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

Judgment Reserved On 31.01.2019

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Judgment Pronounced On 15.05.2019

+ **OMP (COMM) 46/2019**

**M/S SRI ANAND VINAYAK COALFIELDS
LIMITED**

..... Petitioner

Through: Ms. Ruchira Gupta, Mr. Siddhanth Kochhar,
and Mr. Anurag Sharma, Advs.

versus

**M/S INDIAN FARMERS FERTILIZER
COOPERATIVE LIMITED**

..... Respondent

Through: None

**CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J:

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as “1996 Act”) to assail the award dated 14.11.2018. The petitioner before this Court is an entity by the name M/s Sri Anand Vinayak Coalfields Limited, which was arrayed as respondent No.2 before the arbitral tribunal.

1.1 The petitioner will hereafter be referred to as ‘SACL’. The respondent is an entity by the name: M/s Indian Farmers Fertiliser Cooperative Limited. Likewise, the respondent hereafter would be referred to as ‘IFFCO’. Collectively, the petitioner and the respondent will be referred to as the parties unless the context requires them to be referred separately.

2. In order to adjudicate upon this petition, the following broad facts need to be noticed.

3. On 25.8.2007, IFFCO issued a work order in favour of a sole proprietorship by the name Anand Commercial Company (hereafter referred to as “ACC”). The proprietor of ACC is, one, Shri Rajesh Pagaria. ACC was arrayed as respondent No.1 before the arbitral tribunal.

3.1 As would be obvious, upon perusal of the cause title, ACC has not laid a challenge to the impugned award despite the fact that it is the entity against which the award has been passed.

3.2 The reason I have brought this up is on account of the fact that the arbitral tribunal while adjudicating upon the disputes between the parties in the very first instance dealt with a preliminary issue which was as to whether IFFCO’s claim against SACL could be sustained.

3.3 As noticed hereinabove, SACL was arrayed as respondent No.2 in the arbitration proceedings while ACC was impleaded as respondent No.1.

3.4 The arbitral tribunal via the impugned award has observed that since the work order was issued in favour of ACC and there was nothing to show that the work order had been assigned in favour of SACL, the arbitration action would not lie against SACL. In other words, the arbitral tribunal was of the view that there was no privity of contract between IFFCO and SACL. Despite this position obtaining, it is SACL which has assailed the award and not ACC.

4. Via this petition, in effect, ACC has used SACL as a proxy to agitate its case before the Court. Continuing with the narrative, the work order, to begin with, had a tenure of 12 months commencing from 1.7.2007 till 30.6.2008. ACC was required to handle and transport 2,00,000 Metric

Tonnes (in short ‘MT’) of coal as per the terms and conditions agreed to between the parties. For its efforts, ACC was to be paid a sum of Rs.230 per MT towards transportation of coal and Rs.29 per MT for cargo handling. The total value of work order was a sum of Rs.5.18 crores.

5. To ensure performance, as required and agreed to between the parties, ACC in terms of Clause 9 of the work order furnished a Performance Bank Guarantee dated 4.9.2007 (PBG) in the sum of Rs.25,90,000/- to IFFCO.

6. In and about 31.10.2007, ACC also obtained on leasehold basis a vacant plot (in short “plot/depot”) in its favour which was sub-leased at a nominal rent to IFFCO.

6.1 The plot had to be sub-leased in favour of IFFCO on account of the fact that only IFFCO could be issued a license under the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 (hereafter referred to as “2007 Rules”).

6.2 The arrangement, thus, arrived at between the parties was that ACC was to take delivery of the coal-rake from the Railway authorities at the Nirgundi Railway Yard. The coal, thereafter, was unloaded from the rake and shifted to the plot taken on lease by ACC, in the vehicle arranged by ACC.

6.3 The coal stocked at the plot/depot was to be shifted from time to time to IFFCO’s factory at Paradeep.

7. It was, thus, ACC’s obligation to take delivery of the coal-rake; unload the coal from the Railway siding; clear the load onto trucks of ACC; unload the coal at the plot/depot leased by ACC and lastly, shift the coal from the plot to IFFCO’s factory at Paradeep.

