(2016) 03 CAL CK 0023

In the Calcutta High Court

Case No : W.P. 6828(W) of 2015

Shree Enterprises Coal Sales Pvt. Ltd. and Others	APPELLANT
Vs	
Coal India Ltd. and Others	RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 21

Citation : (2016) 03 CAL CK 0023

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : Kalyan Kumar Bandopadhyay, Ram Anand Agarwala, Ramesh Dhara and A.G. Mukherjee, for the Appellant; Saktinath Mukherjee and Kalimuddin Mondal, for the Respondent

Final Decision : Allowed

Judgement

Subrata Talukdar, J.—1. The reliefs claimed in this writ petition pertain to the refusal on the part of the respondents-Bharat Coking Coal Limited (for short BCCL) to refund to the writ petitioner No. 1-company the value of Earnest Money Deposit (for short EMD) against alleged non-lifting of two rakes of coal purchased by the petitioner No. 1-company under the Spot e-Auction Scheme, 2007 (hereinafter referred to for short as the said Auction or only the e-Auction).

2. The facts of this case made out by the petitioner No. 1-company (hereinafter referred to as only the company or the said company) is that the company is engaged in the business of coal trading and, purchases coal from several coal companies, including BCCL.

3. The e-Auction of BCCL was advertised in 2007 and, to participate in the e-Auction the company appointed one, M/s. M. Junction as its Service Provider (for short SP). The company deposited Rs. 39, 00,000/- towards EMD and was allocated two rakes of coal at the rate of Rs. 1220/- per mt.

4. On 6th of April, 2009 the company claims to have submitted two applications

for allotment of railway rakes duly endorsed by BCCL and, on 28th of April, 2009 the Railways sanctioned two rakes with a validity period up to 11th of June, 2009. On the 8th of June, 2009 BCCL directed the company to deposit the coal value for the two rakes which was duly deposited by the company through its SP. However, the company alleges that no supply was effected by BCCL within the validity period of the sanctioned rakes, i.e. the 11th of June, 2009.

5. On 10th of July, 2009 the Railways, who are also the respondents in this writ petition, informed the writ petitioners that the rakes allotted in their favour lapsed due to poor loading performance by BCCL. In view of the stand taken by the Railways by the letter dated 10th July, 2009, the petitioners requested BCCL to refund the entire money deposited including the coal value and the EMD. BCCL refunded the value of coal amounting to Rs. 1,36,02,000/-, however, withheld the EMD of Rs. 39, 00,000/-.

6. Sri Kalyan Kumar Bandopadhyay, Ld. Senior Counsel appearing for the petitioners submits that the BCCL had no Authority to withhold the EMD. Sri Bandopadhyay takes this Court to several provisions of the e-Auction Scheme pertaining to EMD. The said provisions are, particularly Clauses 2.5, 5.3, 6.2, 6.3, 6.7 and 8 which read as follows:--

"2.5 All buyers having been registered with the service providers shall also have to furnish non-interest bearing Earnest Money Deposit (EMD) at the rate of Rs. 500/- per tonne for coal of grade ''E'' & above, & Rs. 400/- per tonne for coal of grade ''F'' & below, with the Service Provider. This EMD shall not be specific for a particular Subsidiary Coal Company and shall be available with the Service Provider for participation in the e-Auction across the Subsidiary Coal Companies of CIL, as long as the required amount of EMD is available in the bidders a/c. with the Service Provider.

5.3 Equivalent amount of EMD of successful bidder corresponding to successful bid quantity, shall be blocked and will be transferred to Coal Company by the service provider along-with the bid sheet in respect of successful bidders.

6.2 EMD amount shall not be treated as an adjustment towards the coal value but would stand converted into a ''Security Deposit'' for performance of the bidders towards completion of the said transaction.

6.3 The above security deposit (as converted from the EMD amount) would be adjusted as coal value, only after completion of lifting of coal covered under coal value paid, excluding security deposit. However, in the event of default in performance by the bidder, the provision of forfeiture of the ''Security Deposit'' (as converted from the EMD) as stipulated, would be applicable.

6.7 In case of buyers who have booked their rail programme through BG, a notice for deposition of coal value by way of DD/Pay order, will be displayed on the notice board of the coal company, at least three working days in advance before the expected date of offer to the Railways for allotment. The buyer will be accordingly required to deposit DD/Pay Order along with the debit advice to the tune of BG involved in the programme, within 48 hours of such notice.

In the event of non-deposition of 100% coal value by the Bidder in terms of Clause-6.7 above, the consent given against take programme will be withdrawn by the coal company and EMD as per e-Auction scheme will be forfeited.

