NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on 24.08.2020
Judgment delivered on 04-09-2020

WA No. 327 of 2020
(Arising out of order dated 02.07.2020 passed by learned Single Judge in WPC No.1396/2020)

- D. B. Power Ltd. Having its registered office at Office Block 1A, 5th Floor, Corporate Block, DB City Park, DB City, Arera Hills Opposite MP Nagar, Zone-I, Bhopal 462016, Through its Authorized Signatory Shailendra Bajpai S/o Shri D.P. Bajpai,, aged about 39 years, R/o Village Badadarha Tehsil Dabhara, District Janjgir Champa (CG)

---- Appellant

Versus

1. South Eastern Coalfields Limited (SECL) Through its Chairman-cum-Managing Director, Office at Seepat Road, Bilaspur, District Bilaspur Chhattisgarh.
2. The General Manager (M & S), South Eastern Coalfields Limited SECL Office At Seepat Road, Bilaspur, District Bilaspur Chhattisgarh.
3. Central Bank of India Through Its Branch Manager, Corporate Finance Branch, 1st Floor, MMO Building, M.G. Road, Fort, Mumbai 400023.

---- Respondents

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WA No. 339 of 2020

(Arising out of order dated 02.07.2020 passed by learned Single Judge in WPC No.1396/2020)

1. South Eastern Coalfields Limited (SECL) Through Its Charmain -Cum Managing Director, Office At Seepat Road, Bilaspur, District Bilaspur, Chhattisgarh.
2. The General Manager (M & S) South Eastern Coalfields Limited, SECL Office At Seepat Road, Bilaspur, District Bilaspur, Chhattisgarh.

---- Appellants

Versus

1. D. B. Power Ltd. Having its registered office at Office Block 1A, 5th Floor, Corporate Block, DB City Park, DB City, Arera Hills Opposite MP Nagar, Zone-I, Bhopal 462016, Through its Authorized Signatory Shailendra Bajpai S/o Shri D.P. Bajpai,, aged about 39 years, R/o Village Badadarha Tehsil Dabhara, District Janjgir Champa (CG)
2. Central Bank of India Through Its Branch Manager, Corporate Finance Branch, 1st Floor, MMO Building, M.G. Road, Fort, Mumbai, 400023.

---- Respondents

WA No.327/2020

For Appellant : Mr. Ravindra Shrivastava, Senior Advocate assisted by Mr. Avinash K Mishra, Advocate.

For Respondent No.1 & 2: Mr. H.B. Agrawal, Senior Advocate assisted by Mr. Vinod Deshmukh, Advocate.

WA No.339/2020

For Appellants : Mr. H.B. Agrawal, Senior Advocate assisted by Mr. Vinod Deshmukh, Advocate

For Respondent No.1 : Mr. Ravindra Shrivastava, Senior Advocate assisted by Mr. Avinash K Mishra, Advocate.

Hon'ble Shri PR Ramachandra Menon,CJ
Hon'ble Shri Parth Prateem Sahu, J

CAV ORDER

Per Parth Prateem Sahu, J

1. Since the above two writ appeals arise out of the order dated 2.7.2020 passed by in WPC No.1396/2020 by which the learned Single Judge has partially given relief to petitioner/appellant in WA No.327/2020 by extending period of

lifting of coal by 45 days from the date of passing of the order i.e. upto 14.8.2020, the same are being disposed of by this common order.

2. Facts of the case, as projected by petitioners/ appellants in W.A. No.327/2020, in brief, are that the appellant is a power generating company incorporated under the Companies Act, 1956 having its thermal power plant at village Badadarha, District Janjgir Champa (CG). Respondent No.1 issued a notification for sale of coal under 'Special Forward E-auction for Power Producers Phase-III of 2019-20'. The Coal India Limited (for short 'the CIL') issued a scheme for the power producers including Captive Power Plants for sale of coal in the year 2015-16 known as 'the Special Forward E-Auction Scheme, 2015'. Pursuant to Notification issued by respondent No.1, the petitioner/appellant participated in the special forward e-auction for which, as per requirement, petitioner/appellant also deposited Earnest Money Deposit (EMD) in the form of bank guarantee dated 20.2.2020 for Rs.16,00,00,000/- drawn in favour of respondent No.1. After completion of e-auction bid process, petitioner company was declared successful bidder and a sale intimation letter for special forward e-auction Phase-III was issued on 27.2.2020. Petitioner/appellant has to lift the quota of coal as per schedule fixed by respondent No.1 but due to announcement of nationwide lock-down, lifting and transportation of coal as

