

(2012) 02 CHH CK 0009
In the Chhattisgarh High Court
Case No : Writ Petition C. No. 3474 of 2011

Vaswani Industries Ltd.

APPELLANT

Vs

South Eastern Coalfields Ltd.

RESPONDENT

Date of Decision : 07-02-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : AIR 2012 Chh 105

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shri Satish K. Agnihotri, J.—By this petition, the petitioner seeks a writ in the nature of mandamus directing the respondent, its servants, agents and employees to resume the supply of coal under the Fuel Supply Agreement (for short "FSA") (Annexure P-1), further to issue instruction to the South East Central Railway, Bilaspur, to load coal in the Railway rakes, as per the original priority, as mentioned in the notice (Annexure P-3).

2. The indisputable facts, in brief, relevant for consideration of the case, are that the respondent entered into FSA with the petitioner on 30.04.2008 for supply of Annual Contracted Quantity, as mentioned in clause 4.1 of the FSA. The period of agreement was five years with effect from the date i.e. immediately succeeding the month in which both the parties signed agreement. Clause 14 of the FSA provides for suspension of coal supplies and clause 16 provides for termination of contract/ agreement. The respondent stopped the supply of coal pursuant to the note dated 12.05.2011 (Annexure R-1). Thus, this petition.

3. Shri Varma, learned senior counsel appearing with Shri Sharma and Shri Chopra, learned Advocates for the petitioner, would submit that without taking recourse to clause 14 of FSA, the supply of coal has been stopped only on the basis of recommendation made in the note dated 12.05.2011. Before taking the

impugned action, no opportunity of hearing was afforded to the petitioner and no show cause notice was also given to the petitioner to put forward its case. Shri Varma, would further submit that lodging of FIR (page No. 105 of the paper book) by the Central Bureau of Investigation/A.C.B, Bhilai, was misplaced, as no opportunity of hearing was afforded to the petitioner. In fact, the allegations made in the FIR are baseless and without any substance. Shri Varma, would next submit that the recommendation made by the Vigilance Department of the respondent is an internal noting and the same cannot be acted upon without accepting the same and passing the proper order, in accordance with law, after affording opportunity of hearing to the petitioner. Shri Varma, would last submit that the supply of coal has not been made since January, 2011, thus a direction may be given to the respondent to supply coal with effect from January, 2011.

4. Per contra, Dr. Shukla, learned senior counsel appearing with Shri Tiwari, learned Advocate for the respondent, would submit that the allegations in the FIR lodged by the C.B.I. and the recommendation of the Chief Vigilance Officer are enough to stop supply of coal under FSA till further advise from the Vigilance Department. Dr. Shukla, does not dispute the fact that no opportunity of hearing was afforded to the petitioner and further no order has been passed before stopping the supply of coal under FSA.

5. I have heard learned counsel appearing for the parties, perused the pleadings and documents appended thereto.

6. Indisputably, the respondent has acted on the recommendation of the Chief Vigilance Officer, which was based on the action taken by the CBI in filing FIR. The said note dated 12.05.2011 reads as under :

South Eastern Coalfields Limited (A Mini Ratna Company) Seepat Road, P.B. No. 60. BILASPUR -4950009(C.G.) VIGILANCE DEPARTMENT Phone 07752 246311 Fax No. 07752 246461

NOTE

Subject :- Stoppage of supply of coal under FSA to M/s Vaswani

Industries Limited, Raipur (CPP) CBI, ACB Bhilai has booked a case (RC 1242011A0004) under Sections 120-B, 420 IPC and 13(2) R/W 13(1)(d) of Prevention of Corruption Act, 1988 against M/s Vaswani Industries Limited Raipur (CPP), its Directors and the following four officers, for alleged diversion of linkage coal during the period August, 2007 to March, 2011:

- (1) Shri A.K. Jain, Sales ,Manager, SECL Hqrs, Bilapur
- (2) Shri B.N. Pandey, Sr. Manager (Mining), Production Deptt, SECL Hqrs Bilaspur
- (3) Shri A. Majumdar, the then Dy. Chief Finance Manager (MM),SECL, Bilaspur
- (4) Shri S. Mitra, the then Dy. CE (E&M),SECL, Bilaspur

As such, it is recommended that supply of coal under FSA to M/s Vaswani

Industries Limited, Raipur (CPP) may be stopped till further advice from this Department.

Sd/- Chief Vigilance Officer

7. The respondent has neither accepted the recommendation nor passed any order to stop supply of coal under FSA. It is worthwhile to mention here that the recommendation has been made to stop supply of coal under FSA.

