before each shipment as per mutually agreed schedule.

C. The sequence of convergence of shipment of Iron ore fines may be C grade, B grade than A grade to facilitate ore cargo at a time as per port constraint.

D. Noble Resources Ltd., Hong Kong be persuaded to make immediate shipment of around 25,000 MT of A grade Iron Ore fines available at OMC Paradip plot as

part shipment against the above tendered quantity at their quoted price of US \$ 16.66 BMT FOB Paradip."

7. This decision of the tender committee was communicated to the petitioner and it was requested for shipment of 25,000 MT of A grade Iron ore fines which was readily available at Paradip Port. The petitioner having intimated its views that shipment of only 25,000 MT will not be viable and it requires a minimum parcel of 60,000 MT, the quantity of A grade Iron ore fines lying at Paradip Port could not be put to shipment which created problem for stacking of fresh materials rake at Paradip. It appears from the counter affidavit of Opposite Party No. 2 that there is no dispute with regard to shipment of entire C grade Iron ore fines and 50% of B grade iron ore fines. It is further case of the Opposite Party No. 2 that on 8.5.2003 the Board Sub-Committee on sales policy decided to review the export of Iron ore fines on the basis of the tender finalised in January and February, 2003. Accordingly, the Board of Directors in their 339th meeting held on 26.9.2003 took the following decisions :

"Regarding export of A grade Iron ore fines, it was decided to examine if there is a parcel provision in the agreement / tender for non-fulfillment of obligation on any legal complicity arises if the A variety ore will be kept reserved for NINL. For the C grade, Board approved for inviting fresh tender."

Accordingly, tender was floated for a quantity of 1,80,000 MT (" 10%) of C grade iron ore fines in all editions of Economic Times on 4.9.03. The Board Sub-Committee on sale held on 22.9.2003 observed as follows :

"(i) Out of the total quantity of A, B & C grade Iron ore fines, two C-grade and one B-grade material have been shipped by M/s Noble Resources Ltd., Hong Kong and Anr. B-grade materials, 1 Lakh MT B-grade material and 2.40 Lakh MT C-grade material at Daitari. After receipt of information from L.C. and confirmed by Company Secretary, it was decided that 60,000 MT A-grade material is to be shipped to M/s Noble Resources, Hong Kong even after 30.9.2003 and the party should be persuaded not to insist for the balance quantity of A-grade as it is physically not available with OMC and hence cannot supply the 2nd shipment of A-grade.

(ii) Further as NINL has agreed that they will be lifting Iron Ore fines from Oct. 03 onwards. The requirement is to be reviewed and for the time being export sale of

C taken by OMC Ltd. should be cancelled invited in the Newspaper and Website of OMC Ltd. for information of all concerned. On the basis of the above decision, the tender for export sale of 1,80,000 MT of C-grade Iron ore fines was cancelled."

The matter was further referred to Board Committee on sales policy which was held on 24th October, 2003 and the following decisions were taken :

"(1) The validity of the tender will not be extended beyond 30.9.2003 and therefore no further quantity shall be supplied to M/s Noble Resources Ltd.

(2) Fresh tender may be incited for B-grade Iron Ore fines for one shipment and one shipment of C-grade. However, while doing so it must be ensured that the quantity is available for export after meeting the requirement of NINL."

8. In view of such decision taken, fresh tender was floated for export of 60,000 MT (" 10%) B grade Iron ore fines and C grade Iron ore fines of Daitari origin and tenders were opened on 12.11.2003. Out of 15 bidders who participated in the tender, the petitioner was one. In a subsequent tender for shipment of 1,20,000 MT (" 10%) C grade Iron fines the petitioner again participated and in another tender floated in March-April, 2004 for shipment of further 1,20,00 MT C grade iron ore fines the petitioner also participated. On the above basis, it is the stand of the Opposite Party No. 2 that the petitioner was aware that no further supply was intended to be made by the Opposite Party No. 2 pursuant to the tender call notice dated 4.2.2003. It is also the stand of the Opposite Party No. 2 that if the balance quantity of Iron ore fines would have been supplied to the petitioner-company at the tender price of February, 2003, the Opposite Party No. 2 would have incurred huge loss as the price rate in the international market had increased to a large extent.

