SUPREME COURT OF INDIA

Sushila Chemicals P.Ltd.

Vs.

Bharat Coking Coal Ltd.

C.A.Nos.8037-38 of 2010

(Altamas Kabir and A.K.Patnaik JJ.)

15.09.2010

JUDGEMENT

A.K.Patnaik, J.

1. Leave granted.

2. These appeals are against the common judgment and order dated 27.10.2009 passed by the Division Bench of the Patna High Court in L.P.A Nos.1265 and 1266 of 2009.

3. The relevant facts very briefly are that pursuant to public advertisements issued by Coal India Limited (respondent No.2 herein) calling upon entrepreneurs to establish coal based industries on the basis of technology developed by the Central Mines, Planning and Design Institute Ltd., the appellants purchased the technology and established plants for manufacturing special smokeless fuel during 1990-1991. The subsidiary of Coal India Limited, Bharat Coking Coal Limited (for short `BCCL'), the respondent No.1 herein, recommended grant of linkage of 5,000 MT of coal to the plants of the appellants and Coal India Limited granted coal linkage to the appellants and the appellants continued to run their respective plants and manufacture special smokeless fuel by processing the coal supplied by BCCL to them. On 18.10.2007, the Government of India, Ministry of Coal discontinued the traditional linkage system and in its place adopted a new coal distribution policy under which coal was to be supplied to different consumers through a Fuel Supply Agreement (for short `FSA') at notified prices to be fixed and declared by Coal India Limited. In accordance with this new policy, BCCL entered into FSA with the two appellants for supply of coal. Clause 4.4 of FSA provided that the total quantity of coal supplied to the appellants under the agreement is meant for use in the plants of the appellants and the appellants shall not sell or divert or transfer the coal for any purpose whatsoever and in the event they engage or plan to engage into any such re-sale or trade, the BCCL shall terminate the FSA forthwith without any liabilities or damages whatsoever payable to the appellants. On 07.06.2009, the Central Bureau of Investigation (for short the `CBI') registered First Information Report (FIR) against 10 consumers including the appellants alleging inter alia that the ten consumers

entered into a criminal conspiracy with Shri Udayan Bhattacharya, the then General Manager (S&M) of BCCL and in furtherance thereof, lifted 11,94,940 tonnes of coal and instead of utilizing the same in their respective plants, sold the same in the open market at higher prices and as a result BCCL has suffered a loss of Rs.4,36,15,300/- approximately and the accused have made corresponding wrongful gain to themselves. In the FIR, the CBI further stated that the facts disclosed the commission of offences punishable under Section 120-B read with Sections 420, 467, 471 of the Indian Penal Code (for short `IPC') and Section 13(2) read with Section 13(d) of the Prevention of Corruption Act, 1988 by Shri Udayan Bhattacharya and the proprietors of different consumer firms and therefore a criminal case be registered and the investigation be taken up. The Chairman of the Coal India Limited thereafter advised the Chairman-cum-Managing Director of BCCL to suspend supply of coal to the firms named in the FIR including the appellants and accordingly BCCL suspended supply of coal to the appellants by a wireless message dated 13.06.2009. BCCL also issued notices to them to explain why FSA executed in favour of the appellants should not be cancelled on the basis of the FIR lodged by the CBI containing the allegations that the appellants were involved in a criminal conspiracy leading to the breach of terms and conditions of FSA.

4. Aggrieved, the appellants filed writ petitions Nos. 8144 of 2009 and 8311 of 2009 before the Patna High Court challenging the suspension of supply of coal by BCCL to the appellants by the Wireless Message dated 13.06.2009 and the learned Single Judge, who heard the writ petitions, held in his common judgment and order dated 26.08.2009 that clause 13 of the FSA was the only clause which provided for suspension of supply of coal to the units of the appellants and this clause provided that suspension shall be permissible when the appellants failed to pay any amount towards purchase price or interest thereon and there was no provision in the FSA for suspension of supply of coal to the appellants on the ground that a criminal case has been instituted regarding misuse of the coal. The Learned Single Judge further held that misuse of coal by the appellants was however germane as per clause 15 of FSA for termination of the agreement and the General Manager (S&M) vide his letter dated 16.07.2009 has issued a show cause to the appellants for termination of the agreement on the ground of misuse of coal and institution of FIR. The learned Single Judge, therefore, quashed the order directing suspension of supply of coal to the appellants and allowed the writ petitions.

5. The respondents then challenged the common judgment and order dated 26.08.2009 before the Division Bench of the Patna High Court in L.P.A. Nos. 1265 and 1266 of 2009 and in the common judgment and order dated 27.10.2009, the Division Bench placed reliance on a judgment of the Division Bench of the Patna High Court dated 05.07.2002 passed in M/s. Central Coal Field Limited vs. M/s, Aman Lime Works (LPA No.701 of 2002) and held that in the larger interest, resumption of supply of coal cannot be directed by the court so long as the respondents do not consider the explanation of the appellants in response to the show cause notice issued by the respondents and allowed the appeals but directed the appellants to take a final decision pursuant to the show cause notice dated 16.07.2009 at an early date.