per schedule could not take place. Lock down very heavily affected the transportation of coal because due to complete stoppage of road transportation. Looking to the effect of nationwide lock down due to Covid-19 pandemic, respondent No.1 extended time for depositing advance payment due under e-auction scheme uptil 17.6.2020. During the extended period, petitioner/appellant somehow managed to deposit the advance payment for the month of March, 2020 on 10.6.2020. The Association of Power Producers (APP) made communication to the CIL highlighting impact of Covid-19 and mentioning that Distribution Companies (“Discoms”), whom they were supplying power, have noticed to back down their power generation, which is having effect on liquidity position.

3. During the happening of aforementioned activities, respondent No.2 issued letter/notice dated 22.6.2020 for taking coercive steps against petitioner/appellant. This made the petitioner/ appellant to approach the High Court by filing writ petition, which came to be registered as WPC No.1396/2020, praying for following reliefs:-

> “10 (i) This Hon'ble Court may be pleased to issue a writ of mandamus or such other appropriate writ directing Respondent No.1 to extend to the Petitioner herein the facility of lifting coal quantity scheduled for the Month of April, 2020 (under Phase III Special Forward e-Auction) at the applicable 'notified price' (i.e. without any markup / premium) along with the right to seek adjustment for supply of lower grade or varied quantity of coal, or
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> (ii) In the alternative, this Hon'ble Court may be pleased to issue a writ of mandamus or such other appropriate writ directing Respondent No.1 to shift the 'Validity

Period' of lifting coal quantity scheduled for the Month of April, 2020 (under Phase III Special Forward e-Auction) till Respondent No.1 resumes offering sale of Coal at the Premium price with 2 months lifting period thereafter or

(iii) In the alternative to all the above, this Hon'ble Court may be pleased to issue a writ of mandamus or such other appropriate writ directing Respondent No.1 to return the Petitioners' Bank Guarantee (bearing No.03007BGA20000065) dated 20.02.2020 (being valid till 15.09.2020) for an amount of Rs.12,00,00,000/- (Rupees Twelve Crores Only) without encashment / forfeiture.

And

10.2.This Hon'ble Court may be pleased to issue a writ of certiorari or such other appropriate writ quashing and setting aside Respondent No.2's purported notice dated 22.06.2020."

4. Learned Single Judge upon hearing the learned counsel for respective parties, has disposed of writ petition with a direction to extend the period of time granted to petitioner till 17.6.2020 for a further period of 45 days from the date of passing of the order for lifting of coal as per agreement, specifying that beyond which the respondent Coal Company would be at liberty to take appropriate action in accordance with the agreement. Learned Single Judge passed the order on 2.7.2020 and aggrieved by which petitioner/ appellant filed this writ appeal. Respondent Nos.1 & 2 have also preferred writ appeal bearing No.339/2020.

5. Petitioner/appellant preferred writ appeal on the grounds that the CIL vide Board's minutes dated 16.4.2020 while acknowledging the liquidity crises has resolved for sale and lifting of coal on reserved price, which will be notified price for a period of six months from April, 2020. But, the variation in

price for lifting of coal has not been offered to petitioner/ appellant and appellant is required to pay premium price which is 20% above the notified price for lifting coal quantity; the learned Single Judge has not considered while disposing of writ petition that the respondents are not affording opportunity of lifting of coal at 'Notified Price Value'; the action of respondent No.1, which is an instrumentality of the State, is wholly arbitrary and unjust in denying level playing field to appellant; APP requested the Ministry of Coal, Government of India to dispense with the penal provision of forfeiture of EMD; the learned Single Judge failed to consider and appreciate the issuance of notice dated 22.6.2020 for forfeiture of EMD of appellant on account of non-lifting of coal. The Board of the CIL, as aforementioned, has varied the basis and governing factors for lifting of coal by resolving to offer the lifting of coal at notified price. The learned Single Judge failed to consider that if the price functional variation is not offered to the appellant under the Scheme of February, 2020, petitioner/appellant will be burdened with huge liability to its lender; not considered that appellant was denied its right to seek adjustment for supply of lower grade of coal; not considered force majeure condition occasioned due to Covid-19 pandemic and consequent nationwide lock down; e-auction scheme Phase-III of 2019-20 had time till 31.8.2020 for lifting of coal which is more than the time what has been extended by the learned Single Judge, amongst other grounds. Other grounds as raised by appellant are with regard to the difficulties due to stoppage of transport movement on road on account of pandemic Covid-19.