9. Shri Das, the Leaned Senior Counsel appearing for the petitioner submitted that after acceptance of the tender submitted by the petitioner pursuant to the tender call notice of February, 2003 the petitioner altered its position by making promises to different companies abroad for supply of A, B & C graded Iron ore fines. The Opposite Party No. 2 having promised to supply different grades of iron ore fines as indicated earlier, assurances were made buy the petitioner to supply the same to different companies abroad and therefore, the Opposite Party No. 2 now cannot back out from his promise and is bound by the doctrine of promissory estoppel.

The Learned Counsel for the petitioner in support of his contention referred to some decisions of the Apex Court as well as this Court which shall be dealt with later on.

10. Shri Mohanty, Learned Counsel appearing for the Opposite Party No. 2

referring to the counter affidavit submitted that there has been no breach of promise on the part of the Opposite Party No. 2 so as to attract the principle of promissory estoppel. Pursuant to the promise made by the Opposite Party No. 2, it had supplied the entire quantity of C grade Iron ore fines as well as 50% of B grade Iron ore fines by September, 2003. The period for lifting the entire quantity having expired in September, 2003, the petitioner cannot also demand for supply of further quantity of B grade and A grade Iron ore fines which were not supplied to it. It was also contended by Shri Mohanty that in all subsequent tenders the petitioner participated and it was aware that period for supply pursuant to the first tender call notice published in February, 2003 had come to an end in September, 2003 and it was not entitled to receive any further material thereafter. Shri Mohanty also contended that the price of the Iron ore fines of each grade in the international market has gone up to such an extent that had the Opposite Party No. 2 supplied the balance B grade and A grade Iron ore fines to the petitioner Iron ore fines, the Opposite Party No. 2 would have sustained huge loss.

11. Shri Jayanta Das, Learned Senior Counsel appearing for the petitioner in support of his contention relied upon a decision of the Apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, The Apex Court in the aforesaid judgment analyzing several English decisions in Paragraph-19 of the judgment observed as follows :

"When we turn to the Indian Law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negated. It is remarkable that as far back as was formulated by Denning, J., in England, a Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel and recognised a cause of action founded upon it in the Ganges Manufacturing Co. v. Sourujmull. The doctrine of promissory estoppel was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay v. The Secretary of State."

The Apex Court further on analysis of previous judgment referred to therein concluded that the law may, therefore, now be taken to be settled that where the Government make a promise knowing or intending that it would be acted on by the promisee and in fact, the promisee, acting in reliance on it, alters his position, the Government would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. So far as applicability of this doctrine to public

bodies or the State is concerned, the Apex Court in the very same judgment in Paragraph-31 observed as follows :

"We may point out that in the latest decision on the subject in Radhakrishna Agarwal v. State of Bihar this court approved of the decisions in the "Indo-Afgan Agencies case and Century Spinning and Manufacturing Co."s case and point out that these were cases "where it could be held that public bodies or the State are as much bound as private individuals are to carry out obligations occurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the of the representations made by these authorities." It would, therefore, be seen that there is no authoritative decision of the Supreme Court which has departed from the law laid down in the celebrate decisions in the Indo-Afgan Agencies case and the Century Spining & Manufacturing Co."s case. The law laid down in these decisions as elaborated and expounded by us continues to hold the field."

