
(2009) 11 AHC CK 0172

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 35576 and 36430 of 2009

Pratap Fuels Industry

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-11-2009

Acts Referred:

Essential Commodities Act, 1955 — Section 3

Citation : (2009) 11 AHC CK 0172

Hon'ble Judges : R.K.Agrawal, J and Jaya Shree Tiwari, J

Final Decision : Disposed Of

Judgement

Mrs. Jayashree Tiwari, J.—Since both the writ petitioner are against the same order and are of same nature they are connected, they are being disposed of by one judgment.

2. By means of both the present writ petition, petitioners have challenged the order dated 13.6.2009 issued by the respondent No. 5 (Annexure No. 1 to the writ petition).

3. In short the contention of the petitioner is that the petitioner an industrial unit has set up a small industrial unit at Varanasi for the manufacture of Soft Coke and is duly registered with the respondent No. 6, the petitioner is also having due registration under the State as well as Central Sales Tax and under the U.P. Pollution Control Board as well as under the Factories Act and is operating unit on the technology provided by Central Fuel Research Institute Dhanbad.

4. The respondents provided a provisional linkage to the petitioner and thereafter fixed the quota of coal of the petitioner on the basis of which, the petitioner continued to lift quota fixed under the said linkages and was running its small scale industrial unit continuously. The Colliery Control Order, 2000 superseded the Colliery Control Order, 1945 but exempted the things done or omitted to be done under the Colliery Control Order, 1945. Upon coming into force of the aforesaid Control Order, respondent No. 6 issued an order that there will be no

restriction on the utilization of the coal by the said industrial unit and further the industrial units will be exempted from any kind of investigation, entry, inquiry, search, acquisition, price fixation etc. and no prosecution will be undertaken against them under the provisions of the E.G. Act and U.P. Consumer Control Order, 1977 (which is annexed as Annexure6 to the writ petition).

5. It is also clarified by the respondent No. 6 that coal has been completely deregulated and no kind of inspection is permissible vide order dated 31.5.2002 which is annexed as Annexure7 to the writ petition.

6. Thereafter, respondents No. 1 and 2 evolved a policy of eaction and simultaneously decided to stop the system of linkages and coal supplies to the non core linked consumers were stopped arbitrarily, in respect of which several writ petitions were filed before the different High Courts of country, the matter went up to the Hon''ble Supreme Court and Hon''ble Supreme Court considered the entire controversies in great detail and set aside the policy of eaction.

7. The respondents now decided to enter into a Fuel Supply Agreement directly between the subsidiary company and the consumers. The petitioner entered into Fuel Supply Agreement with the respondent No. 3, after the agreement was entered into, the petitioner has been lifting the coal strictly in accordance with the agreement and is also providing the month wise consumption chart to the respondent No. 5.

8. Besides, petitioner has also furnished a bank guarantee to the extent of Rs. 32,54,0007. It is further submitted that without any notice to the petitioner, respondents suspended the coal supply to the petitioner, even though as per Fuel Supply Agreement, the petitioner was entitled for uninterrupted supply of coal. Petitioner protested against the said suspension of the supply vide letter dated 16.6.2009 written and address to the respondent No. 5 which is annexed as Annexure12 to the writ petition. The petitioner specifically wrote to the respondent No. 5 reiterating its request for resumption of the coal supply. The petitioner also invited the attention of clause 7.2.4 of the Fuel Supply Agreement, but till now the coal supply has not been resumed to the petitioner and the petitioner is not in a position to run the industrial unit in the absence of coal supply.

9. It is further submitted that on the basis of some anonymous complaint, an FIR has been lodged against ten industrial units by the C.B.I, regarding improper utilization of the coal by the industrial unit. The name of the petitioner also figured in the said First Information Report. The permission was sought from the Special Court for searching the business premises of the petitioner and accordingly a search warrant was issued. It was specified that certain documents are to be seized during search. The business premises of the petitioner at Dhanbad as well as Varanasi was searched by the C.B.I., no incriminating material was found, no documents as mentioned in the list of the documents were seized and the entire search did not disclose that any damage was

deliberately caused by the petitioner. The said search could have no bearing upon the suspension of the supplies of coal to the petitioner.

10. It is further submitted that by various pronouncements of the Hon"ble

Court the coal supply cannot be suspended merely on account of certain criminal investigation is pending consideration regarding improper utilization of coal. A circular has been issued by the respondent No. 1 to the respondent No. 2 that the coal supply has been suspended without any speaking order, hence the violation of natural principles of justice has been committed.

