

(2016) 07 CAL CK 0069

In the Calcutta High Court

Case No : M.A.T 624 of 2016. With C.A.N 3821 of 2016

West Bengal Power Development

APPELLANT

Vs

EMTA Coal

RESPONDENT

Date of Decision : 21-07-2016

Acts Referred:

Coal Mines (Special Provisions) Act, 2015 — Section 11

Citation : (2017) 1 WBLR 52

Hon'ble Judges : Nishita Mhatre and Tapabrata Chakraborty, JJ.

Bench : Division Bench

Advocate : Mr. Jayanta Kumar Mitra, Id. A.G, Mr. Abhrajit Mitra, Mr. Abhratosh Majumder, Mr. Jishnu Chowdhury, Mr. Chayan Gupta, Mr. Sandip Dasgupta and Mr. Ravitej Chilumuri, Advocates, for the Appellant; Mr. S.K Kapur, Mr. Jishnu Saha, Mr. Sanjib Kumar Mal, Mr. Ra

Final Decision : Allowed

Judgement

Tapabrata Chakraborty J. - The instant appeal has been preferred against an order dated 22nd March, 2016 passed by the learned Single Judge in WP 27907 (W) of 2015.

2. Shorn of unnecessary details, the facts are that Eastern Mineral and Trading Agency (hereinafter referred to as EMTA) preferred a writ petition being WP 27907 (W) of 2015 challenging the Request For Proposals (hereinafter referred to as RFPs) dated 5th October, 2015 and 17th October, 2015 issued by the West Bengal Power Development Corporation limited (hereinafter referred to as the said Corporation) for selection of Mine Developer and Operator for development and operation of Pachhwara (North) Coal Block and Barjora (North) Coal Block. Upon contested hearing an interim order was passed in the said writ petition on 9th December, 2015 directing the said Corporation to consider the case of EMTA under Section 11 of the Coal Mines (Special Provisions) Act, 2015 (hereinafter referred to as the said Act of 2015). Pursuant to the said interim order the Chairman & Managing Director (hereinafter referred to as CMD) of the said

Corporation passed an order on 23rd December, 2015 rejecting the EMTA's plea for novating the contract. EMTA challenged the said order by an application, being CAN 214 of 2016 and the learned Single Judge by an order dated 11th January, 2016 observed that the said order did not indicate the exact reasons and CMD was directed to reconsider the order and to pass a reasoned order upon giving a short hearing to the writ petitioners. Aggrieved by the said orders dated 9th December, 2015 and 11th January, 2016 passed in WP 27907 (W) of 2015 both the parties filed separate appeals and the same were heard together and the Appeal Court was pleased to allow the appeals preferred by the said Corporation and to dismiss the appeal preferred by EMTA by a judgment dated 12th May, 2016. None of the parties have preferred any appeal against the said judgment dated 12th May, 2016. In the midst thereof, EMTA preferred an application for appropriate direction, being CAN 2958 of 2016, in the pending writ petition, inter alia, praying for an order to restrain the said Corporation from proceeding any further with the RFPs dated 12th February, 2016 and 27th February, 2016 issued pertaining to Barjore Gangaramchak - Bhadulia Coal Mines and Tara (East) and Tara (West) Coal Mines and from receiving the technical, commercial bids in terms of the said RFPs. In the said application, the learned Single Judge passed the impugned order dated 22nd March, 2016 directing the said Corporation to consider EMTA's claim pertaining to the said coal mines under Section 11 of the said Act of 2015 and not to proceed with the tender till communication of the decision.

3. Mr. Jayanta Kumar Mitra, the learned Advocate General appearing for the said Corporation submits that the coal mines in respect of which an order was sought for by the application being CAN 2958 of 2016 are not the subject matter of the writ petition and the RFPs dated 12th February, 2016 and 27th February, 2016 pertaining to the said coal mines are also not under challenge in the said writ petition and that as such, the said application ought not to have been entertained by the learned Single Judge.

4. He further submits that the appeal preferred by the said Corporation against both the said orders dated 9th December, 2015 and 11th January, 2016 passed in WP 27907 (W) of 2015 were allowed by a judgment dated 12th May, 2016 and that in the event it is contended on behalf of EMTA that the coal mines referred to in CAN 2958 of 2016 come within the ambit of the writ petition, the judgment dated 25th May, 2016 becomes operative upon EMTA and in the event it is contended that the said coal mines do not come within the ambit of the writ petition, then EMTA ought to have preferred fresh writ petition.

