

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

WPA 22476 of 2023

**M/s. STA-BGM and M-SRSC(JV) and Another
Vs.
Eastern Coalfields Limited and Others.**

**For the petitioner : Mr. Debajyoti Basu
Mr. Diptomoy Talukder
Mr. Subhojit Seal**

**For the E.C.L. Authorities : Mr. Debnath Ghosh
Mr. Aniruddha Chatterjee
Mr. Syed Nurul Arefin
Mr. Syed Moyeenul Arefin**

**For the Respondent No.7: Mr. Brajesh Jha
Mr. Subit Majumdar**

Item No. 11

Heard & Judgement on : 16.10.2023

Bibek Chaudhuri, J.

A notice to show cause vide reference
No.E.C.L./AGT/K.C./AGT/2023/464 dated 4th October, 2023 directing

the petitioner to submit its explanation within seven days of receipt of notice is under challenge in the instant writ petition.

It is not in dispute that on 12th May, 2018 a tender was floated in the website of Eastern Coalfields Limited for hiring of HEMM for removal and transportation of 144.70 L Cum of OB (including 10.00L Cum of Re-handling of OB) extraction and transportation of 37.95 L.Te of Coal and 146.10 L. Cum of Backfiling of OB at Kapasara OC Patch under Mugma in the State of Jharkhand. The petitioner was allotted with the work having the lowest bidder.

Consequently, a contract was executed by and between the local administration of EC at Kapasara and the petitioner for execution of the said work.

Subsequent to execution of such contract there were incidents of frequent accidents occurring due to illegal coalmines in the abandoned coal mines in Dhanband, Jharkhand and the National Green Tribunal, Eastern Zone Bench, Kolkata took suo motu cognizance of news report published in NDTV Web Portal on 21st April, 2022 which mentioned that in February at least five people had lost their lives in Eastern Coalfields abandoned mines due to mine collapse at Gopinathpur in Dhanband during illegal mining and the Government had formed special investigation team to probe the incident. Another news item was published in India Today in its edition dated 1st

February, 2022 that due to extraction of coal from an illegal coal mine at least 13 workers were killed at Eastern Coalfields Mugma area Nirsa Block.

In order to stop recurrence of such incident the National Green Tribunal, Eastern Zone Bench at Kolkata constituted a Committee and directed it to submit a report before the Tribunal within a specific period of time. It is submitted by the learned advocate for the petitioner that Kapasara Coal mine is within Mugma area of Dhanband. On receipt of such report a final order was passed by the Tribunal on 4th July, 2022. In the said order the observation of the Committee constituted by the Tribunal was recorded in respect of Kapasara mine. It was observed by the Committee that the mine high wall had several horizontal openings in coal face. Most of these openings were previously developed galleries when under ground mining was being done in Kapasara. However, the project officials and district administration officials informed that local people from nearby villages did illegal/unlawful mining from these galleries. In the said order it is recorded that there was no fencing around the Kapasara mine to stop the illegal/unauthorized mines there.

Learned advocate for the petitioner next refers to an order issued by the Director General, Mine Safety, Ministry of Labour and

Employment wherein it is specifically directed to the Manager of Kapasara colliery:-

“The top edge of the opencast working shall be kept fenced with wire rope strands or barbed wire, supported by posts of timber, iron or concrete (movable). The gap between the adjacent rope strand or wires shall not be more than 0.30 m and bottom most rope, strand or wire shall not be more than 0.25 m and the topmost rope, strand or wire shall not be less than 1.0 m from ground level.

At the fencing stage, opencast working shall be fenced with a masonry wall using lime mortar not less than 0.40 m thick and not less than 1.2 m high, with a parapet top.” (Clause 04.0)

It is the duty of the ECL to make fencing surrounding the Kapasara mine. The ECL authority failed to construct the fencing as yet. Therefore, there was illegal entry of people causing obstruction and hindrance in continuing work by the petitioner. The petitioner informed the ECL time and again giving several representations but the ECL authority did not construct fencing around the said coal mine.

Learned advocate for the petitioner next draws my attention to another order issued by the Director General of Mine Safety on 14th January, 2021 where it is specifically provided in clause 1.4 (a) that before starting any quarrying operation all structures, dwellings/houses and buildings if any located within 100 m distance from the proposed area shall be vacated/demolished and rendered uninhabitable. This direction has also not been complied by ECL and the affected persons were not indemnified. The petitioner informed that during execution of the work, on consequences of non-availability of encumbrances free land, progress of the work suffered badly, resulting losses of huge amount on the part of the contractor for non-utilization of machineries and manpower. The petitioner had sought for assistance for shifting of infrastructure out of the OC patch and desired necessary assistance to conduct sufficient blasting after evacuation of dwelling out of safety zone. But no effective action was taken by unit management, for continuance of the work. Therefore, the petitioner was compelled to stop the work to prevent further losses and informed the management to provide requisite land in totalling and shifting of dwelling to conduct normal blasting. In view of such constraints and due to the failure on the part of the management to render logistic support. The petitioners requested ECL for closer of the contract on natural justice.