8. Refund of EMD for Unsuccessful bidders:--

In case of unsuccessful bidders, EMD shall be refunded by the Service Provider after the auction is over, on the bidder''s request. However, if no such request is received the Service Provider will retain the EMD for participation in e-Auction in future."

7. Sri Bandopadhyay argues that from the four corners of the e-Auction Scheme relating to the provisions for submitting EMD it shall never appear that such EMD can be withheld for no fault on the part of the company-bidders. Sri Bandopadhyay points out that it is the provision in the e-Auction Scheme that the EMD shall be deposited with the SP and, shall be furnished for participation in the e-Auction Scheme for as long as such EMD is available in the account of the bidders with the SP. Next, such EMD shall be transferred by the SP to the coal company, in this case BCCL, in the event a bidder is successful and is allotted the specific number of rakes.

8. Drawing the attention of this Court to Clause 6.2 of the e-Auction Scheme, Sri Bandopadhyay points out that the EMD shall be converted into a Security Deposit (SD) for participation by the bidders towards completion of the bid. Again, highlighting Clause 6.3 of the e-Auction Scheme, Sri Bandopadhyay argues that the SD (i.e. the converted EMD) would be adjusted as coal value only after the completion of lifting of coal. However, in the event of default in performance by the bidder, the provision of forfeiture of the SD shall apply.

9. With reference to Clauses 8 and 9 of the e-Auction Scheme, Sri Bandopadhyay submits that under Clause 8 the EMD shall be refunded to the unsuccessful bidders after the auction is complete. Such return shall follow a request from the SP who will retain the EMD for participation in a future e-Auction.

10. The forfeiture of EMD is provided vide Clause 9 (supra). Such forfeiture can take place in the event a successful bidder does not lift the booked quantity within the stipulated validity period. The forfeiture shall also apply in the event the bidder fails to make payment of the coal value within the stipulated time.

11. On the strength of all the above noted provisions, Sri Bandopadhyay makes the primary point that there was no default in performance on the part of the company. Heavily drawing the attention of this Court to the affidavit-in-opposition filed on behalf of the Railways-respondent, Sri Bandopadhyay takes this Court to the relevant pleadings which are as follows:--

"d) The details of sanctioned programme received for April, 2009, allotment order issued and loading and despatch made form Gareria Pilot by BCCL are annexed hereto and collectively marked with the letter "R-2".

e) It would thus be evident from the above that the loading performance of Gareria Pilot during the material period was extremely poor which was attributable to BCCL only. The Railway had no role to play in that and the matter was duly intimated to BCCL by Railway requesting them to improve the loading performance for getting further allotment against the programme they had got sanctioned from the Director, Rail Movement, Railway Board, Kolkata. Copies of such correspondence are annexed hereto and marked with the letter "R-3 & R-4".

f) Inspite of receipt of such correspondence, BCCL did not improve the loading performance.

g) Thus due to the poor loading performance of BCCL, the sanctioned programme of the writ petitioners i.e. rake numbers BCCL/NC/34-35/April 2009 lapsed for which the Railways cannot be held responsible in any manner 28.04.2009 from 15.05.2009 onwards when 11 rakes already allotted for loading during 29.04.2009 to 11.05.2009 were lying as arrear for loading by BCCL on account of poor loading performance and 12 rakes were pending for issuing allotment order by the Railways. The 11 allotted rakes lying as arrear for loading were loaded by BCCL during 17.05.2009 to 23.07.2009. Subsequently, 5 more rakes were allotted for loading during 15.05.2009 to 09.06.2009 which were loaded by BCCL during 30.07.2009 to 07.09.2009. the matter was duly intimated to BCCL by Railway vide letter No. CAM/Allotment/2009/22 dt. 22.05.2009 in reply to their letter No. BCCL/S & M/PS/F-10/3616, dt. 21.05.2009, the copies of which are enclosed herewith marked as annexure "R-3" & "R-4" respectively. But, the BCCL did not improve loading performance in spite of the request made by the Railway knowing that if loading performance will not be improved the Railway will not accept the offer for issuing allotment against the entire sanctioned programme within the date of validity for allotment and the sanctioned programme will be lapsed. Consequently, the sanctioned programmes of the petitioner i.e. rake Nos. BCCL/NC/33-34/April'' 2009 were not allotted within validity date and whatsoever and all allegations and imputations made against Railway authorities are denied and disputed."

12. On the platform of the above noted facts, Sri Bandopadhyay argues that there was no fault on the part of the petitioners which can provide a ground to BCCL to withhold the EMD. In fact, taking this Court to several of the correspondence addressed to BCCL by the petitioners and the reply of BCCL, Sri Bandopadhyay points out that both BCCL and its parent organisation, i.e. Coal India Ltd. (for short CIL) were informed that the EMD has been withheld without enquiring into the fact that there was no allotment of rakes by the Railways in favour of the company. Sri Bandopadhyay also submits that by letter dated 24th of May, 2010 addressed to the company by the Chief General Manager (S & M/ QC) of BCCL it was, stated as follows:--

Dated, 24th May, 10.