5. Drawing the attention of this Court to the order dated 23rd December, 2015 passed by the CMD of the said Corporation, he argues that the said order of rejection of EMTA's plea for novating the contract, pertaining to the coal mines in respect of which RFPs dated 5th October, 2015 and 17th October, 2015 were issued, stands fortified with appropriate reasons and it has been rightly observed in the said order that EMTA's claim cannot be considered in view of the statutory

mandate contained in Section 11A of the Mines & Minerals (Development & Regulation) Act, 1957 (hereinafter referred to as the said Act of 1957) and the Auction by Competitive Bidding of Coal Mines Rules, 2002 (hereinafter referred to as the said Rules of 2002). The rigours of Section 11A of the Act of 1957 to the effect that the appointment of contractor for coal mines should be through competitive bidding, cannot be diluted and in view of the observations of the Appeal Court in the judgment dated 25th May, 2016, further relegation of EMTA's claim for consideration would be futile.

6. Mr. Kapur, learned senior counsel appearing for EMTA has drawn our attention to the averments made in the writ application in support of his categorical contention that EMTA's claim pertaining to the coal mines as referred to in the application being CAN 2958 of 2016 cannot be construed to be beyond the ambit of the writ petition since EMTA had been the operator pertaining to all the coal mines, namely, Pachhwara (North), Barjora (North), Barjore Gangaramchak - Bhadulia and Tara (East) and Tara (West). Furthermore, the RFPs dated 12th February, 2016 and 27th February, 2016 pertaining to Barjore Gangaramchak - Bhadulia Coal Mine and Tara (East) and Tara (West) Coal Mine were issued subsequent to preference of the writ petition and as the commercial bids were due to expire on 28th March, 2016, the application being CAN 2958 of 2016 had to be preferred seeking interim protection.

7. Drawing the attention of this Court to the provisions of Section 11 of the said Act of 2015, he submits that the said Corporation is enjoined with a duty to apply its mind and to take a decision, fairly and reasonably, as to whether it would continue with the joint venture agreement with EMTA. After the judgments dated 25th August, 2014 and 24th September, 2014 delivered by the Hon'ble Supreme Court in the case of Manohar Lal Sharma v. The Principal Secretary & Others, reported in (2014) 9 SCC 516 and (2014) 9 SCC 614, the said Act of 2015 was promulgated by the competent legislature and that the said Corporation cannot ignore the mandate contained in Section 11 of the said Act of 2015 and cannot deny consideration of EMTA's claim pertaining to the coal mines referred to in CAN 2958 of 2016, in which it had worked for decades and had supplied coal to the government, on a purported plea to the effect that such order for relegation to the appropriate authority ought to have been sought for by preferring independent writ application.

8. He further argues that Section 11 of the said Act of 2015 is the thin end of the wedge on the basis of which EMTA can endeavour to satisfy the authorities that it is eligible and competent to continue as Mining Developers and such legal right of the petitioner cannot be drowned in the general deluge on the rudiments of the judgments delivered in the case of Manohar Lal Sharma (supra). In support of such contention reliance has been placed upon the judgment delivered in the case of Commissioner of Police, Bombay v. Gordhandas Bhanji, reported in AIR 1952 SC 16.

9. According to him, the judgment dated 25th May, 2016 passed in the earlier

appeals has no manner of application since the said judgment was delivered after the said Corporation had considered EMTA's claim pertaining to the respective coal mines in terms of the provisions of Section 11 of the said Act of 2015 but in the instant case, no such decision has yet been taken.

10. In reply, placing reliance upon paragraph 104 of the judgment delivered in the case of Manohar Lal Sharma (*supra*), Mr. Mitra submits that while considering EMPT's claim pertaining to the coal mines, the said Corporation is bound to act in terms of the provisions of the said Act of 1957 and the rules framed thereunder.

11. We have heard the learned advocates appearing for the respective parties and we have considered the materials on record.

12. A legal tussle has spiralled up to this Court seeking a quietus to the issues as to whether the application for appropriate order, being CAN 2958 of 2016, filed in connection with the main writ petition was maintainable and as to whether, in the facts and circumstances of the case, it was incumbent upon the respondents to consider EMTA's claim and to arrive at a decision in terms of the provisions of Section 11 of the said Act of 2015 prior to commencement of the bidding process.

13. Admittedly, EMTA had been the operator pertaining to all the coal mines, namely, Pachhwara (North), Barjora (North), Barjore Gangaramchak - Bhadulia and Tara (East) and Tara (West) and the RFPs pertaining to the coal mines in respect of which an order was sought for on the basis of CAN 2958 of 2016 were issued subsequent to preference of the writ petition and as on the basis of the same the said Corporation embarked upon a bidding process, the learned Court could not have shut its eyes to such event which cropped up during the pendency of the litigation and which had a material bearing on the ultimate decision to be taken. As such, in our opinion, the application being CAN 2958 of 2016 was maintainable and the learned Single Judge rightly entertained the same.