7.1 Besides this, ACC was, in addition, responsible for cleaning the Railway siding; arranging for transit passes from Mining Office at Cuttack and obliged to secure the coal at the Railway siding and ensure that it was ultimately transported from the plot to IFFCO's factory at Paradeep.

8. It appears that there was a delay in transporting coal from the depot to IFFCO factory at Paradeep. This resulted in an exchange of correspondence between ACC and IFFCO. ACC gave several reasons for the delay including lack of planning in rake loading which, according to it, led to a stock build up at its stockyard; delay in unloading the vehicles at IFFCO factory at Paradeep; and the poor road condition.

9. This forced IFFCO to extend the tenure of the work order from time to time. Consequently, ACC was also required to extend the validity period of the PBG. The joint minutes of meeting dated 26.6.2009 record that ACC was given time till 30.9.2009 to transport the balance quantity of coal from Nirgundi to its factory at Paradeep.

9.1 Resultantly, ACC extended the PBG till 31.12.2009, *albeit*, at the threat of invocation of the PBG; an aspect which was conveyed by IFFCO to ACC on 22.6.2009.

10. In the interregnum, ACC generated a coal report dated 1.4.2009. Via this, ACC conveyed to IFFCO that it had available with it 16193.515 MT of coal as on 31.3.2009. According to ACC, out of 16193.515 MT of coal, 15692.190 MT comprised "new coal" while 501.325 MT consisted of "old coal". New coal was the coal which was the subject matter of the work order in issue whereas old coal referred to coal which was the subject matter of other contracts entered into between the parties.

11. It is in this context that IFFCO vide legal notice dated 6.5.2009 called

upon ACC to either deliver the stocks of coal lying with it or to pay, in the alternative, a sum of Rs.1,43,87,290.34 towards the cost of coal along with interest.

12. ACC, in response to this notice, sent a reply dated 14.5.2009 to IFFCO. In this communication, ACC furnished various reasons for the delay in transporting the coal and went on to assure IFFCO that operations would resume as soon as its pending bills were paid. IFFCO sent its rejoinder to this reply on 22.6.2009.

12.1 Suffice it to say, as indicated above, IFFCO agreed to the extension of time for delivery of coal till 30.9.2009 while ACC extended the validity period of PBG till 31.12.2009.

13. Thereafter, a second coal report dated 3.8.2009 was generated by ACC, which disclosed that as on 1.7.2009, it had 15107.600 MT of coal available with it. Furthermore, the report also disclosed that after dispatches made during July 2009 were taken into account, it would have as on 31.7.2009, a closing stock comprising 11661.615 MT of new coal and 501.325 MT of old coal.

14. Evidently, with effect from 1.8.2009, ACC stopped transporting coal to IFFCO factory at Paradeep. ACC instead sought IFFCO's permission to shift the coal to another plot. IFFCO declined the request vide its letter dated 24.8.2009.

14.1 It is IFFCO's case that since ACC did not come forward to have an independent survey being conducted as regards the coal available at the plot/depot, it got an independent survey carried out on 24.9.2009.

14.2 This survey revealed that only 1582.683MT of coal was available at Nirgundi Stock Yard and that the balance stock of coal had been

misappropriated. As a result of this development, IFFCO took two steps: first, it sent a legal notice dated 3.11.2009 to ACC calling upon it to deliver the balance quantity of 11156.57 MT coal to its factory at Paradeep; and secondly, on 4.11.2009, it invoked the PBG and realized a sum of Rs.25,90,000/-.

14.3 There was a shortage of 9573.887MT of coal which had been misappropriated as what was found stored as on 24.9.2009 was only 1582.683 MT as against 11,156.57 MT. Thus, ACC was asked to deliver not only the stock left with it, but also the misappropriated stock amounting to 111561.57 MT or, in the alternative, pay a sum of Rs.99,12,166.18 calculated @ Rs.888.46 per MT along with interest at the rate of 12% per annum, payable from 1.10.2008 till the date of realization. In addition thereto, Rs.15,000/- was demanded as the cost of notice.