12. The Learned Counsel for the petitioner further relied upon another decision of the Apex Court in the case of Union of India and Ors. v. Indian Tobacco Company Ltd. reported in (1985) 4 SSC 370 in which a similar view has also been taken with regard to doctrine of promissory estoppel. Reliance was also placed on a decision of this Court in the case of Prince International Vs. State of Orissa and Others, In Paragraph-22 of the judgment this Court with regard to applicability of doctrine of estoppel observed as follows :

"This takes us to the last, contention of Shri Rath which is based on the principle of promissory estoppel. We are, however, not fully satisfied regarding the applicability of this principle to the case at hand. We have said so because a reference to the observations made in Para-7 of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, which is the leading decision on the subject, shows that this doctrine does not appertain to the realm of contract. It comes into operation where a promise is made knowing or intending that it would be acted on by the promisee and if in fact the promisee acting in reliance on it, alters his position then the promisee, notwithstanding that the promise has not been recorded in the form of a formal contract, as stated in the aforesaid case which was cited with approval in Para-11 of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., ."

Reliance was also placed by the Learned Counsel for the petitioner in the case of Common Cause, A Registered Society v. Union of India and Ors. reported in (1996) 6 SCC 667 and the Apex Court in the said case in Paragraph 44 of the judgment held that Government decision regarding award of contracts are also open to judicial review and if the decision-making process is shown to be vitiated by arbitrariness, unfairness, illegality and irrationality, then the court can strike down the decision-making process and the act based on much decision. Shri Das, the Learned Senior Counsel appearing for the petitioner also cited some decisions which we have not referred in our judgment as those cases also lay down the same principles as has been laid down in the above noted decisions.

13. On analysis of the decisions cited by the Learned Counsel appearing for the petitioner, it is found that in order to grant relief as claimed by the petitioner, the petitioner has to prove that in view of the promise made by the Orissa Mining Corporation, it had altered its position and that the decision taken by the Orissa Mining Corporation to supply the materials as indicated earlier, the petitioner altered its position by entering into agreements with the different consumers outside the country and has also made arrangements for shipment of the said materials to different destinations. In support of such contention, reliance was placed by the Learned Counsel in Annexure-2, the letter written by the petitioner to the General Manager (S & M), Orissa Mining Corporation. From the said letter, it appears that the petitioner submitted its bid indicating therein that the same shall remain valid until close of business hours on 28th of February, 2003 and it was also indicated therein that the entire quantity of Grade A Iron ore fines were to be supplied to Jinan Gengchen Iron & Steel Co. Ltd. and the entire C grade Iron ore fines were to be supplied to Hejin Taixing Coking Co. Ltd. Relying on the said letter it was contended that before submitting the tender the petitioner had contacted the aforesaid companies located abroad for supply and only on their promise to purchase the quantity of materials as indicated in the said letter, the petitioner had submitted its tender. There appears to be some force in the contention of the Learned Counsel for the petitioner even though the respective agreements entered into between the petitioner and the aforesaid companies located abroad have not been placed before the Court. The very fact that the petitioner in its bid had given the names of the companies who were the likely consumers of the Iron ore fines of different grades is an indication that the petitioner had altered its position to some extent by making arrangements for supply of different grades of iron ore fines to the aforesaid companies on the promise of the Mining Corporation that it would supply the different grades of Iron ore fines of such quantity as mentioned in the above notice. It also appears from the letter of the Mining Corporation annexed to the Writ Application that the bid of the petitioner was accepted and the Mining Corporation had also promised to supply the quantity of different grades of Iron ore fines as mentioned therein and the petitioner had also made arrangements for shipment of those materials. From the above facts, it is clear that on the promise of the Mining Corporation for supplying the above quantity of different grades of Iron ore fines as mentioned in its acceptance letter in Annexure-3, the petitioner had altered its position to some extent by not only contacting consumers for the said materials. There is also no dispute pursuant to such promise, the Mining Corporation had supplied the entire quantity of C grade iron ore fines and 50% of the B grade Iron ore fines.

14. So far as the question as to whether the decision of the Mining Corporation to stop supply of certain materials i.e., 50% of B grade Iron ore fines and 120,000 MT of (10%) of A grade Iron ore fines is vitiated by reason of arbitrariness and unfairness or not one has to look into the reasons for taking such a decision. It is stated in the counter affidavit in Para-10 that the Board Sub-

Committee on sales policy held on 8.5.2003 decided to review the export of Iron ore fines on the basis of tender finalised in January-February, 2003 and it was resolved as follows :

"Regarding export of A grade Iron ore fines, it was decided to examine if there is a penal provision in the agreement/tender for non-fulfillment of obligation on the part of OMC Ltd. It should also examine whether any legal compliancy arises if the A variety ore will be kept reserved for NINL. For the C-grade, Board approved for inviting fresh tender."

