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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 330 of 2015

Salasar Steel & Power Ltd. A company incorporated under the Companies Act, 1956 through its Authorised Signatory Shri Manish Mohta having its registered office at 1st Floor, Bhatia Complex, Opp. Rajkumar College, G.E. Road, Raipur, Chhattisgarh 492 001.

---- Petitioner

Versus

1. M/s. South Eastern Coalfields Limited, Through its Chairman-cum-Managing Director, Seepat Road, Bilaspur, Chhattisgarh 495006
2. M/s. Coal India Limited, Through its Chairman-cum-Managing Director, 5th Floor, Core I and II, Scope Minar, Laxmi Nagar District Centre, Laxmi Nagar, New Delhi 110 092
3. Union of India, Ministry of Coal, Through its Secretary, Shastri Bhawan, New Delhi 110 001

---- Respondents

For Petitioner	:	Shri Raunak Jain, Advocate
For Respondent No. 1	:	Shri V.R.Tiwari, Advocate.
For Respondent No. 3	:	Shri Narendra Kumar Vyas, Assistant Solicitor General.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Order on Board

Per Navin Sinha, Chief Justice

27/08/2015

1. The Petitioner is aggrieved by order dated 17.1.2015 passed by Respondent No. 1 communicating material breach of the provisions of the Fuel Supply Agreement (hereinafter referred to as 'the FSA') executed between the parties for the period 2008-2013 and forfeiting security deposit for that reason in accordance with Clause 4.2, 16.1.8 read with Clause 3.7 of the FSA.

2. Indisputably, the FSA for five years expired on 30.4.2013. The Petitioner sought renewal of the agreement. During subsistence of the extended period, pending decision on the renewal, Respondent No.1 on 10/11.12.2013 informed the Petitioner that since it had lost its Captive Power Plant status (hereinafter referred to as 'the CPP') for the year 2010-2011 pursuant to order dated 3.7.2013 of the Chhattisgarh State Electricity Regulatory Commission, it amounted to material breach of the conditions of the FSA. The extended period of the agreement was therefore terminated under Clause 4.2 and 16.1.5 of the same forfeiting security deposit also. The Petitioner, in response to the same, on 15.1.2014 gave a notice for resolution of dispute under Clause 15 of the FSA. It is beyond dispute from the pleadings of the parties that pursuant to the same, Respondent No. 1 agreed to resolve the dispute in terms of clause 15 after which assurance the Petitioner withdrew its letter dated 15.1.2014. The withdrawal was therefore conditional and not absolute. The Respondent No. 1 has then passed the impugned order.

3. Learned Counsel for the Petitioner submits that it is aggrieved both by the termination of the FSA during the extended period of the contract alleging material breach on its part as also by the order dated 5.10.2013 issued by the Respondent No.1 incorporating the requirement for an undertaking as contained in Annexure 1 and 2 to the same for renewal of the FSA, it being violative of the conditions laid down in the National Coal Distribution Policy framed by the Union of India dated 18.10.207 and also the minutes in this regard of the Standing Linkage Committee (Long Term) with regard to those in CPP category.

4. Elaborating the submissions, Learned Counsel submitted that Clause 4.2 of the agreement dealing with end use of coal, prohibited sale, transfer or diversion of the coal supplied under the agreement to a third party and which would amount to a material breach leading to termination. The

Respondent No.1, for the purpose was also empowered to physically verify by local inspection end use of the coal by the Petitioner. The conclusion for breach of the clause was completely unfounded on facts. Loss of CPP status did not constitute a material breach under the agreement and neither could it lead to any presumption for unauthorized diversion of coal. Unauthorised user of coal supplied under the agreement was a question of fact and a finding to be arrived at specifically after due opportunity to the Petitioner. It is not the case of Respondent No.1 that the Petitioner has diverted or unauthorisedly used the coal allotted. Once the Petitioner invoked the dispute resolution clause 15, it being beyond the pale of any controversy that discussions and negotiations took place, Respondent No.1 was required to reduce the resolution of the dispute in writing duly signed by the representatives of the parties. The Petitioner in its representation dated 15.1.2014, inter alia, had also raised an issue with regard to supply of coal even if the CPP status was lost, in terms of the National Coal Distribution Policy and the minutes of Standing Linkage Committee (Long Term). Without dealing with the aforesaid issues, traveling beyond the original notice dated 10/11.12.2013, the impugned order dated 17.1.2015 has been passed incorporating new grounds which were well available to the Respondent No.1 on 10/11.12.2013 but which were not considered relevant by it for the purpose. The order dated 17.1.2015 is therefore arbitrary on this ground also because it takes into consideration materials considered extraneous and irrelevant as opined by Respondent No.1 itself as on 10/11.12.2013. The Petitioner is therefore entitled to refund of the security deposit and the orders dated 10/11.12.2013 and 17.1.2015 are both required to be set aside as not sustainable

5. It is next submitted that renewal of the FSA sought by the Petitioner, even if it be in the domain of Respondent No.1, it cannot impose conditions with regard to past and future CPP status as contained in the order dated 5.10.2013 as they are clearly beyond the guidelines and directions of the

Union of India in the Ministry of Coal as laid down in the National Coal Distribution Policy and the minutes of the Standing Linkage Committee (Long Term). No counter-affidavit has been filed on behalf of the Union of India denying the assertions in that regard contained in the writ petition. Respondent No.1 is therefore required to decide the renewal application without compelling and requiring the Petitioner to file affidavits in that regard.

6. The writ petition was filed after serving copies on Union of India on 23.2.2015. More than six months have gone by and no counter-affidavit has been filed on behalf of the Union of India.