15. Vide communication dated 6.11.2009, ACC, *inter alia*, sought to bring to the notice of IFFCO that the plot/depot was under the charge of IFFCO's security personnel. By taking this stand, ACC attempted to put the blame for the missing coal stock at IFFCO's doorstep. Interestingly, ACC sought further time to complete the job of delivering coal to IFFCO's factory at Paradeep.

16. The aforesaid communication was followed by ACC's yet another communication dated 7.12.2009. Via this communication, ACC denied the assertions made in IFFCO's notice dated 3.11.2009. As a matter of fact, ACC demanded a sum of Rs.5 Crores from IFFCO which included payments against work already executed by it under the work order.

17. On 5.1.2010, the Mining Officer, Cuttack conducted physical verification of the stock at the plot/depot when it was found that there was a

shortage of coal at the plot/depot.

18. This, perhaps, led to the Vigilance Department of the Odisha Government carrying out a raid at the plot/depot on 19.1.2010. The raid got widely published and reported in the media. As a result of the aforesaid development, the Mining Officer, Cuttack, conducted, once again, a verification of the stocks at the plot/depot on 26.3.2010.

19. This exercise revealed that there was a shortage of coal amounting to 9126.210MT. Coal, physically, found in the plot/depot was only 1726.230MT. This resulted in a demand notice dated 30.3.2010 being served on IFFCO. IFFCO was called upon to pay a sum of Rs.73,00,968 towards coal found short at the depot along with penalty in the sum of Rs.25,000/-. The penalty was imposed not only with regard to the coal found short at the subject plot/depot but *qua* other two depots as well. Insofar as the subject plot/depot is concerned, penalty attributable to it was Rs.11,623. The total amount which the IFFCO was, however, called upon to pay was a sum Rs.73,12,591.

20. On 28.1.2010, IFFCO while rebutting the contentions raised by ACC in its communication dated 7.12.2009, sought reference of the disputes obtaining between the parties to an arbitrator.

21. It may be relevant to note that a copy of demand received by IFFCO was forwarded by IFFCO to ACC. ACC, in turn, vide communication dated 17.4.2010 indicated to IFFCO that it was not concerned with the demand raised by the Mining Officer, Cuttack and since in any case, arbitration proceedings had been triggered with the appointment of the arbitrator, the matter could be sorted out by him.

22. Apparently, the first hearing of the then constituted arbitral tribunal

was held on 1.9.2010.

23. Upon a Statement of Claim (SOC) being filed by IFFCO, a reply was filed both on behalf of ACC and SACL. The reply was filed on 20.5.2011. The rejoinder to this reply was filed by IFFCO on 30.9.2011.

23.1 Since, in the interregnum, as indicated above, on 24.8.2011, a fresh raid had been carried out at the plot/depot by the Mining Department which led to the issuance of a show cause notice and, ultimately, a demand via order dated 3.1.2012. In the raid, the Mining Department has found that coal was short by 1726.230 MT and therefore, the Mining Officer, Cuttack demanded IFFCO via the aforesaid order to pay Rs. 15,50,155 in addition to the penalty of Rs. 25,000. IFFCO amended its SOC by adding the amount demanded of it.

24. Issues in the matter were framed by the arbitral tribunal on 31.8.2012.

25. Unfortunately, the learned arbitrator passed away. As a result of which, this Court via order dated 7.11.2014, passed in Arbitration Petition No.513/2013, appointed another arbitrator in the matter. Thereupon, further steps such as admission and denial of documents were taken, followed by the filing of witness statement. These steps took place between 11.5.2015 and 30.4.2016.

26. Unfortunately, the second arbitrator appointed by this Court on 7.11.2014 also passed away. This resulted in this Court appointing yet again another arbitrator on 22.9.2017. The order of appointment was passed by the Court in Arbitration Petition No.512/2017.

27. Before the newly constituted arbitral tribunal, parties agreed that they would not seek cross-examination of witnesses whose affidavits of evidence had already been filed. The procedural order to that effect was passed by the

arbitral tribunal on 9.12.2017.

