

(2009) 07 PAT CK 0046
In the Patna High Court

S.G. Projects Ltd. and etc.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Citation : AIR 2009 Patna 187 : (2010) 8 RCR(Civil) 2774

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Judgement

Navaniti Prasad Singh, J.—In these two writ petitions, the petitioners challenge the action of the respondents in not finding them technically fit and, thus, not considering their financial bids for being appointed as coal coordinator of respondent-Bihar State Mineral Development Corporation Limited and are equally aggrieved by selection of respondent No. 6 in both the writ petitions for the said purpose.

2. As would be seen from the discussion in detail later on in this judgment, the job of the coal coordinator is to lift and distribute coal which is allotted to the Corporation under the new Coal Distribution Policy, 2007 issued by Ministry of Coal, Government of India. This appointment is to be on basis of profit sharing as between the appointed coal coordinator and the Corporation aforesaid.

3. In this country, almost all coal mines are controlled by Government Companies, principally Coal India Limited and its subsidiary Companies. Different policies were laid down by Ministry of Coal, Government of India from time to time for distribution of coal which was available to the said Coal Companies, the relevant being the new Coal Distribution Policy, 2007. Principally under this policy, for private domestic consumers other than defence sector, railways, power utilities, captive power plants and fertilizer sector, the consumers are required to enter into, Fuel Supply Agreement (FSA) and purchase coal at prices notified by Coal India Limited or its subsidiaries. Small and tiny consumers in the non-core sector whose consumption was earlier less than 500 metric tonnes were eligible to get coal through State nominated agency. This coal of coverage through State

nominated agencies was increased by this policy to 4,200 tonnes per annum. Under the new policy, those units whose requirement was 4,200 tonnes per annum or under, they have to get their coal through agencies nominated by the State Government and the rest were to get coal directly from Coal India Limited/ Subsidiary Companies through Fuel Supply Agreement. The relevant parts of the policy are quoted hereunder:

All the existing linkage holders of erstwhile core and non core sector and not having FSAs would be required to enter into FSA with coal companies. At present small and tiny consumers in non core sector, whose annual consumption is less than 500 metric tonnes are eligible to get coal through State nominated agencies/ NCCF etc. The scope of coverage through State nominated agencies is now being increased upto 4200 tonnes per annum. It means that now the distribution of coal to units whose requirement is upto 4200 tonnes per annum will be done through the agencies nominated by State Government. Units whose requirement is more, than 4200 tonnes per annum will take coal directly from Coal India Limited/ Subsidiary Companies through annual requirement is less than 4200 tonnes are concerned, they would be given the option to either entering into FSA with the coal company as per the terms and conditions, including satisfaction level applicable to the other consumers or they may opt put of FSA regime and access their coal requirement through agencies nominated by State Governments.

3. Consumers in small and 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 Governments. These agencies could be State Government Agencies/Central Government Agencies/(National Co-operative Consumer Federation (NCCF)/ National Small Industries Corporation (NSIC) etc.) or industries associations, as the State Government may deemed appropriate. The agency so notified will continue to distribute coal until the State Government 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 Limited.

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 Government/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 charged 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 Department 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.

4. In the above policy, it would be seen that there is reference to "Coal Companies". Reading the policy, this has only reference to the Government Coal Company whose coal is to be distributed under this policy and for whom this policy has been laid down by the Government of India. It would further be seen that under the policy for making available supply of coal to small and tiny units, as noticed above instead of the units going directly to the Coal Company now the Coal Company would allot coal to State Government or their nominee and those persons are now responsible to lift the coal from the mines of the Coal Companies and as a nominee of the State Government under the said policy and on charges permissible under the policy, supply of the coal to the small and tiny units.

5. Keeping in view the aforesaid policy, it appears that in the State of Bihar, the Government took decision to entrust this work under the new Coal Policy, 2007 to the Bihar State Mineral Development Corporation Limited, a wholly owned Corporation of Government of Bihar. The said Corporation then, instead of itself arranging for lifting the coal from the Coal Companies under the policy and giving it to the small and tiny units under the policy, decided to outsource this work on profit sharing basis to private entrepreneurs and, accordingly in October 2008, tenders were issued in this regard, The tender papers were available for purchase upto 22-10-2008 at a cost of Rs. 25,000/-. The tenders were to be filed in two parts, that is the technical bid and the financial bid for appointment of Coal Controller and were to be filed by 23rd of October, 2008. Technical bids were to be opened on 30th of October, 2008. Condition 8 of the tender notice was that the financial capacity of the party must be minimum Rs. 5 crores as certified by Bank. Condition 9 is of importance. It stipulated that in the previous three years, the tenderer must have experience of minimum average lifting and distribution/consumption of 50,000 metric tonnes of coal in respect of which

certificate from Coal Company have to be filed. Details of distribution and consumption had to be given in the tender. As per the coal policy, parties had to specify what part of the profit in percentage would be shared with the Corporation. The applicants/tenderers had to deposit earnest money of Rs. 20 lacs by draft.