"Ref: BCCL/S & M/PS/F-EMD/132 M/s. Shree Enterprises Coal Sales Pvt. Ltd. 854, Todi Corner, 32, Ezra Street, Kolkata- 700 001 Fax No. 033-22216589

Dear Sir,

Please refer to your letter dated 17.03.10 and 16.04.10 regarding non-refund of EMD against the lapsed rake at Gararia siding. In this connection, we have to inform you that the case has been referred to CIL because there is no guideline in E-Auction Scheme for refund of EMD when the offered rakes are not picked up by the Railways for allotment. You are aware that BCCL had offered the rake for allotment but the same could not be picked up by the Railways for allotment. Hence the responsibility lies with the consumer and the Railways. However, the case has been referred to CIL for obtaining guideline regarding refund of EMD in such cases.

Yours faithfully,

(V.K. Sinha) Chief General Manger (S&M/QC)"

13. Thereafter by a communication dated August, 28/30, 2010 addressed to the CIL (Marketing Division) by the Chief General Manager (S & M) of other coal companies in respect of the subject of forfeiture of EMD connected to e-Auction by railway mode it was, inter alia, stated as follows:--

"Sub: Forfeiture of EMD in respect of E-Auction rake (by Rail Mode)

Enclose please find a copy of letter No. BCCL/S&M/PS/F-EA/554 dated 18.1.2010 from Director (Tech) BCCL to Director(Tech) of your subsidiary companies seeking information as to whether EMDs submitted by the concerned bidders are forfeited or not at your end in cases where offers made by your company are not picked up by railway for allotment.

BCCL is yet to get any information from your end to this effect till date and as a result BCCL is not being able to decide as to what action is to be taken in this regard. There are a few such cases in BCCL and EMDs are not being released as there is no specific guideline in the extant e-auction scheme as to how such cases are to be dealt. Since concerned bidders have been regularly insisting for release of EMDs, this issue was deliberated in FDs meeting of BCCL when it was decided that opinion form other subsidiary companies be obtained so that a view can be taken. Since no information was received by BCCL from your end, the matter has been referred to CIL for issuance of specific guideline in such cases.

As BCCL has noted that no specific guideline has been provided in the Scheme to this effect, CIL is of the view that since allotments were not made by Railways within validity period against offers made by BCCL, for which bidders in no way are responsible, question of forfeiture of EMD should not arise. Thus in such cases EMDs need to be refunded.

Since in the extant Scheme this issue has not been directly addressed, certain modification need to be made in the Spot E-Auction Scheme so as to bring about necessary clarity at the operating level both on the part of Coal Company concerned and the bidders.

Before modification is made in the scheme, you are requested to let us know as to what action you have been taking in the past in the event such occasions arose and your views as to how such issue should be addressed so that necessary modification in this regard can be made in the scheme for the sake of clarity.

The Matter may be treated on priority as BCCL/CIL have been getting repeared representation from the concerned bidders for refund of EMDs and matter is yet to be resolved.

Yours faithfully,

Chief General Manager (S&M)"

14. Subsequently, by further correspondence dated 30th December, 2010 again addressed to the Chief General Manager (S & M), CIL to the Chief General Manager (S & M), BCCL on the subject of refund of EMD against lapsed rakes, the following stand was taken:--

"The Chief General Manger (S&M), Bharat Coking Coal Limited, Koyla Bhavan, Koyla Nagar, Dhanbad.

Sub: Refund of EMD against lapsed rakes under e-Auction Schemes.

Dear Sir,

Please refer to letter No. CMD:ES:F-3(B)/10/1103 dated the 08th/21st May, 2010 from CMD, BCCL to Chairman, CIL seeking specific guidelines in case of lapsed rakes arising out of non-allotment by Railways.

The issue of refund/forfeiture of EMD in the event of non-allotment of rakes by Railways within the validity period against offers made by the subsidiary companies in respect of sale of coal by e-Auction was discussed in detail in the CGM/GM(S&M)s'' Coordination Meeting held on 01/10/2010. It was generally agreed that EMD in such eventuality where the rail programme gets lapsed due to non-allotment by Railways, should not be forfeited and the entire amount should qualify for refund.

A proposal to this effect was put up for consideration and approval of competent authority, which has been duly approved by the competent authority. While necessary amendment in the provisions of the existing e-Auction Schemes is in the process of being incorporated, we would request you to take necessary action for refund of EMDs in respect of similar such cases which may have occurred in the past and where EMDs have not been refunded.

This issues with the approval of competent authority."