6. Mr. Shrivastava, learned Senior Counsel representing appellant D.B. Power Ltd. submits that as per e-auction scheme Phase-III in which appellant had participated is based on premium price which is addition of 20% on notified price. The period of lifting of coal is for one quarter i.e. 03 months from February, 2020 to April, 2020 and the mode of lifting of coal is on advance payment basis. Mode of sale of coal was 'road'. Due to outburst of Covid-19 pandemic, nationwide lock-down was announced since 25.3.2020 resulting in stoppage of road transportation. Respondent SECL extended time for lifting of coal under the agreement on case to case basis considering the fact of lock-down. Due to lock-down the Discoms to whom appellant and other power generators were selling power were not in a position to make payment which brought huge financial crisis. Nationwide lock-down is a force majeure. Considering overall situation as also representation of the APP, the CIL took a policy decision on 16.4.2020 for supplying coal on notified price. The difference between notified price and premium price is much large. Coming to the knowledge of policy decision of the CIL dated 16.4.2020, appellant also made representation to the CIL and the SECL for extending benefit of decision dated 16.4.2020 which

remained pending and in the meanwhile, the notice for forfeiture of bank guarantee was issued forcing petitioner/ appellant to file writ petition which came to be disposed of by the impugned order granting extension of time for lifting of coal, but the learned Single Judge has not considered “whether the default of non lifting of allotted quantity of coal by petitioner/appellant on account of pandemic Covid-19 entitles respondent to take steps for forfeiture of bank guarantee. The learned Single Judge after taking into consideration the situation, as recorded in Para-5 of the impugned order, ought to have quashed the notice of forfeiture dated 22.6.2020, but instead of passing such an order, the impugned order is confined only with regard to extension of time for lifting of coal. It is further contended that looking to the effect of Covid-19 pandemic followed by nationwide lock-down on commercial transaction having its financial impact on the business of power generating companies, respondent Nos.1 & 2 have not strictly applied/ enforced the schedule of lifting of coal as per the scheme of e-auction Phase-III. Referring to Annexure A-2, which is a letter written by appellant to respondent No.2, learned Senior Counsel submits that e-auction conducted during the first two quarters for the current financial year 2020-21, to be on notified price and requested respondent No.2 for extending the same benefit and further extending time of lifting of coal upto 30.9.2020, which remained un-replied and undecided, followed by another letter dated 10.8.2020 and instead of deciding letter/ representation, respondent No.2 has issued a letter to the bank for encashment of bank guarantee. It is argued that in the facts and circumstances of case, the notice of forfeiture of bank guarantee be quashed.

7. Mr. HB Agrawal, learned Senior Counsel for respondent SECL submits that petitioner/appellant has filed writ petition seeking a relief for getting the benefit of the policy decision taken by the CIL, but the CIL has not been arrayed as party respondent in writ petition nor in writ appeal, therefore, no relief can be granted to appellant. He further submits that writ petition filed by petitioner/appellant could not have been considered by the learned Single Judge in view of Rule 23 (1) (iv) of the High Court of Chhattisgarh Rules, 2007 (for short 'the Rules of 2007'). Subject matter of writ petition is arising out of tender dispute which is purely a contractual dispute, therefore, the learned Single Judge was not having jurisdiction to entertain the writ petition. It is argued that as writ petition itself was not maintainable before the learned Single Judge, hence in appeal no relief can be granted to the appellant. The order passed in writ petition is infact in favour of petitioner/appellant, therefore, no appeal would lie from the impugned order. Even after providing sufficient time by extending period of lifting of coal, neither the payment was made nor was coal lifted. It is also submitted that in all 14 bidders participated and became successful and out of which, 8 contractors/ bidders have lifted

the coal within the time schedule fixed by respondent Coal Company.