6. Petitioner, in the first writ petition, namely, S. G. Projects Limited, purchased the tender papers and submitted their tender. As required by Clause 9 and provided for in the tender paper, they disclosed that they had lifted coal from the Coal Company, namely, Bharat Coking Coal Limited. It is not in dispute that this is a subsidiary of Coal India Limited. They gave figures of lifting past three years which was much above of minimum requirement of 50,000 metric tonnes and the average was about 1,64,633 metric tonnes. Certificate of Bharat Coking Coal Limited was annexed. As per the technical bid stipulations, as contained in" Clause 10(5), they Were required to give certificate with regard to lifting of coal. However, they did not fill up columns meant for coal distribution and" self consumption of coal as per Clauses 9(2) and (3); It may also be noticed here that as per the technical bid paper, they had only to give certificate with regard to lifting of coal from Coal Company. It is because of non-filling of two-columns, in spite of their clarification given later, their technical bid, has been rejected which is under challenge.

7. So far as writ petitioner of the second writ petition, namely, M/s. Bhagwati Coal Distributors, which was a proprietary concern of one Shyam Kishore Prasad, also filed its tender and in support of experience, it gave certificate in respect of coal lifted, sold, distributed by the said Shyam Kishore Prasad. The Tender Committee rejected its technical bid on the ground that experience of Shyam Kishore Prasad could not be taken into account for the purposes of the firm M/s. Bhagwati Coal Distributors as the firm and the person are two different entities. This is challenged.

8. Respondent No. 6 M/s. Mahalaxmi Continental Private Limited of Gauhati, State of Assam also filed their tender papers but in support of their experience it is not in dispute that they did not file any certificate from Coal Company. They filed certificates from certain persons who, it, is later disclosed in writ proceedings, were private coal miners of Assam and not Coal Company as envisaged under the policy under which these tenders were floated., These (experiences and certificates were accepted as valid, the correctness of which is questioned by both the writ petitioners.

9. On behalf of petitioners, it is submitted as against respondent No. 6 that this tender was floated under and for the purposes of the new Coal Distribution Policy, 2007 of the Coal Ministry, Government of India. The policy clearly envisaged distribution of coal belonging to Coal Companies which, on perusal of the policy as stated above, would show were Coal India Limited and its subsidiaries. The tender was, admittedly, issued under the said policy and for its implementation by State Government Corporation as a nominee of the State

Government. They have in the tender papers and the documents used the same expression Coal Company which should have the same meaning as ascribed to it in the policy moreso because the object was the distribution of coal of the Coal Companies and those Companies were known to the Government and those Companies could verify the authenticity the certificates in this regard. Further, it is submitted that as it was the coal of the said Coal Companies that were to be distributed. The whole idea was that the tender should have had interaction with the said Coal Companies in a substantial manner to show that they were familiar to the said Companies whose product was to be distributed. If these things are kept in mind, it is submitted, then respondent No. 6 did not fulfil the eligibility/ criteria. The private coal handlers or the private coal miners of Assam were unknown to the State Government. In the tender document, as submitted, by respondent No,. 6, there was no authenticity of those certificates which could be verified and, as such, respondent No. 6, it is submitted, was disqualified.

10. In relation to disqualification of petitioner of the first writ application, it was stated that the 3 columns of Clause 9 in the technical ibid document were related to lifting of coal with particulars of Coal Companies and certificate; figures of coal distribution" and figures of self-consumption. The latter two having not been filled up, the financial bid was rejected. It is submitted that if one looks to the certificates that had to be annexed, it was only in respect, of lifting of coal which would be evident from Clause 10(5), of the said document. It is submitted that the very fact that a person lifts substantial amount of coal from a Coal Company, it goes without saying that it is either for sale or, distribution or consumption. The clauses were not clear because there was no mention with regard to sale and, as such, those columns were not filled up. There was no consumption by the petitioner. Accordingly. that column was not filled up. This could not be a disqualification. The tenderer was not required to be a self consumer. However, subsequent clarifications were also given put, were not taken into account.,

11. So far as second writ petition is concerned, it was submitted that a proprietary concern, is nothing but a representation and a business name in which business is carried out by the proprietor. They are one and the same. It is merely the name and style in which proprietor carries a, business and it cannot be said that the experience of the proprietor is not the experience of the proprietary concern. It is submitted that it may be different when corporate entities are involved where an individual"s experience may not be the experience of the incorporated entity as by virtue of incorporation, the entity itself becomes an independent juristic entity, independent of the members who created or who managed or who shared its profit. The view taken by the Tender Committee is, thus, erroneous.

