IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Subrata Talukdar
and
The Hon'ble Justice Hiranmay Bhattacharyya

MAT 484 of 2021
With
I.A. No. CAN 1 of 2021

Eastern Coalfields Limited
Vs.
Imperium Energy Utility Services LLP & Ors.
With
MAT No. 534 of 2021
With
I.A. NO. CAN 1 of 2021

Coal India Limited & Anr.
Vs.
Imperium Energy Utility Services LLP & Ors.

For the Appellants : Mr. Saptansu Basu,
Mr. Mainak Das,
Ms. Tanushree Dasgupta,
Mr. Amit Chowdhury

………advocates for the appellant in MAT 484 of 2021

For the Appellants : Mr. Ranjan Bachawat,
Mr. Varun Kedia

… advocates for the appellant in MAT 534 of 2021

For the Respondent : Ms. Saptansu Basu,

Ms. Tanushree Dasgupta,
Mr. Amit Chawdhury

... advocates for the respondent/Eastern Coalfields Ltd.

For the Respondent : Mr. Ranjan Bachawat

....advocate for the respondent no. 1 in MAT 484 of 2021

For the Respondent : Mr. S.N. Mookherjee,
Ms. Susmita Shaw,
Mr. Kumar Gupta,
Mr. Shatadru Chakraborty,
Mr. N. Chowdhury,
Mr. Dibesh Dwivedi,
Mr. Ramendu Agarwal

... advocates for the respondent no. 1 & 2 in MAT 484 of 2021

For the Respondent : Mr. Kishore Datta,
Mr. Kumar Gupta,
Ms. Sumita Shaw,
Mr. Shatadru Chakraborty,
Mr. Dibesh Dwivedi,
Mr. Ramendu Agarwal

.....advocates for the respondent in MAT 534 of 2021

Heard on : 14.06.2021

Judgment on : 09.09.2021

Hiranmay Bhattacharyya, J.:-

The order dated March 16, 2021 passed by a Hon'ble Single Judge in WPA 3749 of 2021 has been assailed by the respondents by preferring two separate appeals. Coal India Limited (for short CIL) and its Chairman have preferred MAT No. 534 of 2021 and the Eastern Coal Fields Limited (for short ECL) has preferred MAT 484 of 2021.

By the order impugned the Hon'ble Single Judge directed the CIL and ECL to supply one time allotment of 5800 tons of G5 grade coal on contractual terms for trial operation of the plant.

The respondent no. 1 in both the appeals is the writ petitioner. The respondent no. 1 was awarded a contract for (i) Repair, refurbish and bringing back the 3x10 MW Chinakuri TPP in running condition at ECL's cost (ii) Erection of 33KV transmission network [2 Nos. lines each having route length of 15 km (approx.)] with associated civil and structural works and synchronization with the grid of facilitate evacuation of generated power from Chinakuri TPP upto Kanyapur grid substation of West Bengal State Electricity Transmission Company Limited (in short, WBSETCL) and (iii) Leasing of the 3x10 MW Thermal Power Plant (TPP) at Chinakuri of ECL. ECL after completion of job under serial no. (i) & (ii) above for power generation, operation and maintenance of the plant, transmission line etc. and evacuation of generated power for a period of twenty (20) years.

The said respondent claims that the job under Serial No. (i) and (ii) which has been duly certified by the ECL and 5800 tons of G5 grade coal was allotted in its favour for the work under Serial No. (iii) of the contract. The respondent states that by virtue of the work awarded under the said contract and the lease executed by and between the ECL and the writ petitioner/respondent herein, it is bound to operate and maintain the plant and the connected transmission line. The respondent alleges that in spite of the fact that it had completed all formalities but the amount of coal has not yet been supplied and as a result the trial operation and maintenance of the plant, transmission line and evacuation of generated power has become an impossible act. The respondent apprehends that it may be held liable for breach of the terms of the lease and the contract without any fault on its part. Based on such allegations the respondent filed the instant writ petition for a mandamus upon the ECL and its officers to supply G5 and G6 grade coal at power rate continuously from collieries situated close to the Chinakuri Thermal Power Station.