It is also submitted that respondent Coal Company has also filed writ appeal bearing WA No.339/2020 challenging the impugned order passed by the learned Single Judge on the grounds that in view of Rule 23 (1) (iv) of the Rules of 2007 the subject matter of writ petition was arising out of contract/tender, therefore, the learned Single Judge could not have entertained writ petition and the order passed by learned Single Judge is without authority of law. Petitioner/respondent No.1 has reduced the amount of bank guarantee from Rs.16,00,00,000/- to Rs.12,00,00,000/- without prior intimation to appellant Coal Company. Learned Single Judge could not have extended time without deposit of EMD as deposited by other two power generating companies by name, M/s MB Power Limited & M/s Jindal Power Limited, and further that, petitioner/respondent No.1 is having efficacious alternative remedy under the terms and conditions of contract to approach other forum for the action of appellant Coal Company challenged in writ petition, which was otherwise not maintainable before the learned Single Judge.

8. We have heard learned Senior Counsel for the parties and perused the record.

The subject dispute raised in writ petition has arisen from the notification of sale of coal under the Special Forward E-

Auction and as per pleadings made in writ petition, which is under the terms & conditions of the special forward e-auction scheme, 2015 for power producers (including CPPS). The dispute projected in writ petition and before this Court is purely a contractual dispute between the parties as the main challenge is to the action of forfeiture of bank guarantee deposited by appellant Power Company. Apart from that, the learned Single Judge while disposing of writ petition has granted extension of 45 days for lifting coal and also directed that during that period i.e. upto 14.8.2020, notice dated 22.6.2020 shall not be acted upon. Learned Single Judge has clarified that petitioner has to positively lift the entire coal as per agreement beyond which the respondent Coal Company will be at liberty to take appropriate action in accordance with agreement. The Coal Company has not immediately filed writ appeal challenging the impugned order passed in WPC No.1396/2020, but they chose to file the same only on 7.8.2020. Said writ appeal came up for hearing before this Court for the first time on 24.8.2020 i.e. after expiry of extension of time granted in favour of appellant power company. It is submitted by learned Senior Counsel for the Coal Company that even in the extended period of time, the coal was not lifted by appellant.

9. Be that as it may, from perusal of Annexure P-1, terms and conditions, Clause 17 provides for dispute resolution/ arbitration, which is extracted below for ready reference:-

> "17.Dispute Resolution / Arbitration:
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> In the event of any dispute, Bidder / Buyer is necessarily required to represent in writing to the General Manager (Sales) of the concerned coal company, who would deal with the same in a period of one month from such representation. Thereafter, if required the matter be determined by the Director-In-Charge of Marketing of the concerned coal company. Any interpretation of any clause of this will be subject to clarification by CIL, which will be deemed as final and conclusive.
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> All disputes arising out of this scheme or in relation thereto in any form whatsoever shall be dealt Specially by way of arbitration in terms of the Arbitration and Conciliation Act, 1996. The arbitration shall be conducted at Calcutta at a place to be notified by CIL. The arbitrator shall be appointed by the Chairman and Managing Director, CIL upon written request in this behalf. The award rendered by the Arbitrator shall be final and binding on the parties. The place of arbitration & nomination of arbitrator be varied appropriately in view of the Coal Company involved."

10. Dispute raised in writ petition and also in the grounds in writ appeal, is of a contractual and commercial dispute between the parties, appellant is having other efficacious appropriate remedy under the Law of Contracts and under the terms and conditions of special forward e-auction scheme.

11. So far as ground raised by Mr. Agrawal, learned Senior Counsel representing Coal Company that the learned Single Judge could not have entertained the writ petition arising out of tender/contractual matter is concerned, perusal of the impugned order would show that this objection was not raised

during the course of hearing before the learned Single Judge though the Coal Company was represented by an advocate and the order impugned is a bi-parte order. Even otherwise, writ appeal challenging the order impugned dated 2.7.2020 passed by learned Single Judge was filed on 7.8.2020 and it came up for hearing before us only on 24.8.2020 i.e. much after the expiry of extended period of time granted by learned Single Judge vide order impugned. Benefit of extension of time granted by the learned Single Judge vide order impugned in favour of petitioner/appellant has already been completed, therefore, we are not considering the grounds raised in W.A. No.329/2020 with regard to Rule 23 of the Rules of 2007.

12. For the foregoing reasons, particularly the availability of alternative remedy of raising dispute under the Arbitration and Conciliation Act, 1996 or other such remedy under the Contract Law, we are not considering the grounds raised by appellant in WA No.327/2020 on merits. Both the appeals are liable to be dismissed and are hereby dismissed. However, appellant in WA No.327/2020 will be at liberty to approach appropriate forum by filing appropriate proceeding available to them in accordance with law.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-