

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5470/2021

M/s Sainik Mining and Allied Services Limited,
A Public Limited Company, having its registered
Office at 129, Transport Centre, Rohtak Road,
Punjabi Bagh, New Delhi – 110035 and Corporate
Office at 7th Floor, Corporate Tower, Ambience Mall,
N.H. No.48, Gurugram-122001, herein represented
by Senior General Manager Omprakash Katare,
aged about 63 years, having its office at Sainik
Mining & Allied Service Limited, Qtr. No.B-92,
WCL Colony, Near Harihar Mandir, Umrer, Nagpur
(Maharashtra), Pin Code-441204, who has been duly
authorized vide letter dated 08/12/2021 read with
Board Resolution dated 23/07/2020.

PETITIONER

.....VERSUS.....

1. M/s Western Coalfields Limited,
through its General Manager (CMC), WCL HQ,
Nagpur, Coal Estate, Civil Lines, Nagpur-440001.
2. M/s Western Coalfields Limited,
through its General Manager, Umrer Area,
PO Project, Dist. Nagpur-441204.
3. HDFC Bank, through Manager, having Branch
Office at E-13/29, Second Floor, Harsha Bhawan,
Middle Circle, Connaught Place New Delhi-110001.

RESPONDENTS

Shri A.S. Jaiswal, Senior Advocate with Shri Gopal Sawal, counsel for the
petitioner.

Shri S.P. Dharmadhikari, Senior Advocate with Shri Kartik Shukul, counsel for
the respondent nos.1 and 2.

CORAM : A. S. CHANDURKAR AND SMT. M.S. JAWALKAR, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 01ST MARCH, 2022.

DATE ON WHICH JUDGMENT IS PRONOUNCED : 16TH MARCH, 2022.

JUDGMENT : (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned
counsel for the parties.

2. The challenge raised in this writ petition is to the order dated 08.12.2021 that has been issued by the Area General Manager, Umrer Area of the Western Coalfields Limited by which the work order issued to the petitioner pursuant to the tender notice dated 20.02.2016 has been terminated and the performance security deposit furnished by the petitioner has been forfeited. In addition, the petitioner has been debarred from participating in future tenders of the Western Coalfields Limited for a period of three years.

3. The facts giving rise to the present writ petition are that the petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of excavation as well as mining of coal and other allied services. On 20.02.2016, the Western Coalfields Limited issued a tender notice inviting bids for three jobs with duration of 83 months. As per Clause 6.2 of the tender notice if there was failure on the part of the Contractor to complete the work within the agreed time and also to maintain the progress of that work, the Contractor was liable to pay liquidated damages. As per Clause 6.4 there was a provision for extending the date of completion for reasons stipulated therein including a cause beyond the control of the Contractor. As per Clause 9, the contract was liable to be cancelled in full or in part if the Contractor defaulted in proceeding with the works with due diligence and the

Contractor continued to do so even after a notice in writing from the Engineer In-charge. As per Clause 9(b) if there was failure to achieve monthly agreed quantity of 75% or a period of six consecutive months or a cumulative period of six months within a continuous period of eighteen months then except on account of non-availability caused by a Force Majeure event or an act of omission of company not occurring due to any default of the Contractor, the Western Coalfields Limited was free to act accordingly. Though there are other sub clauses to Clause 9 they are not relevant for the present purpose. As per Clause 19 there is a provision for payment of price variation and as per Clause 19.04.1 price variation on account of diesel has been provided. In the formula stated in that clause the diesel component expressed as percentage of total value of work was 0.30. The bid submitted by the petitioner was accordingly accepted by issuing the letter of acceptance on 27.05.2016. Pursuant thereto the petitioner was issued the work order dated 08.12.2016. In Clause 21 of the said work order, the rate of diesel as on 15.03.2016 was indicated at Rs.52.37 Ps. per litre. It was stated that the escalation/de-escalation would be payable/recoverable as per the price variation clause of the Special Terms and Conditions of the Tender Document.

4. It is the case of the petitioner that pursuant to aforesaid work order the work commenced and the same was being done smoothly.