14. To answer the issue as to whether in facts of this case the matter needs to be relegated to CMD for consideration of EMTA's claim pertaining to the concerned coal mines, the observation made in the earlier order dated 12th May, 2016 needs to be taken into consideration. In the said judgment the Appeal Court, while considering the order dated 23rd December, 2015 passed by CMD, observed as follows :

"The order reflects that the authority has taken into account all aspects of the matter and has only thereafter passed an order that the Power Corporation would not novate the contract with the prior allottee. The decision of the Managing Director is not expected to be a judicial decision. It is a business decision which must be made. Since the Power Corporation is an instrumentality of the State the decision must reflect that its Managing Director had made an informed choice for not novating the contract, without being arbitrary or capricious. The learned Single Judge has directed the Managing Director to pass a further order after affording a personal hearing to EMTA. In view of the

judgment of the Supreme Court in Manohar Lal Sharma (supra) the Power Corporation is not bound to afford a hearing to the prior allottee. With respect, we are unable to agree with the observations of the Karnataka High Court on this aspect. The learned Single Judge, in our opinion, was not right in his view that reasons have not been disclosed by the Managing Director for refusing to novate the contract. Therefore, there was no need to direct the Managing Director to pass a fresh order."

15. A perusal of the order dated 23rd December, 2015 would reveal that while passing the same, the CMD of the said Corporation had borne in mind the observations of the Hon'ble Supreme Court in Manohar Lal Sharma's case (supra) and the fact that the process of coal block allocation and procedure of formation of Bengal EMTA Coal Mines Limited, in which EMTA Coal Limited has 74% share, is being investigated by the Central Bureau of Investigation under the supervision of the Hon'ble Supreme Court. There has been no change in the facts as taken into consideration by CMD while rejecting EMTA's claim pertaining to the coal mines in respect of which RFPs were issued on 5th October, 2015 and 17th October, 2015. No new material has been brought on record and no difference in the facts, as existing on the date of issuance of the earlier order of the CMD dated 23rd December, 2015, has been brought to the notice of this Court which would persuade the CMD to arrive at a different conclusion pertaining to the subsequent RFPs dated 12th February, 2016 and 27th February, 2016, in the event the matter is relegated. The issue of relegation depends upon the nature of jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected and the scheme and policy of the statute. The extent of power of CMD has not been disputed and the mode and manner of such exercise of power had already been found by the Appeal Court to be free from arbitrariness and that as such any direction towards relegation of the petitioners' claim to the CMD would be otiose.

16. In the event EMTA's claim for novating the contract in its favour consequent to Section 11 of the said Act of 2015 pertaining to the concerned coal mines is relegated to CMD, the said authority in compliance of such direction cannot pass any order being oblivious of the observations of the Appeal Court in the judgment dated 12th May, 2016 and the provisions of Section 11A of the said Act of 1957 and Rule 5 of the Rules framed thereunder wherein it has been categorically stipulated that the State Government shall grant reconnaissance permits, prospective licence or mining lease in respect of coal to such company as selected through auction by competitive bidding and that as such further relegation of EMTA's claim to the said Corporation for consideration, in our opinion, would be an idle formality.

17. The issues involved in the case of Commissioner of Police, Bombay (supra) were as to whether the order towards cancellation of license was passed by the Commissioner on his own authority acting in exercise of some power which was either vested in him or of which he bona fide believed himself to be possessed

and as to whether the State Government was competent to take such decision. It was held that the Commissioner was vested with the authority and discretion to cancel or suspend the relevant license under the Rules and that the direction of the State Government towards cancellation of such license was found to be without jurisdiction and the Commissioner was directed to consider afresh the claim of the respondents therein weighing all different aspects of the matter. The factual scenario involved in the instant lis is totally different. It is not the case of EMTA that the earlier order dated 23rd December, 2015 passed by the CMD of the said Corporation was without jurisdiction. On the contrary, according to EMTA, it was incumbent upon the CMD to consider such claim. The said judgment delivered in the case of Commissioner of Police, Bombay (supra) is, thus, distinguishable on facts and the same has no manner of application in the instant case.

18. For the reasons discussed above, the learned Single Judge's direction upon the said Corporation, in the impugned order dated 22nd March, 2016, towards consideration of EMTA's claim under Section 11 of the said Act of 2015 pertaining to the coal mines in the application being CAN 2958 of 2016, is set aside and the said Corporation would be free to proceed with the tender. Needless to observe, the said tender process shall abide by the result of the writ petition.

19. With the above observations and directions, the appeal and the application are disposed of.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Later: After the judgment is pronounced in open Court, the learned counsel appearing for the respondents prays for stay of the same.

Prayer is considered and refused.