12. Having considered the rival contentions, in my view, the writ petitions must succeed and the selection of private respondent No. 6 must be held to be vitiated. The rejection of the tenders of the two writ petitioners is equally bad. The Tender Committee must reconsider the entire matter afresh.

13. Learned Advocate General appearing for the State and the State respondents and Shri R. B. Mahto, learned Senior Counsel appearing for private respondent No. 6 submit that Coal Company in the tender document would not be restricted to Coal Company as envisaged under the policy. It would include private Coal Companies or private coal miners as well. As to how the Tender Committee came to know about these private Coal Companies or private coal miners of Assam and their working has not been disclosed. With the tender document, no certification from competent authority of either the State of Assam or Government of India was filed by respondent No. 6 to establish the authenticity of their claim that the alleged private Coal Companies with whom they had their dealings were bona fide Coal Companies/Miners in the State of Assam.

14. In my view, petitioners are correct when they submit that the expression Coal Company, as used in the tender document, has to be read in consonance with the concept of Coal Company under the new Coal Distribution Policy, 2007. The tender was not independent of the said policy. The said policy was for distribution of coal produced by the Coal Companies that is Coal India Limited and its subsidiary. It is in that respect, the expression Coal Company used in the policy repeatedly, the tender itself speaks of meeting the requirement of new Coal Policy, 2007. They are connected documents. In my view, it is a well established principle of interpretation that in set of documents if the same expression is repeatedly used, it is to have the same meaning ascribed to it unless there is compulsive reason to depart. The policy and the tender are in furtherance of a singular object. The experience required was with regard to distribution of coal of the Coal Company because the object of the tender was the same. If this is kept in mind then the petitioners are correct in their submissions in this regard and I regret my inability to agree with the submission as made on behalf of the State or respondent No. 6 in this regard.

15. In this connection, I may also note when respondent No. 6 submitted certificates from different persons, who were these persons and what were their antecedents was not at all known to the State or for that matter, the Tender Committee. It is not the experience with anybody that was required. It was the experience with the Coal Company that was required because it was the Coal of the Coal Company that was to be lifted and distributed. Thus, in my view, the selection of respondent No. 6 stands vitiated.

16. Now, coming to the rejection of the technical bid of petitioner of the first writ application, the tender document would show that the petitioner had to give certificate of lifting of coal from the Coal Company. It did so. It gave the turnover far above the minimum requirement of Bharat Coking Coal Limited which is a subsidiary of Coal India Limited. It had no self consumption and, therefore, it did not fill up the same. It had sold the coal to various persons but there was no column for sale instead there was column for distribution which they, under bona fide confusion, did not fill. However, the fact remains that their experience in dealing in coal of the Coal Companies was far above the minimum requirement.

In my view, they were, thus, wrongly excluded.

17. Similarly, when we come to the writ petition of the second writ petitioner, on a misconception of law, they were wrongly excluded. A proprietary concern" is only a firm name and style in which the proprietor carries on his business. It is well established in law that there is no distinction between the identity of the proprietary concern and the proprietor. They are the same entity. The experience of the proprietor in his individual name is the experience of the proprietary firm being the name and style in which he carries on his business. The rejection of his tender on the ground that Shyam Kishore Prasad's experience could not be treated as an experience of the proprietor firm of the said Shyam Kishore Prasad was erroneous in law and cannot be sustained.

18. Here I may, in fairness to Shri R.B. Mahto, learned Senior Counsel appearing for private respondent No. 6. note another contention with regard to petitioner of the first writ application. He has submitted that after the said petitioner was informed on opening the technical bid that his technical bid was being rejected, he asked for refund of his earnest money. The State then responded by agreeing to refund his earnest money of Rs. 20 lacs. It is submitted that this would disentitle him to maintain this writ petition. I may also notice that though these facts were known to the State and the State Corporation-respondent, they have not pleaded this fact. I must also notice that the State has responded and expressed its willingness to refund the earnest money of petitioner of the first writ petition after the writ petition itself was filed. In my view, if legally the rejection of the tender of petitioner of the first writ petition is not sustainable then merely because they had asked for refund of the earnest money which refund has not been taken/given as yet would not disentitle them to maintain the writ petition. I may also notice that even if the first writ petition is to be held not maintainable, the second writ petition is itself enough to cancel the selection of respondent No. 6 which brings us back to the stage of deliberation by the Tender Committee where all tenders have to be reconsidered. Thus the objection, as raised against petitioner of the first writ application, need not be taken into account as valid objection.

19. Thus, on the findings aforesaid, I have no option but to hold that rejection of the tenders of the two petitioners of the two writ petitions was wrong. Their tenders are liable to be considered. The selection of respondent. No. 6 is vitiated in fact and in law and cannot be sustained and the decision to select him is set aside.

20. The Tender Committee would now reconsider the matter keeping in view the directions and observations made above.

21. The writ petitions are allowed.