11. In the counteraffidavit filed by respondent Nos. 2,3,4 and 5, it is submitted that in order to avoid further diversion of coal, the answering respondents have suspended the supply of coal.

12. Respondent No. 5 by his letter dated 16.7.2009 has issued a showcause notice to the petitioner as to why the Fuel Supply Agreement should not be cancelled based on the F.I.R. lodged by the C.B.I, and allegations that the unit is involved in criminal conspiracy which leads to breach of terms and conditions of FSA, copy of showcause notice is annexed as Annexure C.A. 2 to the affidavit.

13. It is submitted that prior to introduction of New Coal Distribution Policy, the supply of the coal was made to all the valid non core linked consumers under erstwhile linkage system, which has been done away with. The Ministry of Coal formulated a New Coal Distribution Policy and all valid linked consumers of erstwhile linkage system, were required to enter into Fuel Supply Agreement. As such the petitioner also entered into Coal Supply Agreement.

14. It is further submitted that the Coal Supply Agreement is a non statutory agreement and a private contract, the breach of which may entail suit for damages or any other relief permissible under Civil Law. The petitioner has not yet submitted reply to the showcause dated 16.7.2009.

15. It is further stated that petitioner may fulfil its requirements by obtaining coal under eaction system for running its units in the meantime. Petitioner has an alternative remedy before the competent Civil Court in terms of agreement and there is a remedy provided under clause 14 of FSA, which the petitioner could avail.

16. In the rejoinder affidavit, while rebutting the contention as laid down in the counteraffidavit stated that the present writ petition is fully maintainable and the arbitrary conduct of the respondents cannot be countenanced and as such on merits orders are required to be passed in the present writ petition.

17. It is submitted that importance of coal has already been considered in detail by the Hon"ble Apex Court in the matter and there is no material to establish

that any breach of the terms of the Fuel Supply Agreement has been committed by the petitioner or there is no utilization of coal by the petitioner contrary to the

terms stipulated in the agreement.

18. It is further submitted that there is no alternative remedy open to the petitioner and the only remedy available to the petitioner is redressal of the grievances with respect to violation of constitutional rights of the petitioner by approaching this Hon"ble Court in its extra ordinary jurisdiction under Article 226 of the Constitution of India. That reply to the showcause notice has been submitted by the petitioners on 27.7.2009.

19. We have heard Sri V.B. Upadhyay, learned Senior counsel assisted by Sri Manish Goyal learned counsel for the petitioner and Sri Madhur Prakash, learned counsel appearing for respondent Nos. 2 to 5.

20. From perusal of the record it comes out that the crux of the matter as alleged by the petitioner is that on the basis of the First Information Report lodged, the coal supply cannot be suspended by the respondents and stopping of the coal supply is adversely affecting their business and the suspension of the coal supply by the respondents is arbitrary. Stress was led on the point that if an FIR has been lodged, merely lodging of the First Information Report when there is no material available during the investigation, as yet, the supply of the coal ought not to have been suspended. As against this learned counsel submitted that lodging of an FIR, there appears a prima facie assumption that some breach of the terms of agreement have been committed and power to suspend the coal supply is an ancillary power which flows from the power of the respondents to suspend the agreement. It is in true sense an auxiliary or accessory power which cannot be separated from the main power of suspending or cancelling the agreement.

21. In this connection, learned counsel for the respondents referred a case law of Patna High Court in L.P.A. Nos. 1265 & 1266 of 2009 in which Division Bench of Hon"ble Patna High Court has held.....

"The reliance was placed on the judgment of Hon"ble Apex Court in case of Ashoka Smokeless Coal India (P) Ltd. and others v. Union of India and others, reported in 2007(2) SCC 640, to highlight that the Supreme Court directed for evolving a policy for supply of coal to industries like the writ petitioners, with due regard to public interest and it was emphasized by the Apex Court that if norms for supply of coal are violated then such violations should be dealt with stringently. Reliance was also placed on a Division Bench judgment of this Court dated 5.7.2002 passed in M/s. Central Coal Field Limited v. M/s. Aman Lime Works (LPANo. 701 of 2002 and another analogous case) for highlighting the view taken by the Division Bench, (in the context of the earlier prevailing linkage policy) that once it has been found prima facie that the unit concerned has not fulfilled the conditions for which the coal was supplied and an inquiry is pending with regard to deregistration of the unit, the direction to suspend the supply of coal is reasonable and serves public purpose.