28. Upon completion of oral submissions, the arbitral tribunal reserved the matter for pronouncement of the award on 27.7.2018. Liberty was, however, given to the counsel for the parties to file their written submission.

29. It is in this background that the impugned award came to be passed.

30. Ms. Ruchira Gupta, who appeared for SACL, assailed the award, broadly, on the following grounds:

- (i) The work order entailed only handling and transportation of the coal. It did not impose any obligations on SACL or ACC with regard to storage and security of coal in the plot/depot or in the stockyard.
- (i)(a) In support of this submission, reference was made to Clauses 3(c) and 5.03 of the work order.
- (ii) While SACL was liable to pay lease rent for the plot/depot, it was not responsible for the safety and security of the coal found stored at the plot/depot.
- (iii) The licence in respect of the plot/depot was issued in favour of IFFCO. Therefore, IFFCO was clearly liable for any shortage of coal found at the plot/depot. The fact that IFFCO was responsible for the custody of the coal stored at the plot/depot was evident from the fact that the plot/depot had been sub-leased by SACL to IFFCO.
- (iv) The learned Arbitrator failed to appreciate that under the 2007 Rules, IFFCO could not have appointed SACL as agent for storing the coal. Since IFFCO was the licence holder, the responsibility for storing the coal lay with IFFCO and could not

be palmed off to SACL.

- (v) SACL was responsible only for providing infrastructure and for carrying out liaison work. It was IFFCO's responsibility to ensure that the coal available at the plot/depot was secured. The movement of coal, it was contended, could not take place without the authorization of IFFCO.
- (v)(a) In this behalf, reliance was placed by SACL on letters dated 15.9.2009 and 16.9.2009.
- (vi) Learned arbitrator erred in holding that SACL was responsible for the storage of coal by relying upon the wording contained in Clause 5.02 of the work order. Clause 5.02 of the work order made SACL "in charge" of the coal only during the period of transportation and not during the period it was stored at the plot/depot.
- (vi)(a) In other words, what was sought to be emphasized was that the learned Arbitrator had misapplied the provisions of Clause 5.02 of the work order.

Reasons

31. Having heard the learned counsel for the petitioner, I am of the view that the principal issue which arose between the parties for consideration before the arbitral tribunal was as to whether or not ACC was responsible for the security of the coal stock stored at the plot/depot. The learned arbitrator, in this behalf, after considering the material on record, which, included the provisions of the work order and witness statement returned with the following findings of fact:

- (i) As per Clause 5.03 of Attachment-I of the work order, ACC

was required to provide a separate plot for storing 20,000MT of coal of IFFCO.

- (ii) That the rent for plot/depot was paid by ACC. The plot/depot was sublet to IFFCO at a nominal rent for the purposes of enabling it to obtain a trading licence under the 2007 Rules.
- (iii) After the coal was unloaded from the railway rakes, it was taken to the plot/depot by ACC and only thereafter, transported to IFFCO's factory at Paradeep.
- (iv) It was ACC's responsibility that once it had unloaded the coal from the railway rakes, it would be transported to either IFFCO factory at Paradeep directly or to the plot/depot and thereafter, transferred to IFFCO's factory at Paradeep.
- (v) The expression "contractor's depot" in the work order placed an obligation on ACC to provide a depot. Therefore, the coal, while it was stored in the contractor's depot was in the custody and/or charge of the ACC until it was delivered to IFFCO's factory at Paradeep.
- (vi) Since the provisioning of a plot/depot was the obligation of the ACC, which formed part of mutual promises made between the parties, the consideration paid for transportation and cargo handling embedded in it the consideration for storage.
- (vii) There was no term in the work order (at least none was brought to the notice of the learned arbitrator) that after the coal was unloaded at the plot/depot an acknowledgement from IFFCO by way of proof of delivery was generated. If the coal delivered at the plot/depot was to be in charge and custody of IFFCO,

then, such a document would have been generated — which would have been preceded with an exercise involving ascertainment of the weight of the coal so received at the plot/depot. On the contrary, the coal reports generated demonstrated that the security of coal was ACC responsibility.