15. On the strength of the above stated correspondence, Sri Bandopadhyay points out that therefore there was a conscious decision on the part of BCCL and the other coal companies under CIL that, in the absence of specific guidelines under the e-Auction to refund the EMD, in cases where the lifting of coal could not be performed due to no fault on the part of the bidders, steps should be taken to refund the EMD. However, in spite of such conscious decision as reflected in the above noted communication dated 24th of May, 2010, August 28/30, 2010 and 30th December, 2010 (supra) suddenly, without assigning any particular reason, the Chief General Manager (S & M), CIL informed its subsidiary coal companies, including BCCL, by fax dated 16th August, 2011 as follows:--

"The proposal for refund of EMD against lapsed rake under e-Auction Scheme forwarded by BCCL was placed before CMDs. The CMDs, after detailed deliberation at length did not agree to refund the EMD. Hence, it was decided that the letter No. (illegible) dated 30/12/2010 issued by CGM (S&M) should be treated as withdrawn."

16. Sri Bandopadhyay argues that the sudden withdrawal of the proposal to refund the EMD without assigning any reason is itself bad in law. Such withdrawal does not take into notice the fact that the EMD cannot be withheld when the bid could not be successfully performed due to no fault on the part of the bidder-company. Reminding this Court of the affidavit filed on behalf of the Railways (supra), Sri Bandopadhyay argues that the Railways-respondent had gone on record with the fact that the rakes lapsed due to slow loading arrangements by BCCL. Such lapse cannot be attributed at all to the petitioner-company and therefore there has been no performance failure on the part of the company to lift its allotted quantity of coal. Hence, with the return of the coal value it was also incumbent upon BCCL to refund the EMD which amounts to a robust sum of Rs. 39,00,000/-. Since the matter has been withheld by BCCL from 2009 the said amount of EMD has, by now, after the lapse of seven years, accumulated substantial interest.

17. Two additional points made by Sri Bandopadhyay connect to the petitioner being unequally treated since, in respect of another company namely, R.S. Fuel Ltd., the EMD has been refunded to the successful bidder although the contract could not be completed. Such point is supported through pleadings which shall appear from paragraphs 32 and 36 of the writ petition.

18. The final point made by Sri Bandopadhyay is that no opportunity of hearing was granted to the writ petitioners prior to refusing refund of EMD. In effect, the decision not to refund the EMD emanates out of the general instruction from CIL to the other coal companies as would appear from the fax dated 16th August, 2011 (supra). Therefore, such general instruction does not address the specific facts of this case and, in such view of the matter, deserves to be set aside.

19. Sri Bandopadhyay relies upon a line of settled authority to underscore the point that the presence of an arbitration clause between the company and BCCL,

cannot be a bar to maintainability of this writ petition when the issues are limited on the basis of available facts.

20. The decisions relied upon by Sri Bandopadhyay are as follows:--

", 2007 (9) SCC 593 in the matter of Popcorn Entertainment & Anr. v. City Industrial Development Corporation & Anr.;

, AIR 2003 SC 2120 (Para 7) in the matter of Harbanslal Sahnia & Anr. v. Indian Oil Corporation Ltd. & Anr.;

, 2004 (3) SCC 553 (Paras 16 & 19) in the matter of ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.;

, 2011 (5) SCC 697 (Para 33) in the matter of Union of India & Ors. v. Tantia Construction Pvt. Ltd.;

, AIR 2008 SC 336 (Para 18) in the matter of BCPP Mazdoor Sangh & Anr. v. N.T.P.C. & Ors.."

21. Therefore, Sri Bandopadhyay concludes by pointing out that even though the petitioner despatched a notice of arbitration to the competent authority of CIL to take steps under the arbitration clause, no such steps have been taken till date. Therefore, the arbitration has been rendered infructuous. In the alternative, in the light of the above noted limited facts and, the line of settled judicial authorities (supra), there are no impediments to seek reliefs by way of this writ petition.

22. Arguing on behalf of BCCL, Sri Saktinath Mukherjee, Ld. Senior Counsel draws the attention of this Court to the following facts which are pleaded at paragraphs C, D and E of the affidavit-in-opposition of BCCL which read as follows:--

