

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 20th October, 2015

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W.P.(C) 10030/2015 & CM No.24548/2015 (for stay).

M/S SHAURYA COAL CARRIERS PVT. LTD..... Petitioner

Through: Mr. Anunaya Mehta, Adv.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Dev P. Bhardwaj, CGSC for R-1&2/UOI with Col. Lamba.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.24549/2015 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

W.P.(C) 10030/2015 & CM No.24548/2015 (for stay)

3. The petition (i) impugns the letter dated 5th October, 2015 of the respondent No.2 Directorate General of Resettlement (DGR), Ministry of Defence to the respondent No.3 Mahanadi Coalfields Ltd. (MCL) requiring the respondent No.3 MCL to confirm the termination of the contract with the petitioner and to withhold all payments to the petitioner till clearance from the respondent No.2 DGR; (ii) impugns the letter dated 24th April, 2015 of the respondent No.2 DGR to the petitioner to submit parawise comments to the earlier letter dated 6th April, 2015 of respondent No.3 MCL to the

respondent No.2 DGR; (iii) seeks a direction to the respondents to “refund all amounts withheld from the petitioner” including the amount of approximately Rs.91 lakhs withheld earlier as also the amount of approximately Rs.50 lakhs withheld in terms of the letter dated 5th October, 2015; and, (iv) seeks to restrain the respondents from withholding any amounts of the petitioner and from taking any coercive action against the petitioner without first issuing a proper show cause notice to the petitioner.

4. Having *prima facie* not found the petition entertainable, the counsel for the petitioner has been heard at length. He has argued:

- (a) that the petitioner is an Ex-Serviceman (ESM) company;
- (b) that the respondent No.2 DGR has been set up to rehabilitate the ESM ;
- (c) that the respondent No.2 DGR has signed a Memorandum of Understanding (MoU) with the respondent No.3 MCL of sponsorship of ESM companies for transportation of coal;
- (d) that the petitioner company was so sponsored by the respondent No.2 DGR;
- (e) that the petitioner company, instead of signing a fresh agreement with the respondent No.3 MCL, merely ratified the MoU

aforesaid which governs the relationship between the petitioner and the respondent No.3 MCL;

(f) that Clause 20 of the said MoU deals with “Termination of Contract” and *inter alia* provides that if an ESM company is not adhering to the conditions of MoU and/or is found indulging in any malpractice, MCL/Coal Subsidiary may initiate action for termination of contract, withholding of payment of bills, forfeiture of security deposit but, after issuing a show cause notice to the ESM company under intimation to DGR and after affording opportunity to ESM company to initiate corrective / remedial measure;

(g) that the respondent No.2 DGR has issued a show cause notice to the petitioner and which the petitioner could not place before this Court owing to the extreme urgency in which this petition has been filed but there has been no compliance of Clause 20 of the MoU aforesaid which governs the contract of transportation of coal under which the petitioner has been performing;

(h) that the respondent No.2 DGR has on the contrary directed the respondent No.3 MCL to terminate the contract of the petitioner in non-compliance with Clause 20 of the MoU;

(i) that in response to the various show cause notices issued by the respondent No.2 DGR, the petitioner has submitted its replies and has fully satisfied the respondent No.2 DGR of being in compliance of all the terms and conditions and has also remedied / ratified the violations which had occurred inadvertently and owing to be misguided from the actions of the respondent No.2 DGR.

5. I have at the outset enquired from the counsel for the petitioner, as to how the writ remedy under Article 226 of the Constitution of India is available to the petitioner, the dispute subject matter of petition being in the realm of private contract and having no public law character and whether not the appropriate remedy for the petitioner is a remedy under the civil law or of arbitration, if agreed to.

6. The counsel for the petitioner, well prepared to answer the said query, has at the outset stated that there is no arbitration clause in the agreement between the parties and the only other remedy available to the petitioner would be by way of a civil suit. Else on law, he has invited attention to ***ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2004) 3 SCC 553, ***Whirlpool Corporation Vs. Registrar of Trade Marks***

(1998) 8 SCC 1 and to the latest dicta in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728.

7. The Supreme Court in ***Joshi Technologies International Inc.*** supra having dealt also with the other two judgments cited as well as a host of other judgments and having *inter alia* observed that the summarisation of the legal position in paras 27 & 28 of ***ABL International Ltd.*** has to be understood in the context of discussion that preceded and noted in the said judgment, I have heard the counsel for the petitioner further with respect to ***Joshi Technologies International Inc.*** supra only and have enquired from him, how the present petition can be said to be having any public law character attached to it and whether not the present petition is *inter alia* for enforcing a money claim *per se* arising out of contractual obligations and which have been held to be normally not entertainable, except in the exceptional circumstances.

8. The counsel for the petitioner has attached the public law character to the present action by contending that the act of the respondents No.1 & 2 Union of India (UOI) and DGR of sponsoring ESM companies for coal

transportation is a rehabilitative and welfare measure for the ESM and thus is not purely a matter of contract but has a public law element to it.