In course of hearing of the said writ petition it was contended on behalf of the ECL that it is always and still ready to comply with the contractual obligation to supply 5800 tons of G5 grade coal from any mine of ECL situated within 40 kms from the plant to be operated and maintained by the writ petitioner in terms of the contract. The only defence taken for non-supply of coal is procedural intervention owing to policy matters.

The contention of the CIL before the Writ Court was that they are under no obligation to supply coal as promised by ECL and they have been unnecessarily dragged into the instant litigation.

The Hon'ble Single Judge by the order impugned disposed of the writ petition by directing the CIL and ECL to supply 5800 tons of G5 grade coal on contractual terms for trial operation of the plant. The Hon'ble Single Judge left the writ petitioner/respondent no. 1 in the said appeals free to agitate insofar as the other prayers made in the writ petition regarding continuous supply of coal after the one time allotment of 5800 tons in an appropriate proceeding if the occasions so arises.

Mr. Saptansu Basu learned senior advocate appearing for the appellants in MAT 484 of 2021 assails the impugned order in-so-far-as the writ petition was disposed of without giving any opportunity to the appellant to disclose their stand against the allegations directed against them in the writ petition by filing an affidavit in opposition. Thus, the EC could not apprise the Hon'ble Single Judge about the coal policies that are prevailing. He further contended that the existing coal supply policies do not allow and/or permit the ECL to supply coal to the respondent no. 1. He next contended that the nature of the relief granted in favour of the writ petitioner/respondent no. 1 herein is in the nature of an order for specific performance of contract which cannot be granted by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. In support of such contention Mr. Basu placed reliance upon a judgment of the Hon'ble Supreme Court of India in the case of *Shri Ram Builders vs. State of Madhya Pradesh and ors.* reported at (2014) 14 SCC 102.

Mr. Bachawat learned Senior Counsel appearing for the appellants in MAT 534 of 2021 contended that the CIL being a third party to the agreement for lease dated August 7, 2019 could not have been directed to make arrangements for supply of one time allotment of 5800 tons of G5 grade coal to the writ petitioner as CIL was not a party to such contract. He contended that relief of a specific performance of a contract cannot be granted in a writ petition and in support thereof reliance was placed on *Shri Ram Builders*(supra).

Mr. Mukherjee learned Senior advocate appearing for the writ petitioners/respondent no. 1 in MAT 484 of 2021 contended that it is well settled that the jurisdiction under Article 226 cannot be ousted only on the ground that the dispute pertains to the contractual arena. In support of such contention he placed reliance upon a judgment of the Hon'ble Supreme Court of India in the case of *Unitech Limited and ors. vs. Telengana State Industrial Infrastructure Corporation and ors.* reported at 2021 SCC Online SC 99.

Mr. Mukherjee further contended that ECL agreed to supply G5 and G6 grade coal from nearby mines within 40 kms radius from the plant. He further contended that the repair and refurbishment work of 3x10 MW Chinakuri Power Plant has been completed and the same is ready for test and trial run for which 5800 tons of G5 grade coal is required to be provided by ECL to the respondent no. 1. He further contended that none of the policies relied upon by the appellants in the application for stay create any embargo upon ECL to supply G5 grade coal from a mine situated nearby the plant in question to the writ petitioner/respondent herein.

In course of argument Mr. Mukherjee referred to the annual report and accounts of ECL for the period of 2019-20. He drew the attention of the Court to the actual off-take of coal in 2019-20 against the demand of coal for the purpose of colliery consumption. By referring to the said document Mr. Mukherjee submitted that the plea taken by the appellant of policy intervention as a ground for non-suply of coal is without any basis as would appear from the said report.

The appellants have questioned the jurisdiction of the Writ Court to entertain and decide the instant dispute relating a contract. The other ground of challenge is that the coal policies in force are creating an obstacle in the path of performing the contractual obligations by the appellants.

The parties have advanced their arguments on the merits of the appeal.

We have heard the learned advocates for the parties and have considered the materials on record.