"(c) In the instant case, e-auction was held on 26th March, 2009. The writ Petitioner NO.1 Company became a successful bidder at the rate of Rs. 1,220/- for 2 rakes of coal from the source of Gararia pilot and the same was informed on the self-same date i.e. 26/3/2009 at 18.20 hours. A Xerox copy of the said communication is annexed and marked with the letter "R1". Thereafter, the writ petitioners, according to the procedure and terms of spot e-auction scheme submitted Annexure ''C'' i.e. consent for loading with BCCL on 6/4/2009. On receipt of the same, BCCL, in its turn, after maintaining all the formalities, forwarded the same to the Directorate, Railway Movement. On receipt of the same, the Directorate, Rail Movement, Railway Board, Kolkata, sanctioned the required rakes giving the unique identification number on 28/4/2009 i.e. to say that the rake is fit for movement. The validity period for availing the allotment was fixed on 11/6/2009 i.e. 45 days from the date of issue of the consent i.e. 28/4/2009. Xerox copy of Annexure ''C'' sanctioning the said 2 rakes by the Directorate, Rail Movement, is annexed and marked with the letter "R2". On obtaining the railway sanction to the consented rake programme i.e. Annexure

''C'', as aforesaid, BCCL, Kolkata Office, informed BCCL, Head Quarter, at Dhanbad, indicating the status of financial coverage i.e.. Bank Guarantee of each sanctioned rake. Then, BCCL, Head Quarter, Dhanbad, informed the respective collieries seeking loading date of the sanctioned e-auction rakes. According to the said procedure, BCCL, Kolkata Office, issued a notice on 6/5/2009 intimating the buyers who have booked their rail programmes through Bank Guarantee and requested to deposit the DD/PO along with debit advice to the tune of Bank Guarantee involved in the respective programmes by 5.30 p.m. on the date mentioned in the said notice. In the said notice, the date for loading was also mentioned. Even before 6th May, 2009, similar notice was given i.e. 27/4/2009. Xerox copy of the said notices dated 27/4/2009 and 6/5/2009 are annexed and marked with the letter "R3". But the writ petitioners deposited the coal value equivalent to 100% of Bank Guarantee only on 8/6/2009 as per the intimation of BCCL dated 6/5/2009. Xerox copy of deposit memo on account of coal value deposited on 8/6/2009 is annexed and marked with the letter "R4". Thus, there is a delay in depositing the coal value by way of DD/PO, at least by 28 days i.e. from 12/5/2009 (in pursuance of notice dated 6.5.2009). Thus, the delay is also on account of the writ petitioners. BCCL submitted offer/intend with the Zonal Railways i.e. Eastern Central Railway, Dhanbad, mentioning the category as "Non-Core Sector - E-Auction. In the instant case, such indent/offer under the said NC - EA was offered to the railway on and from 13/5/2009 (i.e. vide notice dated 6.5.2009). Xerox copies of such offers/intends are annexed and marked with the letter "R5". There was and/or is no fault on the part of BCCL in the matter of offer/allotment of rakes with the railways but the petitioners did not take any effective steps for allotment of rakes for reasons best known to them.

(d) I say that Clause 11.12 of the said spot e-auction scheme, 2007 of BCCL, inter alia, provides for Arbitration, to which I crave leave to refer to at the time of hearing, for its true meaning, scope and effect thereof.

In that view of the matter, the instant application is not maintainable in view of the alternative remedy available to the writ petitioners.

(e) I say that in terms of the relevant clauses of the said spot e-auction scheme, 2007, Earnest Money Deposit (in short EMD) may be forfeited by BCCL. I crave leave to refer to relevant Clauses 9.1 and 9.2 at the time of hearing.

A Xerox copy of the spot e-auction scheme, 2007 of BCCL is annexed and marked with letter "R6".

Accordingly to the said express terms and conditions of the contract, BCCL forfeited the EMD since the consumer namely the writ petitioner No. 1 company failed to lift the entire allocated quantity. It is also on record that because of non-lifting of the allocated quantity by the petitioner, BCCL suffered huge financial loss for no fault of BCCL. The said allocated unlifted quantity was sold at a notified price which is less that the bid price to power houses/fertilizer plants. BCCL also suffered loss on account of conducting the e-auction being charges payable to the service provider namely Metal Junction, including service tax. BCCL suffered heavy financial loss."

23. Sri Mukherjee therefore submits that it is a clear position under the e-Auction Scheme that in the event of non-performance the SD (that is, the converted EMD) is liable to be forfeited. Sri Mukherjee further submits that there is a difference between sanction and allotment. Unique rake numbers were given by the Railways in favour of the company upon sanction also by the Railways. The outer limit of allotment of rakes was 11th of June, 2009 and BCCL was required to load coal upon allotment and such loading performance of BCCL never lapsed since there was no sanction of rakes in favour of the company by the Railways.

24. Drawing the attention of this Court to the stand of the writ petitioners, Sri Mukherjee points out that the writ petitioners'' complaint is of non-allotment of rakes. The non-allotment of rakes is purely a function of the Railways and such would appear through the e-Auction procedure. BCCL cannot be put to blame for the non-allotment of rakes in favour of the company. It is not in dispute, according to Sri Mukherjee, that the rakes were admittedly not sanctioned in favour of the company.