8. Clause 14 of the FSA deals with suspension of coal supplies, which reads as under :

14.SUSPENSION OF COAL SUPPLIES

14.1. Notwithstanding other provisions of this Agreement, in the event the Purchaser fails to pay any amount including any interest, due to the Seller under this Agreement within a period of thirty (30) days of the same falling due, the Seller shall have the right to resort to any one or more of the following :

(a) Adjust the outstanding amount against the Security Deposit or by invoking the Security Deposit BG maintained in terms of Clause 3 or such portion of it as available; and/or

(b) Invoke the Financial Coverage Bank Guarantee or any cash deposit towards Financial Coverage to the extent available and necessary to meet the outstanding dues; and/or

(c) Suspend supplies of Coal to the Purchaser.

14.2. During the period of suspension of supplies in terms of Clause 14.1 the Seller shall be relieved of his obligations to supply Coal. However, the obligations of the Purchaser under this Agreement shall be deemed to remain in full force.

14.3. In the event of suspension of Coal supplies pursuant to this Clause, the Seller shall have the right to continue the suspension for as long as the interest-free Security Deposit or the Financial Coverage, as the case may be, has not been fully replenished. The Seller shall resume the Coal supplies within three (3) days of payment of the outstanding amount together with interest as also full replenishment of Security Deposit and or the Financial Coverage.

14.4. In the event rail movement is declared/considered not feasible by Railways, review will be made jointly in the matter of mode of transport.

9. The Supreme Court in Sethi Auto Service Station & Another v. Delhi Development Authority & Others observed as under :

14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are

not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.

10. This Court in *Payal Travels v. State of Chhattisgarh & Others* observed as under :

5. It is a trite law that a resolution is not an order and the same cannot be given effect to unless a proper formal order is passed on the basis of resolution by the competent authority. It has been held in a catena of decisions of the Supreme Court that resolution is a mere guideline or recommendation and the same is not effective ipso facto.

11. P. Ramnatha Aiyar's *Advanced Law Lexicon* 3rd Edition defines the word 'recommendation' as advise, counsel or opinion.

12. A Constitution Bench of the Supreme Court, in *Naraindas Indurkha v. The State of Madhya Pradesh & Others*, while considering the distinction between prescription and recommendation in case of text book observed as under:

15. It may be noted that there is a basic distinction between recommendation and prescription of a text book. When a text book is prescribed by an appropriate authority having legal power to do so, it has to be followed by the schools. Prescription of a text book carries with it a binding obligation to follow the text book. There is no such obligation when a text book is merely recommended. Recommendation has merely a persuasive effect, it being open to the schools to accept the recommendation or to reject it as they think fit.

13. In *New India Assurance Company Ltd. v. Nusli Neville Wadia & Another*, with regard to guidelines the Supreme Court observed as under:

23. Issuance of such guidelines, however, is not being controlled by statutory provisions. The effect thereof is advisory in character and thereby no legal right is conferred upon the tenant.

14. The Supreme Court in *Union of India & Another v. Kartick Chandra Mondal & Another* observed as under :

18. An order would be deemed to be a government order as and when it is issued and publicised. Internal communications while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law.

15. Further, in *State of Uttaranchal & Another v. Sunil Kumar Vaish & Others* the Supreme Court held as under :

24. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, can such noting be treated as a decision of the

Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/ reversed/ overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review. (See *State of Punjab v. Sodhi Sukhdev Singh*, *Bachhittar Singh v. State of Punjab*, *State of Bihar v. Kripalu Shankar*, *Rajasthan Housing Board v. Shri Kishan*, *Sethi Auto Service Station v. DDA* and *Shanti Sports Club v. Union of India*.)

16. It is not the case of the respondent that supply of coal under FSA was stopped on account of any order passed by the respondent. Dr. Shukla, does not dispute the fact that stoppage of supply of coal was on the strength of a note dated 12.05.2011 of the Chief Vigilance Officer, wherein, he has recommended for supply of coal under the FSA to the petitioner. As aforestated, the noting has no statutory character and the same cannot be given effect to unless it is accepted and a proper order in accordance with law is passed.

17. Contention of Shri Varma, that a direction may be issued to the respondent to supply coal with effect from January, 2011, does not merits acceptance, as the issue in this case is not non-supply of coal prior to stoppage of supply of coal and further, if the petitioner has any grievance, the petitioner may take recourse to provisions of law and also under FSA.

18. In view of the above, without expressing any opinion on the merits of the case, the petition deserves to be allowed on the ground that the respondent has stopped the supply of coal under FSA without passing proper order on the basis of the note as aforestated, whereunder, the recommendation to stop supply of coal was made. Thus, stopping supply of coal under FSA on the basis of recommendation is not sustainable in the eyes of law.

19. As an upshot, the petition is allowed. The respondent is directed to resume the supply of coal under FSA. However, liberty is reserved to the respondent to take appropriate steps in accordance with law, if so advised.

20. So far as lodging of FIR and certain other allegations in respect of action of the petitioner is concerned, this Court is not making any observation or expressing any opinion at this stage, as the same is the subject matter of investigation and the authorities may proceed with the same, in accordance with law. No order as to costs.