9. I have further enquired from the counsel, whether not all actions of the State are in a way for welfare of the citizens or for some section/s of the society or the other and that if that were to be the test, whether not it would tantamount to writ remedy being available against the State, including in matter of contract and which otherwise in the judgment supra has been held to be not.

10. The counsel for the petitioner has then contended that the writ petition should be entertained because the respondent No.2 DGR is asking the respondent No.3 MCL to act in violation of the terms and conditions of the MoU which was entered into by the respondent No.2 DGR itself with the respondent No.3 MCL.

11. I am afraid, the matter would still be in the realm of the contract. Moreover, all that the respondent No.2 DGR did vide the impugned letter dated 5th October, 2015 was to ask the respondent No.3 MCL to confirm the termination of the contract of the petitioner. If the respondent No.3 MCL before affecting the said termination is required to follow a procedure, I am

sure the said procedure shall be followed, if not already followed and there is nothing to suggest that it will not be.

12. Notice in this regard may however be taken of the letter dated 6th April, 2015 of the respondent No.3 MCL to the respondent No.2 DGR. The respondent No.3 MCL in the said letter informed (i) that during verification of documents of the Pay Loaders deployed by the petitioner, it was found that the ownership of one of the Pay Loaders was not as per the norms of the MoU; (ii) that the petitioner in response thereto had stated that the said Pay Loader may not be allowed to operate; (iii) that on re-scrutiny of documents, it was further found that another Pay Loader also did not fulfil the terms of the MoU and therefore the deployment of that Pay Loader also was stopped; (iv) that thus the work done by the aforesaid two Pay Loaders was not as per the guidelines for deployment of fleet, in the MoU; therefore an amount of Rs.91.29 lakhs had been withheld from the payment to the petitioner, based on the calculation of difference of ESM loading rate to civilian rate of the contemporaneous time; (v) that the issue of wrongful deployment of the Pay Loaders by the petitioner and withholding of payment was examined by a committee constituted at the headquarter which had also opined to recover the amount for differential rate of loading for ESM and civilian contract; (vi)

that since a violation of Para 8 of the MoU had been committed by the ESM company, the case file was being forwarded for further scrutiny and recommendation.

13. The aforesaid is suggestive of, response of the petitioner having been called for to each and every violation.

14. This Court in writ jurisdiction cannot entertain the dispute, whether the petitioner was in breach or not and if not whether the contract has been wrongfully terminated and if so to what relief the petitioner is entitled to. Suffice it is to state that the contract by its nature was terminable and not specifically enforceable.

15. The counsel for the respondents No.1&2 appearing on advance notice has also contended that in fact the petitioner is in default of payment to its manpower and which is also making a claim against the respondents and which claim will have to be satisfied by the respondents.

16. The counsel for the petitioner, though not disputing, states that the petitioner would clear the said payments when its own monies are released by the respondents.

17. The counsel for the respondents No.1&2 has also handed over a booklet titled “Guidelines on Formation and Running of Ex-Servicemen Coal Transport Companies” published by the Self Employment Directorate of DGR, Ministry of Defence in June / July, 2007 and which in its Appendix D contains “Clauses to be Incorporated in the Memorandum and Articles of Association” of ESM company and Clause 11 thereof requires an ESM Coal Transport Company sponsored by DGR to submit various reports and returns as directed by the DGR from time to time and provides that non-submission of specified reports or incorrect facts and figures may result in cancellation of sponsorship / non-renewal of contract; Clause 13 similarly provides that violating or non-compliance of all the clauses may lead to withholding of payments by coal subsidiary or cancellation of sponsorship by the DGR. Needless to state, once the sponsorship of the petitioner is withdrawn by the respondent No.2 DGR, the question of the respondent No.3 MCL dealing with the petitioner does not arise.

18. The counsel for the respondents No.1&2 has from the departmental file brought by Col. Lamba to the Court also shown a letter dated 6th August, 2015 of the respondent No.2 DGR to respondent No.3 MCL detailing as many as 12 show cause notices issued to the petitioner, right from 13th July,

2009 till 8th July, 2015 and the replies thereto of the petitioner and stating that since the petitioner “has been constantly violating the provisions of the MoU” and the Guidelines on Formation and Running of Coal Transportation Company, 2007 vide which the petitioner company is governed, immediate action under para 20(a) of MoU was recommended against the petitioner.

19. The aforesaid also takes care of the grievance of the petitioner of the respondent No.2 DGR having directed the respondent No.3 MCL to act in violation of the said guidelines.

20. The aforesaid file also contains the notice dated 21st July, 2015 issued by the respondent No.2 DGR to the petitioner and its three Directors asking them to visit the DGR on 4th August, 2015 for meeting, as their previous replies to the show cause notices issued earlier had not been found satisfactory.

21. I am therefore satisfied that it cannot also be said that there is any violation of the principles of natural justice as is also pleaded in the petition.

22. No case for entertaining the writ petition is thus made out.

23. Dismissed.

24. I however clarify that the observations contained herein are merely for the purpose of adjudicating the maintainability of the writ petition and in the event of any civil proceedings being undertaken by the petitioner would have no binding effect in adjudication thereof.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 20, 2015

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(corrected and released on 21st November, 2015)