However on account of setting in of the Covid-19 pandemic the petitioner started facing difficulties. On 02.04.2020 a letter was issued by the petitioner to the Area General Manager stating therein that for aforesaid reason which was beyond the control of the petitioner the daily targets could not be achieved. On 12.10.2021 the petitioner called upon the Area General Manager that the price of diesel had increased and it was higher than the basic price of contract for which reason the petitioner was not in a position to clear the outstanding dues of the Indian Oil Corporation Limited. This was likely to result in interruption of the ongoing work. By a communication dated 10.08.2021 the petitioner informed the Chairman and the Managing Director of the Western Coalfields Limited, Nagpur all the difficulties faced on account of increase in the price of diesel to Rs.97.09 Ps. per litre on 30.07.2021. The rates thereafter increased to about Rs.103/- per litre as per communication dated 27.10.2021. Considering the joint representations made by various contractors to the Chairman of the Coal India Limited seeking modification of the price variation clause, the General Manager, Coal India Limited informed the Regional Managers of its various subsidiaries that for future tenders an amendment was being made in Chapter 6 of the Contract Management Manual of Coal India Limited. The same was to be made applicable for future tenders including tenders in which the bid submission had not been completed. On 02.11.2021 a show cause notice

was issued by the Are General Manager to the petitioner stating therein that the site of the work had been handed over to the petitioner on 06.10.2016 and the work had been commenced on 25.11.2016. The scheduled completion date of the work as per the work order was 24.10.2023. It was stated that the overburden removal and coal production performance during April-2021 to September-2021 was extremely poor. In addition there was deployment of insufficient numbers of machines/equipments as per the agreement thus resulting in failure to achieve the agreed quantity of coal and OB Evacuation. Various letters had been issued for achieving the mutually agreed targets and despite assurances by the petitioner there was no improvement in the performance. It was stated that about 32 letters during the period 2017 to 2021 had been issued but the petitioner had not improved its performance for achieving the targets. Reference was made to Clause 9 sub clauses (a) to (c) of the contract and the petitioner was called upon to show cause as to why action as stated in Clause 9 may not be taken.

The petitioner on 12.11.2021 submitted its reply stating therein that for a period of about 58 months 80% of removal of OB and 93% of evacuation of coal had been undertaken. The targets could not be met during April-2021 to September-2021 on account of outbreak of Covid-19 pandemic. It was further stated that on account of increase in

the price of diesel the cost of mining work had increased making it difficult for the petitioner to run the machines with full capability.

5. The Area General Manager on 08.12.2021 after consideration of the explanation of the petitioner and after grant of personal hearing informed the petitioner about termination of the work order that was issued on 27.05.2016, directed forfeiture of the performance security deposit or 20% of the value of incomplete work whichever is higher and also debarred the petitioner from further participation in future tenders of the Western Coalfields Limited for a period of three years. It is this order issued by the Area General Manager of the Western Coalfields Limited that is the subject matter of challenge in this writ petition.

6. Shri A.S. Jaiswal, learned Senior Advocate for the petitioner submitted that on account of global increase in the price of diesel it became financially difficult for the petitioner to meet the targets with regard to carrying out the work order under the contract. The diesel component that was agreed was 0.30 when the price of diesel was Rs.52.37 Ps. per litre as stated in the work order. The price of diesel had risen to Rs.103/- per litre and for reasons beyond the control of the petitioner it was difficult for the petitioner to achieve the targets as fixed. The Western Coalfields Limited on realizing this material aspect had on its

own increased the diesel component from 0.30 to 0.56 on 17.11.2021. However this variation was made applicable only to future contracts without making the same applicable to existing and unfinished contracts such as the present one. There was no valid reason on the part of the Western Coalfields Limited to exclude the existing contracts like the one in hand and the lower component of 0.30 was liable to be modified to the component that was to operate for future contracts. Since the increase in the price of diesel was for reasons beyond the control of the petitioner, it was clear that the present situation was covered by the exception to Clause 9(b) being a Force Majeure event. The Western Coalfields Limited therefore was not justified in terminating the work order and further forfeiting the performance security deposit and debarring the petitioner. The learned Senior Advocate referred to the judgment of the Division Bench in *AG Enviro Infra Projects Private Limited Versus State of Maharashtra & Others* [2018(6) AIR BomR 698] and submitted that the escalation in the price of diesel globally was a factor which required alteration of the diesel component from 0.30. He also referred to another judgment of the Division Bench in *A2Z Infraservices Limited Versus Union of India & Others* [2018 (3) LLJ 363] and submitted that the ratio thereof was clearly applicable to the case in hand. Therein the business efficacy test was applied and it was submitted that on similar lines the work order of the petitioner was liable to be restored. It was thus prayed

that the impugned action taken by the Western Coalfields Limited being arbitrary in nature and violative of Article 14 of the Constitution of India was liable to be set aside.