- (viii) The fact that Clause 5.02 obliges ACC to ensure that no damage or theft or pilferage was caused to the coal stock available with it while ACC was in charge, showed that during the period the coal was stocked at the plot/depot, it was under the care and charge of ACC. A conjoint reading of Clause 3.00(c), 3.00(e), 5.02 and 5.03 of Attachment – 1 to the work order, amongst others, demonstrated that it was the obligation of ACC to store coal at the nearby plot/depot till instructions were received to transport coal to IFFCO's factory at Paradeep. In other words, between the time when coal was unloaded from the railway rakes and till it was delivered by ACC at IFFCO's factory at Paradeep, ACC was required to ensure that there was no loss or theft, pilferage or damage to the coal, which was placed in its charge. Thus, the coal stored at the plot/depot was part of this chain.
- (ix) The conduct of ACC and the communications addressed by it to IFFCO would show that it always portrayed that it was in charge of the plot/depot. In this behalf, reference was made, *inter alia*, to letters dated 21.9.2008, 3.11.2008, 11.11.2008, 13.11.2008, 17.11.2008, Coal Reports dated 1.4.2009 and 3.8.2009.

- (x) It is specifically found that the two Coal Reports generated by ACC established the fact that the coal was stored at the plot/depot pursuant to the terms and conditions contained in the work order.
- (xi) There is no provision (at least none was shown to the learned arbitrator) in the 2007 Rules or the Forms appended thereto, which prohibited the appointment of an agent for the security of the coal.
- (xii) The nominal rent paid by IFFCO to ACC was only to secure the license from the Mining Department as the coal was stored for and on its behalf by its agent i.e. respondent No.1.
- (xiii) The Mining Officer's, report dated 30.3.2010 alludes to the fact that the plot/depot where the coal was found to be short was that of ACC.
- (xiv) The new-coal which was available in the plot/depot as on 31.7.2009 as per ACC's own Coal Report dated 3.8.2009 amounted to 11661.615 MT. Since the work order pertained only to new-coal, IFFCO could not claim money for old-coal amounting to 501.325 MT.
- (xv) After the generation of Coal Report dated 3.8.2009, ACC had not transported any coal from the plot/depot to Paradeep.
- (xvi) The coal found stocked as per the Coal Report dated 3.8.2009 also dwindled as found in Inspection dated 29.6.2009 and ultimately, it disappeared from the plot/depot which was in the charge of ACC.
- (xvii) Though IFFCO had demanded compensation at the rate of Rs.

1085.34 per MT consisting of price component equivalent to Rs. 826.34 per MT and transportation cost amounting to Rs.259, it ought to be paid compensation at the rate of Rs.800 MT towards price as this was the rate stipulated in the Mining Officer's order dated 30.3.2010. IFFCO was not entitled to compensation for transportation cost at the rate of Rs.259 per MT as no proof of payment of this amount by IFFCO to ACC was placed on record. In sum, IFFCO ought to pay a sum of Rs.93,29,292/- towards compensation in respect of undelivered coal amounting to 11661.615MT at the rate of Rs.800 per MT. IFFCO was not entitled to claim for loss of reputation.

(xviii) IFFCO was negligent in not acting with the necessary speed after it discovered that there was a shortage of coal amounting to 9573.88MT as on 24.9.2009 as reflected in its Inspection/Verification Report dated 26.9.2009.

(xix) IFFCO was negligent in reporting the shortage of coal and failed to lodge an FIR and therefore, was entitled to only 50% of the amounts demanded of it by the Mining Department, which included the amount levied as a penalty.

(xx) ACC was entitled to amounts towards unpaid bills and encashed PBG. Towards unpaid bills, ACC was entitled to payment/adjustment of a sum of Rs.14,39,565/-. Likewise, towards PBG, ACC was entitled to payment/adjustment of the sum of Rs.25,90,000/-.

32. Given these findings, what is required to be examined is as to whether the learned Arbitrator stepped outside the contours of his jurisdiction drawn

for him by the work order.