Admittedly, the dispute involved in the instant writ petition relates to a contract between the ECL and the respondent no. 1 herein. ECL has challenged the jurisdiction of the Writ Court to entertain a writ petition on contractual matters. Since the issue of jurisdiction goes to the root of the matter, this Court proposes to decide the said issue first.

The Hon'ble Supreme Court of India in *Unitech Limited* (supra) held that recourse to the jurisdiction under Article 226 of the Constitution of India is not excluded altogether in a contractual matter. It was further held that the State and its instrumentalities are not exempt from the duty to act fairly merely because in course of their business dealings they have entered into the realm of contract. The Hon'ble Supreme Court further held that in determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew disputed questions of fact which would depend upon an evidentiary determination, requiring a trial. The Hon'ble Supreme Court held thus-

"39. A two judge Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India [ABL International] analyzed a long line of precedent of this Court to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:

> *"27. …the following legal principles emerge as to the maintainability of a writ petition: (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable. (b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. (c) A writ petition involving a consequential relief of monetary claim is also maintainable.""*

"41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must,

undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract."

Thus, it is well settled that the jurisdiction of this Court under Article 226 of the Constitution of India is not ousted merely because of the fact that the dispute pertains to a contract between a private party on one hand and the State or its instrumentalities on the other. It is equally true that the Writ Court must abstain from exercising jurisdiction in contractual matters if determination of such dispute involves disputed factual issues requiring a trial on evidence.

This Court shall now consider whether the Hon'ble Single Judge was justified in entertaining the instant writ petition.

The documents annexed to the stay application reveals that a team of executives from ECL carried out a joint inspection with regard to completion of repair and refurbishment job of 3x10 MW Chinakuri Power Station and erection of 33KB overhead lines and upon being duly satisfied accepted the completion report for the said work. It further appears that in a meeting of the Board of Directors held on 9th May, 2019 the ECL Board after detailed deliberation approved total quantity of 5800 tons of G5 grade coal to be allocated on one time basis from suitable mine of ECL within 40 kms from the plant for trial operation of Chinakuri Power Plant. It further appears that the ECL executed the deed of lease dated August 7, 2019 thereby agreeing to supply G5 and G6 grade of coal from the nearby mines within 40 kms radius from the plant. Various correspondence made by ECL go to show that the required coal shall be supplied by ECL for operation of the power plant.

It was submitted on behalf of ECL before the Hon'ble Single Judge that it was always and still is ready to comply with its contractual obligation to supply 5800 tons of G5 grade coal from any mine of ECL situated within 40 kms from the plant. In the stay application ECL has referred to various policies that are in existence for supply of coal by a coal mining company namely "SHAKTI", "EXTENSION OF EXISTIGN FSA FOR 5 YEARS", "LINKAGE AUCTION", "SPOT E-AUCTION", "SPECIAL FORWARD E-AUCTION" and "EXCLUSIVE E-AUCTION". However, it has been specifically admitted by the ECL in the said application that none of such policies fits the matter of the supply of coal to the respondent no. 1. Thus, it is crystal clear from the averments made in the stay application that none of the existing policies create any embargo upon supply of G5 grade coal by ECL to the respondent no. 1 for using the same for the purpose of trial run of the captive power plant. In course of hearing, ECL also could not point out any policy which debars it from performing its obligation regarding supply of coal to the respondent no. 1 as per the contract and the lease agreement.

Mr. Basu, the learned Senior Advocate for the ECL submitted that an agreement to do an act impossible in itself is void. He submitted that it is impossible on the part of ECL to supply coal to the respondent no. 1 as per the agreement. Mr. Basu contended that the Hon'ble Single Judge erred in law by directing ECL to do an impossible act. In other words, according to Mr. Basu, the Hon'ble Single Judge by the judgment and order impugned in the appeal directed enforcement of an agreement which is void *ab initio*.