6. Mr. Jaideep Gupta, learned counsel for the appellants, submitted that the reasons given by the Division Bench of the High Court in reversing the order passed by the learned Single Judge are not correct. He submitted that the plants of the appellants, admittedly, were manufacturing smokeless fuel and the object of the FSA executed by the BCCL in favour of the appellants was to provide coal for the plants of the appellants manufacturing smokeless fuel and, therefore, suspension of supplies of coal by BCCL without terminating the agreement (FSA) is unreasonable and arbitrary and violative of Article 14 of the Constitution and for this reason the learned Single Judge had quashed the suspension of supplies of coal by the BCCL to the appellants. He further submitted that the BCCL suspended supplies of coal to the plants of the appellants only on the basis of the allegations in the FIR lodged by the CBI. He argued that as BCCL did not have sufficient materials in its possession, the suspension of supplies of coal to the appellants was arbitrary and unreasonable and violative of Article 14 of the Constitution. He cited the decisions of this Court in *ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.*[1] *and Noble Resources Ltd. v. State of Orissa & Anr.*[2] for the proposition that a writ petition was maintainable against the State and its instrumentalities and functionaries even in contractual matters of the State if their action is found to be violative of Article 14 of the Constitution or in the breach of public law or vitiated by mala fides or ulterior motives.

7. Mr. Gupta next submitted that the learned Single Judge of the High Court had rightly held that under Clause 13.1 of FSA, suspension of coal supply is permitted only on the limited ground of non-payment of the dues by the appellants to the BCCL towards amount of the price of the coal and any interest thereon and not on any other ground and, therefore, BCCL could not suspend the supply of coal to the appellants on the mere institution of the criminal case by the FIR lodged by the CBI. He submitted that after the judgment and order of the Division Bench of the High Court, the appellants submitted their explanation in reply to the show-cause notice dated 16.07.2009 of the BCCL, but the BCCL has passed the orders on 03.02.2010 holding that the appellants have failed to submit substantial proof regarding end use of the coal in their plants for which the coal was delivered as per FSA and hence resumption of supply of coal to the appellants cannot be agreed to. He submitted that since the respondents have not terminated FSA for supply of coal to the appellants this Court should direct the respondents to resume supply of coal to the appellants.

8. Mr. Anupam Das, learned counsel for the respondents, submitted that the FIR lodged by a premier investigating agency like the CBI and the chequered history of the appellants before the FIR were sufficient for the BCCL to suspend the supply of coal to the appellants under FSA. He submitted that in any case investigation into the allegations made in the FIR has already been completed by the CBI and charge sheet has been filed against the appellants which vindicate the stand taken by the respondents that the appellants were diverting coal meant for their plants for sale in the open market.

9. Mr. Das further submitted that the Division Bench of the Patna High Court has rightly held that in larger public interest resumption of supply of coal could not be ordered. He submitted that in the orders dated 03.02.2010 the BCCL have taken view that the documents submitted

on behalf of the appellants only prove payment of sales tax and the appellants have failed to submit substantial proof regarding the end use of the coal in the plants for which coal was delivered as per FSA and hence the resumption of supply of coal to the appellants cannot be agreed to.

10. Mr. Das cited the observations of this Court in *Ashoka*[3] in Para 188 at Page 703 on the need to control black marketing and mis-utilization of coal. He submitted that it is pursuant to these observations of this Court that the new Coal Distribution Policy has been framed to discontinue the Linkage System which could not check the menace of black marketing and diversion of coal to the open market and supply of coal on strict terms and conditions stipulated in FSA to the consumers has been contemplated to ensure proper utilization of the coal in the plants. He submitted that this is why in Clause 4.4 of the FSA it is clearly provided that the total quantity of coal supplied to the appellants under the agreement is meant for use in the plants of the appellants and the appellants shall not sell/divert and/or transfer the coal for any purpose whatsoever and in the event they engage or plans to engage into any such resale or trade, the BCCL shall terminate the FSA forthwith without any liabilities and damages whatsoever payable to the appellants. He submitted that therefore the BCCL can suspend supply of coal to the appellants if the appellants have not been able to establish that the coal already supplied to the appellants has been used in the plants of the appellants. He submitted that Clause 13 of FSA, which provides that if the appellants fail to pay any amount including any interest due to the BCCL towards purchase price of the coal the BCCL can suspend supply of coal to the appellants, is not exhaustive of the contingencies in which the BCCL can suspend supply of coal to the appellants.