25. Therefore, the question of lapsed rakes is within the domain of the Railways and the writ petitioners. The matter was referred to CIL and, in instances where it was found, such as in the case of R.S. Fuel (supra), that the fault in all aspects did not lie with the bidding company, both the coal value and the EMD were refunded. Taking this Court to the pleadings in the affidavit-in-opposition of BCCL (supra), Sri Mukherjee argues that the petitioner delayed in submitting the coal value within due time. In view of such delay in submitting the coal value, although the petitioners were put on notice requiring the deposit to be placed with BCCL in advance, the sanction of the rakes in favour of the petitioners by the Railways lapsed due to delayed deposit by the petitioners. Therefore, nil allotment followed the refusal of sanction.

26. Sri Mukherjee reminds this Court that from the pleadings in the affidavit-in-opposition of BCCL (supra) it shall be amply evident that in all other cases of companies which have deposited their coal value on time, steps were taken by BCCL to approach the Railways and receive both the sanction and the allotment of rakes. However, in the facts of the present case, since there was a delay of 28 days in depositing the coal value by the company, the Railways could not take steps on time to sanction the rakes. As a result BCCL had to sell the coal at a notified price much below the auctioned rate. Such sale below the auction price has caused loss to the BCCL and the same would appear from the pleadings in its affidavit-in-opposition (supra).

27. Therefore, Sri Mukherjee makes the point that to ascertain the fault, the remedy lies in the arbitration. Sri Mukherjee argues on the platform of judicial authority, that when the examination of the fault is a question of fact, such examination cannot be done in a writ proceeding but, requires to be decided in

the arbitration.

28. Sri Asis Sanyal, Ld. Counsel for the Railways places reliance on Section 21 of the Arbitration and Conciliation Act, 1996 (for short the 1996 Act). Sri Sanyal also draws the attention of this Court to pages 79 and 80 of the writ petition which are the letters dated 7th September, 2011 and 22nd September, 2011 addressed by the company to the Chairman, CIL for appointment of an arbitrator under the arbitration clause on the subject of non-refund of EMD by BCCL.

29. Therefore, Sri Sanyal argues that there is a demand for arbitration made by the petitioners qua the dispute on the non-refund of EMD. Such demand for arbitration has proceeded under Section 21 of the 1996 Arbitration Act. The effect of the demand for an arbitration under Section 21 of the 1996 Act is that with such a demand for appointment of an arbitrator, the arbitral reference should be held to have commenced. In support of his above noted submissions, Sri Sanyal relies upon the decision reported in , 2012 (12) SCC 581 at Paragraphs 16, 17 and 18 in the matter of State of Goa v. Praveen Enterprises.

30. On the strength of the above noted authority, Sri Sanyal argues that since arbitration can be stated to have legally commenced, the petitioners must be asked whether they are willing to withdraw the notice of arbitration. It is the argument of Ld. Railway Counsel that the petitioners may not withdraw the notice of arbitration in order to save limitation, in the event the petitioners do not succeed in this writ petition.

31. Sri Sanyal makes the final point by drawing the attention of this Court to the affidavit-in-opposition of BCCL by which BCCL has admitted that arbitration is necessary. Since the writ petitioner has also given notice of the arbitration, Ld. Counsel for the Railways submits, that if such is the position that the contesting parties want arbitration, this Court should not interfere sitting in its writ jurisdiction but, refer the matter to arbitration.

32. After hearing the parties and carefully considering the materials on record this Court arrives at following findings:--

"A) That from the affidavit-in-opposition of the Railways it has been abundantly highlighted that the sanctioned programme of the petitioners lapsed due to the poor loading performance of BCCL. The Railways make mention of such poor loading performance with the assistance of supporting figures. For instance, eleven rakes allotted for loading between 29th April, 2009 to 11th May, 2009 were loaded by BCCL on 17th May, 2009 to 23rd July, 2009.

Thereafter, five more rakes allotted during 15th May, 2009 to 9th June, 2009 where loaded as late as between 30th July, 2009 to 7th September, 2009.

B) This Court further notices from the affidavit of the Railways that the Railways put BCCL on notice cautioning that if the loading performance was not improved, the former will not accept any allotment offer qua the entire sanctioned programme. The average loading time per rake was indicated in the letter of the

Railways dated 22nd May, 2009 at page 25/Annexure R-4 to the affidavit of the Railways and the arrears in loading as on 22nd May, 2009 stood at eleven rakes.

The Railways made it clear to BCCL through the letter of 22nd May, 2009 that "Taking allotments for a siding and not accepting the rakes for loading is of no use, as this will only build up the arrears. Railway has sufficient number of rakes for loading.

Hence, BCCL should take necessary action to clear the arrears before offering for the allotment of rakes."