7. Per contra, Shri S.P Dharmadhikari, learned Senior Advocate for the respondent nos.1 and 2 opposed the aforesaid submissions. According to him, the work order issued to the petitioner was terminated in accordance with Clause 9 of the contract for *bona fide* reasons. The order dated 08.12.2021 had clearly referred to Clauses 9(a) to 9(c) of the contract. Contention urged by the petitioner could at the most relate to Clause 9(b) of the contract but there was no escape from the fact that there was a breach committed also with regard to Clause 9 (a) and 9(c) thereof. On 17.11.2021, the Western Coalfields Limited had taken a policy decision in the matter of consideration of joint representations of various contractors and had amended Chapter 6 of the Contract Management Manual which was to be made applicable for future tenders including the tenders in which bid submission had not been completed. The decision not to apply such amendment to existing contracts could not be said to be arbitrary as the same would have resulted in the material altering the contracts already entered. The decision to alter the escalation clause was a matter of policy having financial implications and hence the Coal India Limited did not act arbitrarily in making amendment

to operate prospectively. There was an escalation clause in the contract entered into with the petitioner and the parties were bound by the same. The petitioner was infact attempting to seek substitution of the escalation clause in the contract but such prayer was not liable to be granted in exercise of jurisdiction under Article 226 of the Constitution of India. It was submitted that the period of the contract was 83 months and it was for the petitioner as a prudent business firm to have considered future possibilities while submitting its offer. The offer made by the petitioner was to do business on the terms set out by the Western Coalfields Limited and it was not permissible mid-way to seek alteration in the terms of the contract. He submitted that in accordance with the escalation clause the increase in the price of diesel was being paid to the petitioner but it was only the petitioner who had defaulted in meeting the timeline for completion of the work. The escalation clause in the contract was to operate for the Contractor as well as the Principal and the same could not be viewed only from the perspective of the Contractor. The rise in price of diesel was hardly related to Article 14 of the Constitution of India. In the writ petition there was no foundational pleadings as to the effect of the pandemic situation on the petitioner. Further the petitioner did not dispute the reasons contained while applying Clause 9(a) and 9(c) and had only sought to rely upon Clause 9(b). The rise in global prices of diesel could not be said to be a Force Majeure event as such rise was not

the act of God. Since there was no omission on the part of the Western Coalfields Limited it was only the petitioner who was to blame for not achieving the given targets.

The learned Senior Advocate sought to distinguish the judgments relied upon by the learned Senior Advocate for the petitioner by submitting that therein the Contractor as an agent of the Principal was required to comply with statutory obligations under the Minimum Wages Act, 1948. It was in that context that the price variation clause was directed to be modified. In the case in hand there was no such statutory obligation to be met either by the Western Coalfields Limited or by the petitioner. Hence the business efficacy test was not applicable and the price escalation clause was already provided. Moreover the policy decision dated 17.11.2021 was not under challenge by the petitioner so as to pray for that policy decision to be modified for being made applicable even to existing contracts. It was then submitted that this Court while issuing notice had directed that the bank guarantee furnished by the petitioner was not to be encashed if the same had not been encashed on the date of the order. Relying upon the decision in *U.P. Cooperative Federation Ltd. Versus Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] it was submitted that only if there was an element of fraud on the part of the beneficiary that the encashment of the bank guarantee could be refused by the bank. There was no such case

pleaded by the petitioner. It was thus submitted that no interference was called for in the writ petition and the same was liable to be dismissed.

8. We have heard the learned counsel for the parties at length and we have perused the documents placed on record. After giving due consideration to the rival submissions, in our view the petitioner has not made out any case for grant of relief under Article 226 of the Constitution of India. In matters arising out of contractual disputes it is well settled that the Court in exercise of jurisdiction under Article 226 of the Constitution of India is merely concerned with the decision making process rather than the decision itself. If the decision making process is found to be fair and the decision has been taken after following all procedural requirements and by granting due opportunity to the concerned party the scope to interfere with the decision taken thereafter would be limited. In the present case we find that the petitioner has not raised a serious challenge to the decision making process of the Western Coalfields Limited in terminating the work issued to the petitioner. The challenge is principally to the decision of the Western Coalfields Limited of terminating the work order issued to the petitioner. In other words, the challenge is to the decision itself and not to the decision making process. The issuance of show cause notice dated 02.11.2021 and the fact of the petitioner giving reply thereto on 12.11.2021 is not in dispute.

The termination of the work order on 08.12.2021 is in view of Clauses 9(a) to 9(c) of the Conditions of Contract. We may note that there was also no serious challenge to the factual data mentioned in the show cause notice that has been made the basis for termination of the work order. The grievance of the petitioner is that on account of the global increase in the prices of diesel, the diesel component in the work order which was prescribed at 0.30% became financially non-viable. The Coal India Limited on noticing such global increase in the prices of diesel unilaterally on 17.11.2021 amended Chapter 6 of the Contract Management Manual and revised the rates of diesel component. Such revision however was made applicable only to future tenders and the tenders in which the bid submission had not been completed. The petitioner contends that in the light of the difficulties faced and with the onset of the pandemic such amendment in the rate of diesel component ought to have been applied even to the work orders in hand.