11. We have considered the submissions of the learned counsel for the parties and we are unable to accept the contention of the appellants that the Division Bench of the High Court should have sustained the judgment and order of the learned Single Judge of the High Court quashing the order suspending the supplies of coal to the appellants under FSA. The learned Single Judge of the High Court had held that BCCL could not suspend the supplies of coal to the appellants on the mere institution of a criminal case by the FIR lodged by the CBI. The FIR lodged by the CBI contained allegations of mis-utilization of the allotted coal and sale of the allotted coal by the appellants in the open market. As a matter of fact, in the charge sheet which has been filed after investigation in the Court of Special Judge, CBI Cases, Dhanbad, it is stated that a search was conducted at the plant premises of the appellants in June 2009 by the CBI officials in the presence of independent witnesses during which the plants of the appellants were found to be non-functional and the names of employees/workers as per the Attendance Register as well as other documents relating to sale of finished goods as produced by the appellants were found to be fake and fabricated as full particulars, addresses etc. were not provided in the records in respect of such employees/workers engaged and purchasers of finished goods and thus the quantity of coal issued to the appellants-companies was not utilized in their plants but sold in the black-market. It was thus clear that there were materials with the CBI in support of the allegations made in the FIR against the appellants that they were not utilizing the allotted coal in their plants but were selling the same in black-

market, but these materials could not be placed before the Court because the CBI was not impleaded as a respondent in the writ petitions filed by the appellants.

12. We further find that in the counter-affidavit filed in the High Court in reply to the writ petitions filed by the appellants, Coal India Limited and BCCL have pleaded that under Clause 4.4 of FSA the appellants were required to utilize the entire quantity of coal allotted to them in their respective plants and had undertaken not to sell/divert/transfer the coal for any purpose whatsoever and as the FIR lodged by the CBI disclosed breach of this clause of FSA, Coal India Limited and BCCL had to suspend the supplies of coal to prevent further diversion of coal by the appellants and this decision was taken pending a final decision regarding termination of FSA in terms of Clause 15 thereof. Thus, the case of the respondents herein before the High Court was that suspension of supply of coal has been ordered to prevent further diversion of coal by the appellants. The Coal India Limited and BCCL are Government Companies of the Government of India and are bound by the policy decisions of the Government of India, Ministry of Coal, and since under the new Coal Distribution Policy formulated pursuant to the observations of this Court in Ashoka Smokeless Coal India (P) Ltd. & Ors. v. Union of India & Ors. (supra) mis-utilization of allotted coal and black-marketing of such coal by the appellants was to be checked, the Coal India Limited and BCCL did not act arbitrarily or unreasonably to suspend the supplies of coal under FSA to the appellants, if they entertained a serious doubt on the basis of the FIR lodged by the CBI that the supplies of coal, if made, to the appellants may be mis-utilized by the appellants and may be sold in the open market.

13. It is settled by a series of decisions of this Court starting from *Kumari Shrilekha Vidyarthi v. State of U.P.*[4] that even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law. In *Sterling Computers Ltd. v. M/s M & N Publications Limited and Others*[5] in para 28, however, this Court held: "Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones."

> "Obviously, one such relevant consideration which the Coal India Limited and BCCL as public authorities have to consider is whether continuation of supply of coal to the appellants may not lead to mis-utilization or black-marketing of the coal by the appellants which are prohibited under FSA and the policy decision of the Government considering the allegations made by the CBI in the FIR on the basis of the reliable information received."

14. It is true as has been held by the learned Single Judge of the High Court that Clause 13(1) of FSA provides that in the event the appellants fail to pay any amount including any interest due to BCCL under FSA within a period of 30 days of the same falling due, BCCL shall have the right to suspend supplies of coal to the appellants, but Clause 13(1) does not

stipulate that in no other contingency the BCCL can suspend supplies of coal under FSA to the appellants. Moreover, Clause 13(1) of FSA enumerates the three options available to BCCL in case the dues towards the price of coal and interest is not paid by the appellants and it does not provide for the different contingencies in which BCCL can suspend the supplies of coal to the appellants. In our considered opinion, the BCCL will also have the right to suspend supplies of coal to the appellants where it has doubts that the appellants may mis-utilize the allotted coal and divert or sell the same in open market because, as would be clear from Clause 4.4 of the FSA and the new Coal Distribution Policy decision dated 18.10.2007, the very object of FSA as well as policy decision of the Government is to allot coal to the appellants for utilization in their plants and not for any other purpose. Therefore, if the FIR lodged by the CBI, which is a premier investigation agency of the Central Government, created serious doubts that the allotted coal may be diverted or sold in the open market instead of being utilized in the plants of the appellants, the BCCL would be within its rights to suspend the supplies of coal to the appellants till the doubts are cleared in appropriate proceedings.

15. The Division Bench of the High Court was, therefore, right in setting aside the judgment and order of the learned Single Judge quashing the order of the BCCL suspending supplies of coal to the appellants. We accordingly dismiss these appeals with liberty to the appellants to challenge the orders dated 03.02.2010 in which the BCCL has held that the appellants have failed to submit substantial proof regarding the end use of the coal in their plants. No costs.

[1]*(2004) 3 SCC 553*
[2]*(2006) 10 SCC 236*
[3]*(2007) 2 SCC 640*
[4]*(1991) 1 SCC 537*
[5]*(1993) 1 SCC 445*