7. Learned Counsel for the Respondent No.1 submits that there has been no arbitrariness on its part. The Petitioner invoked the dispute resolution clause which was complied with and after hearing the Petitioner, the impugned order dated 17.1.2015 has been passed. What may or may not have been said in the order dated 10/11.12.2013 is no more relevant. If Respondent No. 1 was satisfied regarding loss of CPP status, holding it to be a material breach entailing forfeiture of security deposit, the Court may not interfere with the order. It cannot be said that the orders are without reasons.

8. It is further submitted that there is no vested right of renewal of the FSA in the Petitioner. Respondent No.1 was entitled to incorporate further conditions at the time of renewal because every renewal essentially amounts to a fresh grant. The conditions incorporated by letter dated 5.10.2013 was well within the powers of Respondent No. 1 and cannot be described as arbitrary or irrational.

9. We have considered the submissions on behalf of the parties.

10. The issue for termination of the agreement for material breach entailing forfeiture of security deposit and renewal of the FSA, are distinct issues and are required to be dealt separately.

11. The Petitioner entered into an FSA with Respondent No.1 on 28.4.2008 for its 15 MW CPP located at village Gerwani, Ambikapur Road, Raigarh. We have been taken through the agreement and do not find any clause in the same that loss of CPP status at any stage during subsistence of the agreement would tantamount to a material breach entailing termination or that it shall amount to diversion or unauthorized use of coal inviting the application of clause 4.2 of the agreement.

12. Clause 4.2 of the agreement is clear in its language and admits of no ambiguity. The clause has to be read in its entirety in its plain and natural grammatical meaning without reading into it anything else as the intention of the parties has to be gathered from the language used in the agreement itself.

13. Read together, the clause provides that if the Petitioner diverted, sold, transferred or in any manner dealt with the coal supplied to it under the FSA by Respondent No.1, it would amount to a material breach of the agreement. Respondent No.1 was also entitled to examine and even physically verify such unauthorised user. It is not the case of Respondent No.1 that it ever carried out a physical inspection of the CPP of the Petitioner and arrived at a finding of user contrary to the FSA. The letter dated 10/11.12.2013 did not make any such allegation. Merely because the Petitioner may have lost its CPP status for the year 2010-11, it cannot lead to any conclusive opinion of diversion or unauthorised user of the coal by any prudent standard. Loss of CPP status may entail denial of certain advantages that may be provided by the State or other authorities but cannot lead to an inescapable opinion for unauthorised user of coal.

14. If that were not enough, after the Petitioner represented invoking the dispute resolution clause. Respondent No.1 was required to act strictly in accordance with Clause 15.3. The agreement sets out the rights and obligations of the parties. It binds both the Petitioner and Respondent No.1. If the Petitioner was assured for resolution of the dispute and in good faith withdrew its letter dated 15.1.2014 it does not lead to any conclusion that the dispute had come to an end. If that were so, there was no need for Respondent No.1 to pass fresh orders on 17.1.2015 referring to its earlier order dated 10/11.2013 and the Petitioners letter dated 15.1.2014. It could have quite simply only reiterated its earlier order dated 10/11.12.2013 as the dispute did not exist after its withdrawal by the Petitioner. The resolution of the dispute was required to be reduced in writing signed by representatives of the parties. The order dated 17.1.2015 does not meet the requirement of clause 15.3 of the agreement. Having singed the agreement, it was not open for Respondent No.1 to deviate from the same and adopt some other procedure to its own satisfaction. It is not the case of Respondent No.1 that the Petitioner had refused to sign any agreement that may have been arrived at because of which unilateral orders had been issued. We are therefore in agreement with Learned Counsel for the Petitioner that if the grounds mentioned in the order dated 17.1.2015 existed when notice was given on a very specific ground on 10/11.12.2013, there has to be an explanation why it was not incorporated. The only reasonable conclusion in the circumstances is that on 10/11.12.2013, Respondent No. 1 itself did not consider the further grounds mentioned in the order dated 17.1.2015 necessary or relevant.

15. For that reason, we are unable to uphold the orders dated 10/11.12.2013 and 17.1.2015 and set aside the same. The interim order dated 25.2.2015 restraining Respondent No.1 from forfeiting the security deposit is made absolute. If the Union of India had filed counter-affidavit, it would have facilitated us in giving a quietus to the matter for renewal today itself. If a period of more than six months has been considered insufficient by the Union of India to file counter-affidavit for assisting us in the matter more so when the sheet anchor of the arguments of the Petitioner are based on decisions taken by the Union of India, we are not persuaded to keep the writ petition pending before us a statistic for reasons attributable to the Union of India.

16. The matter for renewal of the FSA is therefore referred to Respondent No.3, Secretary, Ministry of Coal, Government of India to examine the contentions of the Petitioner that the conditions sought to be incorporated by Respondent No.1 with regard to past and future CPP status through communication dated 5.10.2013 with its enclosures was beyond the National Coal Distribution Policy and the minutes of the Standing Linkage Committee (Long Term). The Petitioner, if so advised may file any additional representation before the Secretary, along with a copy of the present order, in support of its claims for renewal. In the facts and nature of issues involved, we are further satisfied to direct that a personal hearing would facilitate a better and early decision in the matter.

17. Considering that there is always an urgency in commercial matters, the Secretary is expected to pass final orders in the aforesaid manner within a maximum period of three months from the date of production and/or receipt of a copy of the order. If the Secretary proposes to pass an order adverse to the Petitioner, he is required to pass a reasoned and speaking order so that judicial review, if necessary, is facilitated.

18. The writ petition is allowed.

Sd/-	Sd/-
(Navin Sinha)	(P. Sam Koshy)
CHIEF JUSTICE	**JUDGE**

Amit