Accordingly, tender was floated for a quantity of 1,80,000 MT (" 10%) of C-grade Iron ore fines in all editions of Economic Times on 4.9.03. The Board sub-committee on sale held on 22.9.03 observed as follows :

"(i) Out of the total quantity of A, B & C grade Iron ore fines, two C-grade and one B-grade material has been shipped by M/s. Noble Resources Ltd., Hong Kong and another B-grade materials is due to be loaded during the current month. It was informed that there is a stock of 60,000 MT A-grade materials, 1 lakh MT B-grade material and 2.40 lakh MT C-grade material at Daitari. After receipt of information from L.C. and confirmed by Company Secretary, it was decided that 60,000 MT, A-grade material is to be shipped to M/s. Noble Resources, Hong Kong even after 30.9.03 and the party should quantity of A-grade as it is physically not available with OMC and hence cannot supply the 2nd shipment of A-grade.

(ii) Further as NINL has agreed that they will be lifting Iron ore fines form Oct., 03 onwards. The requirement is to be reviewed and for the time being export sale of C-grade fines may be postponed. Therefore the tender auction taken by OMC Ltd. should be cancelled invited in the Newspaper and Web site of OMC Ltd. For information of all concerned. On the basis of the above decision the tender for export sale of 1,80,000 MT of C-grade Iron ore fines was cancelled."

15. In Paragraph-11 of the counter affidavit it is stated that the Board Committee on sales policy held on 24.10.03 decided in the following manner:

"(1) The validity of the tender will not be extended beyond 30.9.03 and therefore no further quantity shall be supplied to M/s. Noble Resources Ltd.

(2) Fresh tender may be invited for B-grade Iron ore fines for one shipment and one shipment of C-grade. However, while doing so it must be ensured that the quantity is available for export after meeting the requirement of NINL."

16. Referring to the aforesaid decision, it was pointed put by the Learned Counsel for the Mining Corporation that a decision was taken on 27.9.2003 that 60,000 MT of A-grade Iron ore fines should be supplied to the petitioner after 30th September, 2003 as the balance quantity of 60,000 MT was not available physically for supply. It was also con tended that in the meeting of the Board Committee on sales policy held on 24.10.2003 it was decided that no further supply should be made to the petitioner. It is the case of the Mining Corporation

that the contract for supply of materials was a time bound programme and the period having expired, a decision was taken not to supply the balance materials of A and B grade Iron ore fines to the petitioner and, therefore, there is no arbitrariness or unfairness. It is not in dispute that 60,000 MT B-grade Iron ore fines and 120,000 MT of A grade iron ore fines had not been supplied to the petitioner by the Mining Corporation by 30th of September, 2003. There is also no dispute that the entire quantity of different grades of Iron ore fines were to be lifted by 30th of September, 2003. We are, therefore, of the view that the period for supply/lifting of the aforesaid materials having expired with effect from 30th September, 2003, the decision taken by the Mining Corporation not to supply any further material after expiry of the said period does not suffer from any arbitrariness or unfairness. Several lapses were pointed out by the Learned Counsel for the petitioner to have been committed by the Mining Corporation during the contract period. For such lapses as alleged by the Learned Counsel for the petitioner, other remedies are available in law and the petitioner may take recourse to such remedies, if so advised.

17. We are therefore of the view that even though the doctrine of promissory estoppel applies to the present case, the contract period having expired, the decision taken by the Mining Corporation for not supplying other materials in favour of the petitioner does not suffer from any arbitrariness or unfairness.

18. We, therefore, do not find any merit in the Writ Application and the same stands dismissed.

Sujit Barman Roy, C.J.

19. I agree.