9. We find that the decision taken by the Coal India Limited on 17.11.2021 of amending the Contract Management Manual is in the nature of a policy decision which is not under challenge in the writ petition. This policy decision has financial implications and it is perhaps with said aspect in mind that it has been made applicable to future tenders. It is however not necessary to go into the justification

on the part of Coal India Limited for not applying the revision in the rate of diesel component to existing contracts. It is also not the case of the petitioner that the benefit of such amendment was granted to a work order already issued and that such benefit was denied to the petitioner. The learned Senior Advocate for the respondents is justified in submitting that in effect the petitioner seeks substitution of the price escalation clause in the contract from what was agreed by the petitioner. It would not be a sound exercise of discretion if the Court were to alter certain terms of the contract as the parties would be governed by the contract entered into between them. We also note that it is the stand of the respondents that amongst various work orders in operation it was only the petitioner who had defaulted in completion of the work allotted to it and other contractors had continued with the completion of contracts awarded to them. We therefore do not find anything arbitrary on the part of the respondents in not applying the amendments made to the Contract Management Manual to the contract that was awarded to the petitioner on 08.12.2016. On perusal of the show cause notice and the reply submitted by the petitioner we are satisfied that the contract of the petitioner has been terminated in accordance with the terms of the tender document itself by relying upon Clauses 9(a) to 9(c) thereof.

10. In support of the contention that the Western Coalfields Limited ought to have applied the amendments made in Chapter 6 of the Contract Management Manual even to tenders wherein the work order was issued by taking a note of the increase in the price of diesel, the learned Senior Advocate for the petitioner sought to rely upon the decision in *AG Enviro Infra Projects Private Limited* (supra). The facts of the aforesaid case indicate that one of the conditions of the tender was to apply the notification issued by the State Government in the matter of payment of minimum wages. During the period when the contract was being worked out a notification increasing the minimum wages was issued by the State Government. The Contractor by relying upon such increase had sought the benefit of resolutions passed by the General Body of the Municipal Corporation by which the Municipal Corporation agreed to provide minimum wages to the contract labourers. In that context it was held that it was the statutory obligation firstly of the Municipal Corporation to implement the notification modifying the rates of minimum wages. The Municipal Corporation as principal was bound by such notification and therefore it was its duty to see that the Contractor who was its agent was not put to any financial distress while complying with such statutory obligation. The Court further found that the benefit of the resolutions passed by the Municipal Corporations was extended to similarly situated contractors and on

the basis of parity such benefit was liable to be extended to the petitioner.

In *A2Z Infraservices Limited* (supra) there was an increase in the rates of minimum wages with effect from 19.01.2017 when the contract was being worked out. The Court again noticed that there was a statutory obligation on the part of the Railway Department which was the principal to comply with the notification increasing the rates of minimum wages. The Contractor sought compensation for the increase in the cost of labour pursuant to the notification dated 19.01.2017. It was held that though the Railways applied the price variation clause till 18.01.2017 it had not done so after issuance of the notification dated 19.01.2017. The Court held that the Railways ought to neutralize the cost of labour by acting under the price variation clause and further referred to the principle of “business efficacy”.

11. The facts of the aforesaid decisions clearly indicate that the Contractor therein was obliged to comply with prescribed statutory obligations under the Minimum Wages Act, 1948. Since it was the duty of the principal to ensure such compliance and the work was being done by its agent, the Court found it appropriate to direct the principal to ensure that the Contractor was not put at a loss while complying with such statutory obligations. However, we find that the facts of the case in hand are distinct and the ratio of the aforesaid decisions cannot be made

applicable to the present case. The Coal India Limited took a policy decision of amending the Contract Management Manual by increasing the rate of diesel component and making it applicable to future tenders as well as the tenders in which the bid submission had not been completed. This policy decision amending Chapter 6 of the Manual has not been challenged by the petitioner and it is also not the case of the petitioner that the amendment as made have been applied either by Coal India Limited or by Western Coalfields Limited to a work order that was already issued and the work was in progress. Moreover, there is no statutory obligation involved mandating the principal to abide by any variation in the diesel component. It is merely a factor that is provided for under the price variation clause and is in the nature of a business risk. Hence, the ratio of the said judgments do not apply to the case in hand.