(C) BCCL which, now has both the petitioners and the Railways to deal with, attempt to first put the responsibility for the lapse in the rakes on the petitioners by, pleading in their affidavit affirmed on 3rd May, 2013 by one, Kalyan Kumar Majumder that the programme of the writ petitioners being serial Nos. 24 and 25 was received by the Dhanbad Railway Office on 29th April, 2009 and 11th June, 2009 which was the last date of validity of allotment of rakes by the Railways. However, the rakes were not loaded in respect of the programme of the petitioners as well as six programmes of four other consumers.

(D) BCCL further foists the reasons for the lapse in the sanction by the Railways on the writ petitioners for depositing the coal value after 28 days pursuant to the intimation of BCCL to the writ petitioners dated 6th May, 2009.

When the Railways were approached to allot the rakes after the delayed submission of the coal value close to the last date of validity of the allotment of rakes, viz. 11th June, 2009, i.e. 45 days from the date of consent by the company to the auction, such rakes were not sanctioned by the Railways.

(E) This Court again notices the fact that notwithstanding acceptance of the stand taken by BCCL that the petitioners submitted coal value after a delay of 28 days, admittedly such coal value was submitted on and by 8th June, 2009, which was a good three days prior to the closure of the consent to sanction rakes expiring on 11th June, 2009 qua the petitioners.

At this stage this Court is required to notice the Office Order No. ECR/CAP/1/2009 at page 16 of the affidavit of the Railways whereby it is stated at the final paragraph as follows:--

"Allotment will be given two days in advance (emphasis supplied). Allotment for Saturday, Sunday, holidays will be given in advance."

F) This Court is also required to notice that the e-Auction terms are between the petitioners and BCCL. From the several documents on record appended to the affidavit of the Railways it can be convincingly gathered that the request for allotment of rakes is inter se the coal company, i.e. BCCL and the Railways. It is also noticed by this Court that the Gareria Pilot Siding is exclusive to BCCL for loading and neither the petitioners nor any other bidder can have any access thereto.

G) Faced with the affidavit of the Railways, BCCL next takes the defence that the allotment of the rakes was the sole concern of the writ petitioners, an argument which this Court finds difficult, from the facts on record, to accept. On the contrary the delivery of coal through rakes is from a siding which belongs to BCCL and, no rake of the petitioners can be placed superseding the earlier rakes being loaded in arrears by BCCL.

In fact, in the light of the statistics at paragraph A) above of this judgment, from the affidavit of the Railways it is apparent that at the time when BCCL complained of delayed submission of coal value by the writ petitioners, the rakes lying in arrears for the period between 29th April, 2009 to 11th May, 2009 were being loaded by BCCL between 17th May, 2009 to 23rd July, 2009. It also appears and, for the sake of the present discussion is reiterated, that the rakes allotted between 15th May, 2009 to 9th May, 2009, the latter date being closer to the period of validity of the consent to sanction rakes in favour of the petitioners expiring on 11th June, 2009, were loaded much thereafter during 30th July, 2009 to 17th September, 2009.

H) Next, BCCL tries to meet the argument of the Railways by placing reliance in its affidavit of Kalyan Kumar Majumder that sufficient stocks of coal were lying with the BCCL at the Gareria Pilot Siding. Therefore, in view of such sufficient stocks of coal it cannot be alleged that the railway rakes were being loaded in arrears.

I) By way of supplementing the above noted discussion this Court is required to further take notice of the terms and conditions of the e-Auction Scheme and its Objective which, in essence, reflects its Preamble. The Objective of Scheme is as follows:--

"Coal distribution through e-Auction has been introduced with a view to provide access to coal for such buyers who are not able to source coal through the available institutional mechanism. In the long run it is expected that e-Auction may help in creating spot as well as future market of coal in the country.

The purpose of e-Auction is to provide equal opportunity to purchase coal through single window service to all intending Buyers.

E-Auction has been introduced to facilitate across the country wide ranging access to book coal on-line for all sections of coal Buyers enabling them to buy coal through a simple, transparent and consumer friendly system of marketing and distribution of coal."

J) Therefore, the Objective of the e-Auction is to facilitate access to coal through a consumer friendly system of marketing and distribution. By no stretch of imagination it can be argued that part of such Objective places the onus on the consumer (read the writ petitioners) to arrange on their own for the transportation of coal.

Moreover, the access of the writ petitioner to BCCL is through a SP who is required to deposit both the coal value and the EMD. It is useful to note that as per Clause 7.5 of the e-Auction Scheme, the buyers of coal have a validity window for seeking (emphasis supplied) allotment of rakes within 45 days from the date of issue of consent by the coal company.