22. To support the same view reliance was also placed upon another Division

Bench order dated 24.4.2008 passed in L.P.A. No. 174 of 2008 (Bharat Coking Coal Limited v. M/s. Sushila Chemical Private Limited) in which the aforesaid

Division Bench judgment was noticed and in that view of the matter no direction was given for resuming the supply of coal till the proceeding was finally determined. Of course, a period of two months was indicated for taking a final decision in the pending proceedings.

23. It is further held in the aforesaid case by the Hon"ble Patna High Court that on behalf of appellants, it has been further submitted that although pursuant to Supreme Court judgment in case of Ashoka Smokeless (supra) a new policy was evolved for supply of coal in place of old linkage system, the agreement in terms of the new policy has been entered into between the parties and from Clause 4.4 and 15.1.5 is abundantly clear that in the event the purchaser resells or diverts the coal purchased, seller shall have the right to terminate the agreement forthwith. Emphasis has been laid down over these clauses of the agreement to claim a right in the appellant to terminate the agreement forthwith in view of lodging of the criminal case and allegation of misuse of the coal purchased and on that basis, it has been suggested that if there is a power to terminate the agreement forthwith then the power to suspend the supply of coal would be an ancillary power available to the appellants once it is in possession of the materials leading to prima facie satisfaction that there has been misuse of the purchased coal.

24. On behalf of the writ petitioners/respondents it was submitted that the writ Court has taken a proper view on the basis of clause 13 of the agreement and (otherwise also rules of natural justice ^and fairness required that supply of coal should have been continued till a final decision could be taken by the appellants on receipt of showcause from the writ petitioners.

25. Attempt was made on behalf of the writ petitioners to take us to various facts with a view to demonstrate that the allegations made in the FIR lodged by the CBI are general in nature and the writ petitioners have not received any substantial amount of coal supplied during the relevant period and the financial impact as assessed by the CBI is also not accurate. Keeping in the mind the stage of the criminal case and also the fact that showcause notice has already been issued to the writ petitioners vide letter dated 16.7.2009, we are not persuaded to enter into issues of facts.

26. The only material issue is whether suspension of supply of coal requires interference in exercise of writ jurisdiction or not. We have no hesitation in following the earlier two Division Bench judgments and orders relied upon by the learned Senior counsel appearing for the appellants. In larger public interest we are not inclined to order for resumption of supply of coal, so long as the appellants do not consider the showcause of the writ petitioners and take a final view on merits. In larger public interest, the requirement of hearing and fairness can be ensured even by post facto hearing. This view is in accordance with the

earlier views taken by two Division Benches of this Court primarily on the ground of public interest.

27. Enforcement of a commercial agreement in exercise of writ jurisdiction is generally not warranted, specially when damages will suffice and can be claimed through ordinary civil action by establishing unjustified breach of contract.....

28. In view of the aforesaid discussion, we have no option but to set aside that part of finding of the writ Court wherein it has been held that the appellants

cannot suspend the supply of coal on the basis of First Information Report because the same is de hors the grounds for suspension in clause 13 of the agreement. As a result, the decision of the authorities for suspension of supply of coal to the writ petitioners, in our view requires no interference. Both the appeals are allowed accordingly.

29. Following the earlier Division Bench orders/judgments we are of the view that appellants must take a final decision pursuant to showcause notice dated 16.7.2009 at an early date preferably within two months from the date of receipt of showcause from the writ petitioners. It may be indicated here that as per submissions at bar, showcause replies have not been filed by the writ petitioners as yet. It is expected that they shall file their replies at an early date so that final decision may be taken by the appellants expeditiously...."

30. Thus, in accordance with the aforesaid judgment passed by the Division Bench of the Hon"ble Patna High Court in which the rulings of the Hon"ble Apex Court was also relied upon, we are of the opinion that the contention of the petitioner that coal supply has been wrongly suspended, appears to have no force in itself. It is obvious that coal supply has been suspended in the larger public interest and power to suspend the coal supply is an ancillary power to suspend or cancel the contract itself.

31. In the circumstances, we are of the considered opinion that the order suspending the supply of coal to the petitioners passed by the respondent needs no interference by this Court in its extraordinary writ jurisdiction.

32. However, it is directed that since showcause notice dated 16.7.2009 has already been issued to the petitioners to showcause why his agreement be not cancelled and petitioners have already submitted their explanations/objections on 27.7.2009, the respondent No. 5 is directed to consider the said objections/ explanations of the petitioners after affording to them an opportunity of hearing and to take a final decision on the same expeditiously, preferably within a period of two months from the date a certified copy of this order alongwith the copy of objections/explanations is filed before them.

33. With these observations the present writ petition is disposed of.