12. Another aspect that cannot be lost sight of is that the show cause notice issued to the petitioner on 02.11.2021 has specifically referred to Clause 9(a) to 9(c) of the conditions of contract while seeking to terminate the contract. Clause 9(a) to 9(c) reads as under:

“Termination, Suspension, Cancellation & Foreclosure of Contract:

The company shall, in addition to other remedial steps to be taken as provided in the conditions of contract, be entitled to cancel the contract in full or in part, if the contractor,

a. makes default in proceeding with the works with due diligence and continues to do so even after a notice in writing from the Engineer-in-charge, then on the expiry of the period as specified in the notice

Or

b. fails to achieve a monthly agreed quantity of 75% (Seventy Five percent) for a period of 6(Six) consecutive months or for cumulative period of six months within any continuous period of 18(eighteen) months, save and except to the extent of non-availability caused by I) a Force Majeure event or ii) an act of omission of company, not occurring due to any default of the contractor.

Or

c. commits default/breach in complying with any of the terms and conditions of the contract and does not remedy it or fails to take effective steps for the remedy to the satisfaction of the Engineer-in-charge, then on the expiry of the period as may be specified by the Engineer-in-charge in a notice in writing.”

The impugned order dated 08.12.2021 has proceeded to terminate the contract by relying upon Clause 9(a) to 9(c). Prior to issuance of the show cause notice it has been stated that there were various notices issued to the petitioner in which it was stated that the monthly targets were not being achieved. It is not the case of the petitioner that such notices were not issued to it. It is on that basis that the Area General Manager has invoked Clause 9(a) to 9(c) thereof. The thrust of the petitioner is on the global increase in the price of diesel thereby rendering the diesel component of 0.30 to be financially non-viable. The petitioner has sought to rely upon such increase to

be a Force Majeure event. Such contingency finds place in Clause 9(b) of the conditions of contract. Before adverting to the same suffice it to observe that there is no specific challenge raised to termination of the contract under Clause 9(a) to 9(c) of the conditions of contract. The show cause notice dated 02.11.2021 refers to the performance of the petitioner in detail and further states that about 32 letters were issued to the petitioner between 2017 to 2021. Despite that the performance of the petitioner for achieving the daily minimum quantity of OB removal and coal evacuation by deploying equipments as per the terms and conditions of the contract had not improved. Reply of the petitioner does not counter the aforesaid. We therefore find that invocation of Clause 9(a) and 9(c) of the Conditions of Contract for terminating the contract is supported by material that finds place in the show cause notice as well as the order terminating the contract.

13. Coming to the termination of the contract by relying upon Clause 9(b) of the Conditions of Contract we find that if there is failure to achieve monthly agreed quantity of 75% for a period of six consecutive months or for a cumulative period of six months within any any continuous period of eighteen months, the contract is liable to be terminated. This contingency is saved only to the extent of

non-availability caused by a Force Majeure event. Increase in the price of diesel cannot qualify as a Force Majeure event. Such increase in the price of diesel would be in the nature of an expected or foreseen phenomenon keeping in mind the duration of the contract which was for a period of about seven years or 83 months to be precise. The price escalation clause in the Conditions of Contract and especially Clause 19.04.1 refers to such price variation on account of diesel. The diesel component is provided at 0.30 as percentage of total value of work. The petitioner having accepted the terms of the contract while submitting its bid, the parties would be governed by this price variation clause. That clause generally would operate to the benefit of either party depending upon the increase/decrease in the price of diesel. That would be a factor to be considered by a bidder while submitting his bid. Seeking modification of the diesel component on the basis of the amendment of those rates in the Contract Management Manual would result in substituting one of the terms of the contract with another which in our view would not be permissible since there is no such scope provided for in the conditions of contract. The parties would be governed by Clause 19.04.1. It would therefore not be permissible for the petitioner to invoke the Force Majeure clause which is not attracted at all.

14. For aforesaid reasons therefore we do not find any case made out to interfere in exercise of writ jurisdiction under Article 226 of the Constitution of India. The writ petition therefore stands dismissed with no order as to costs. Rule stands discharged.

(SMT. M.S. JAWALKAR, J.)

(A.S. CHANDURKAR, J.)

APTE

At this stage, the learned counsel for the petitioner seeks stay of the judgment. He submits that the interim order operating be continued for a period of four weeks. This request is opposed by the learned counsel for the respondents.

We do not find any case made out to stay the encashment of the bank guarantee. The respondents are free to encash the same. The interim order making the work order subject to the outcome of the writ petition shall continue to operate for a period of four weeks and shall cease to operate automatically after that period.

(SMT. M.S. JAWALKAR, J.)

(A.S. CHANDURKAR, J.)

APTE