33. To my mind, the main thrust of the arguments advanced on behalf of SACL was that shortage and security of coal was not its responsibility. I must indicate herein that while I refer to SACL, I would also examine the matter from the point of view of ACC. This exercise has been done with a view not to dismiss the petition at the very threshold on the ground that it had been filed by SACL, even though, as correctly found by the learned arbitrator, it had no privity of contract with IFFCO. A perusal of the provisions of the work order would show that SACL/ACC was responsible for unloading the coal from the railway rakes and then, arranging for the transportation either directly to IFFCO's factory at Paradeep or to the plot/depot and thereafter, to have the coal transported from the plot/depot to IFFCO's factory at Paradeep upon instructions being received in that behalf from IFFCO.

34. The evidence laid before the learned arbitrator clearly demonstrated that vast quantities of coal nearby 12,16,294 MT (which included 11661.615 MT of new coal) disappeared from the plot/depot and consequently, was not delivered to IFFCO. The argument advanced on behalf of SACL/ACC that its obligation under the work order was only to transport and handle the coal is clearly untenable.

35. A conjoint reading of Clause 3.00(c), 3.00(e), 5.02 and 5.03 of Attachment – 1 of work order clearly establishes that it was the obligation of SACL/ACC to store the coal at the plot/depot till instructions were received to ferry the same to IFFCO's factory at Paradeep. In particular, Clause 5.02 placed an obligation on SACL/ACC to ensure that there was no danger or theft or pilferage caused qua the coal kept in its charge. Thus, the argument

advanced on behalf of SACL/ACC that it was only in charge of transportation and handling, to my mind, is completely untenable.

36. As noted by the learned arbitrator, the two reports dated 1.4.2009 and 3.8.2009 generated by ACC demonstrated that SACL/ACC was in charge and in custody of the coal stored at the plot/depot. The argument that IFFCO was the sub-lessee has no substance as the sublease was an arrangement, arrived at between IFFCO and ACC, *albeit*, for nominal rent only for the purposes of facilitating the issuance of the trading license. Under the 2007 Rules, a trade license could only be issued in favour of IFFCO. Even according to SACL, under the 2007 Rules, the trading license could be issued in favour of IFFCO and therefore, the fact that the license was issued in favour of IFFCO or that it paid nominal rent to ACC would not have me hold that SACL/ACC was not the custodian of the coal stored in the plot/depot.

37. For the very same reasons, I find no merit in the argument that SACL/ACC was only responsible for providing the infrastructure and to carry out liaison work. The learned arbitrator after having appreciated the material on record and upon interpretation of the clauses obtaining in the work order has come to the conclusion that not only was it the responsibility of ACC to provide a plot/depot for storing the coal, but that while the coal was stored therein in its capacity as its custodian, it was responsible for any loss caused to IFFCO on account of theft or pilferage. In this particular case, contrary to the argument advanced on behalf of SACL, the actual shortage was proved by unimpeachable evidence, which was the 3.8.2009 coal report generated by ACC. ACC was unable to place before the learned arbitrator any material to show that after 3.8.2009, it had delivered coal,

which was found in stock as on 31.7.2009.

38. The other argument advanced in this behalf which is that the fact that the coal report generated by ACC established that it had access to the stock register, is an argument, which is stated to be rejected. It is common knowledge that stock registers are in the custody of person(s) and/or entities, who are the custodian of the stock and not a third party lest there is tampering of the record.

39. I am also not impressed by the argument advanced on behalf of SACL that IFFCO under 2007 Rules could not have appointed ACC as its agent. As correctly appreciated by the learned arbitrator there is no prohibition in the 2007 Rules or in the Forms appended thereto (at least none was pointed out) qua appointment of an agent by IFFCO to ensure the security of its stock.

40. Thus, for the foregoing reasons, I am not inclined to interfere with the impugned award.

41. The captioned petition is, accordingly, dismissed. The cost will follow the result of the petition.

(RAJIV SHAKDHER)
JUDGE

MAY 15, 2019 /pmc