From the correspondence exchanged between the parties which are available on record as well as the coal policies that are in existence, as alleged by the ECL, it does not appear to this Court that the agreement for supply of G5 grade coal by the ECL to the respondent no. 1 can be said to be an agreement to do an act which is an impossible one. ECL entered into the agreement for supply of

G5 grade coal being fully aware of the existing coal policies. For the reasons as aforesaid this Court is unable to accept the submission of Mr. Basu that the agreement for supply of coal is in effect an agreement to do an impossible act.

In the instant case the facts are not much in dispute. As such the determination of issues involved in the instant writ petition would not require a trial on evidence. Thus, this Court is unable to accept the submission of the learned advocate for the appellants that the jurisdiction of this Court under Article 226 is ousted merely because the dispute pertains to a contract between the parties.

In *Sri Ram Builders* (supra) the Hon'ble Supreme Court of India refused to grant any relief for specific performance of a contract in an appeal arising out of a writ petition as it appeared to the Hon'ble Supreme Court of India that the entire purpose of the contract has been frustrated by subsequent events and relegated the appellant to the Civil Court for seeking remedies for breach of contract as the issues raised therein would involve adjudication of disputed questions of fact which can only be suitably adjudicated in the civil suit.

In the instant case since the facts are not much in dispute and there is nothing on record to arrive at a finding that the entire purpose of the contract has been frustrated by subsequent events. Thus, the judgment in the case of the *Sri Ram Builders* (supra) is not applicable to the facts of the instant case.

The writ petitioner has alleged that the respondent authorities acted in an arbitrary manner by not supplying the G5 grade coal. Thus, this Court is of the considered view that the Writ Court had the jurisdiction to entertain the instant writ petition.

During the course of exhaustive arguments by the parties and the documents placed in support thereof, it could not be conclusively proved by the appellants that the contract in issue between ECL and the respondents can be said to be directly affected by the coal policies in existence. It is a matter of record that the contract was entered into by the parties with their eyes wide open in the teeth of the existing coal policies.

To the mind of this Court the contract pertains to a captive power plant and it is not contemplated to cover lifting of coal or coal auction *qua* either CIL or ECL and third parties. Furthermore, the captive power plant is to be operationalized wholly on the basis of the first supply of the coal as contemplated of 5800 tons to benefit ECL production. It is therefore an in-house arrangement *of* ECL, *by* ECL and *for* ECL.

The scope of the writ petition and hence this appeal is confined to the role of the respondent no. 1 is limited to only establishing and operationalizing the captive power plant under the contract without such role being amplified into the realm of an open third party bidder for lifting of coal or participating in a coal auction.

In the above view of the matter, this Court is not inclined to intervene on a contractual term which is not disputed by any of the parties. To the best of the mind of this Court the arguments on the existing coal policies appear to be extraneous to the contractual term. It all along transpires from the record that ECL is ready and willing to discharge the term of the contract supplying the 5800 tons of coal to its captive power plant but, for the introduction of the arguments at this stage, of existing coal policies standing in the way.

In the backdrop of the above discussion, the arguments of the appellants in MAT 534 of 2021 on the applicability of existing coal policies do not appear to affect Clause-7.1 of the contract. Thus, this Court holds that the technicality connected to national coal policies, as argued by the appellants, cannot stand in the way of granting the relief as proposed to be granted by this Court in view of Clause 7.1 of the said contract.

Since the contract relates to operationalisation of the captive power plant of ECL which is a subsidiary of CIL, this Court is also of the considered view that CIL cannot be permitted to shirk off its responsibility in the matter as rightly held by the Hon'ble Single Judge.

For the reasons as aforesaid, this Court is not inclined to interfere with the order passed by the Hon'ble Single Judge in the writ petition.

The appeals being **MAT 484 of 2021** and **MAT No. 534 of 2021** stand **dismissed** without, however, any order as to costs. The connected **applications** also stand **disposed of** accordingly.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Subrata Talukdar, J.) **(Hiranmay Bhattacharyya, J.)**

09.09.2021

Later:

Mr. Bachawat, Learned Senior Advocate for the appellant in M.A.T. 534 of 2021 prays for stay of operation of the judgment.

The prayer for stay is considered and rejected.

I agree.

(Subrata Talukdar, J.) **(Hiranmay Bhattacharyya, J.)**