In fact, to the mind of this Court, such seeking of allotment is, at all stages in respect of the bidders routed through the coal company, in this case BCCL, to the Railways.

K) It is further useful to notice from the terms and conditions of e-Auction that the obligations of the buyer (read the writ petitioners) through their SP is umbilically connected to the coal company, in this case BCCL.

L) Having regard to the above noted findings, this Court is of the considered view that the petitioners cannot be allowed to be penalised for the lack of symphony between BCCL and the Railways. The terms and conditions of the e-Auction relating to the requirement of performance by the petitioners is unconnected to both the BCCL and Railways being required to streamline their mutual process of sanction, allotment and thereafter loading of rakes followed by further requests by BCCL to the Railways for more rakes.

In fact, after the receipt of the coal value from the writ petitioners on 8th June, 2009 (supra), as per the order of Railways No. ECR/CAP/1/2009 (supra), sanction could have been made in favour of the petitioners within a period of two days from 8th June, 2009, i.e. by 10th June, 2009 or, latest by 11th June, 2009, being the last date of the validity of the consent to supply rakes.

However, the Railways have made it clear in their affidavit that future requests for rakes will not be accepted in the event the loading arrears are not speeded up by BCCL.

M) In the above view of the matter this Court finds it unjust that the petitioners should be put to a long period of arbitration for combing through little details to ascribe fault when, on a broad acceptable perspective of facts it transpires that the petitioners have been caught between the allegorical frying pan and the fire.

In view of the expressed stand taken on affidavits by both the authorities, viz. BCCL and Railways, it is clear to the mind of this Court that although the writ petitioners may have fallen behind in depositing the coal value, the company did not lack bona fides in fulfilling its obligations under the e-Auction Scheme. Admittedly, the petitioners did not fail to perform under the contract or under performed in any manner. The failure to perform lay in the mutual causes of BCCL and the Railways. Therefore, BCCL wisely refunded the coal value but decided, arguably, on acute legal advice, to retain the EMD which, obviously promised the potential of a protracted lis.

This Court therefore agrees with the line of decisions of the Hon''ble Apex Court which entitles a Writ Court to examine the facts, even of a contract, notwithstanding the presence of an arbitration clause. Useful reference in connection with the above noted legal position may be made to the judgments of the Hon''ble Apex Court reported in , 2011 (5) SCC 697 (at Paras 33 and 34) in the matter of Union of India & Ors. v. Tantia Construction Pvt. Ltd.; and in , 2004 (3) SCC 553 (at Para 8) in the matter of ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors. The Hon''ble Apex Court, inter alia, held through the above noted decisions that in all cases of disputed questions of fact, the Writ Court is not barred from exercising jurisdiction merely because there is a dispute with regard to the interpretation of a term of a contract. Such dispute does not axiomatically become a disputed fact and, the Writ Court, in appropriate circumstances, can exercise jurisdiction to look into the term of the contract itself.

In , 2003 (2) SCC 107 in the matter of Harbanslal Sahnia & Anr. v. Indian Oil Corporation Ltd. & Ors., the Hon''ble Apex Court has, inter alia, held that the writ remedy is a rule of discretion and, in specified circumstances, such discretion must be exercised for the ends of justice.

N) For all the above noted reasons to push the writ petitioners now to arbitration only for determining for whose fault the rakes were not sanctioned, although it does transpire from the above noted discussion that the ball is shuttling between the courts of BCCL and the Railways, would be a travesty of justice. To the mind of this Court BCCL was aware of the fact that the performance of the writ petitioners could not be faulted in as much as BCCL did not fail to return the full coal value. To the further mind of this Court the fact that BCCL toyed with the idea of returning the EMD to the writ petitioners for a while is evident from the correspondence annexed to the writ petition itself.

This Court also notices that the decision not to return the EMD was communicated by way of a general instruction by CIL to all coal companies without examining the specific facts of this case. Such generality of reasoning without affording an opportunity to the affected party to ventilate its grievances is an exercise vitiated by non-application of mind and, therefore, perverse.

Accordingly, the impugned communication dated 16th August, 2011 marked Annexure P-17 to the writ petition stands quashed. BCCL is directed to take consequential steps to refund the withheld EMD amount to the writ petitioners qua the e-Auction in issue in this writ petition along with simple interest at 8% per annum within a period of eight weeks from the date of communication of this order failing which BCCL shall be liable to pay an additional interest of 2% per annum until actual payment."

33. WP 6828(W) of 2015 stands accordingly allowed.

34. There will be, however, no order as to costs.

35. Urgent certified photocopies of this judgement, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

Later

36. Sri Kalimuddin Mondal, Ld. Counsel appearing for the respondent Nos. 1 to 7-BCCL prays for stay of operation of this judgment and order.

37. The prayer for stay is considered and rejected.