It is, therefore, submitted by the learned advocate for the petitioner that the petitioner is constrained to file the instant writ petition for issuance of appropriate writ or direction declaring that execution of contract vide order dated 15th September, 2018 in terms of the agreement of the same date is not possible due to the contingencies and statutory restrictions and also for the following reliefs:-

c) Issue an Appropriate Order, or Direction that execution of the works contemplated to the Work Order vide ref no.ECL/HQ/CMC/WO/Kapasara OC Patch/600 dated September 15, 2018 and the Agreement as executed thereunder and entered between the ECL and the first petitioner is not legally possible due to contingencies and statutory restrictions as appear and for other like reason or reasons;

d) Issue an Appropriate Order, or Direction that the foundational representation of the contract has been failed for the live contingencies and statutory restriction(s) also due to arbitrary, unfair, unreasonable and culpability of the respondents ECL and that the petitioners are legally and otherwise prevented to resume/start the works;

Alternatively,

e) Issue an Appropriate Order, or Direction that the respondents ECL were/are not project ready at the time of issuing the Tender on May 12, 2018 and even after execution of the agreement, sometimes in around September, 2018 and now, despite of the live contingencies and statutory restrictions which appear and also corroborate by the contemporaneous documents and for other like reason or reasons, the ECL is insisting and compelling the first petitioner for illegal mining and attracts "Doctrine of Supervening Impossibility" in the discharge of the contract;

f) Issue an Appropriate Order, or Direction that the first petitioner is absolved in discharge and from any performance of the contract which were/are legally impossible due to supervening impossibilities qua in contemplating to Work Order vide ref no.ECL/HQ/CMC/WO/Kapasara OC Patch/600 dated September 15, 2018 and the Agreement thereunder;

g) Issue a Writ of and/or in the nature of mandamus commanding to the respondents ECL and each of them and /or their men, agents etc. to act as per the law and to forthwith take steps for closure of the contract in full in regard to the Work Order vide ref No.ECL/HQ/CMC/WO Kapasara OC Patch/600 dated September 15, 2018 and agreement as executed thereunder and also to release all charges over Performance Security and Additional Performance

Security Deposits as also retention money (ies) of the first petitioner and direct to refund all those same to the petitioners forthwith along with the interest and costs thereon;

h) Issue a Writ of and/or in the nature of mandamus commanding to the respondents ECL and each of them and /or their men, agents etc. to act as per the law and to forthwith take steps so that the first petitioner shall be released as also absolved in discharge and from any performance of the contract due to the presence of live contingencies and statutory restrictions that do appear from the contemporaneous documents as also for other like reason or reasons;

i) Issue a Writ of and/or in the nature of Mandamus commanding to the respondents ECL and each of them and/or its men and agents to act as per the law and to forthwith withdraw and rescind all decision(s), if any, and, being taken against the first petitioner for continuation of works under the Work Order vide ref. No. ECL/HQ/CMC/WO Kapasara OC Patch/600 dated September 15, 2018 and agreement as executed thereunder even in presence of live contingencies and the statutory restrictions that do appear from the contemporaneous documents and for other like reason or reasons;

j) Issue a Writ of and/or in the nature of Prohibition commanding to the respondents ECL and /or each of them and/or its men and agents to act as per the laws and also to take no coercive

step(s) and/or no penal measure(s) against the petitioners in regards to the Work Order vide ref No.ECL/HQ/CMC/WO/Kapasara OC patch/600 dated September 15, 2018 and the agreement as executed thereunder and to give no effect or further effect there-under and of like nature including to take no step(s) towards invocation of Performance Security and Additional Performance Security Deposit(s) as also retention money(ies) of the first petitioner as being held by the respondents ECL and in any way/manner whatsoever including of all decision(s) if any and anything connected thereto and/or being taken there-under;

k) Issue a Writ of and/or in the nature of Certiorari commanding to the respondent authorities and each of them and /or its men and agents to produce and transmit all records and proceedings pertaining to the instant case, so that upon perusal of each of those same, this Hon'ble Court may administer conscionable justice to the parties by quashing and setting aside decision making process and unreasonable, arbitrary, unfair acts and culpable omissions of the respondents ECL'

L) Issue Appropriate Order(s) and /or Direction(s)

m) Issue a Rule NISI in terms of prayers(c) to (L) as made above;

n) Pass an order of injunction do restraining the respondents ECL and each of them and its men and agents to take any step or steps towards appropriation or the Performance Security and Additional Performance Security Deposit(s) as also retention money(ies) of the first petitioner as being held by the said respondents under the Work Order vide ref No.ECL/HQ/CMC/WO/Kapasara OC patch/600 dated September 15, 2018 and the agreement as executed thereunder and in any manner whatsoever, in pendency of the Rule;

o) Pass an order of injunction do restraining the respondents ECL and each of them and its men and agents to take coercive step(s) and /or penal measure(s), against the petitioners in regards to the Work Order ref No.ECL/HQ/CMC/WO/Kapasara OC patch/600 dated September 15, 2018 and the agreement as executed thereunder, if any and in any way or manner whatsoever and/or anything connected thereto in pendency of the Rule or, the application;

p) Pass ad-interim order(s) in terms of the prayer(s) made above;

q) Order appropriate costs and incidentals to the application to be borne by the respondents;

r) Pass such other and further order(s) and/or direction(s) as to Your Lordship may deem fit and proper for the ends of justice.

The learned Advocate for the respondents/ECL, on the other hand, submits that at this stage this Court cannot pass any temporary order of injunction restraining the ECL from appropriating the performance security and additional performance security deposits as also retention money of the petitioners as well as restraining the ECL from taking coercive steps or penal measure against the petitioners on the ground that the relationship between the petitioners and the ECL arises out of a contractual obligation. The Court cannot injunct a party to the contract to take action for forfeiture of the contract or to terminate the contract if the terms and conditions of the agreement so states. In this regard, it is submitted by the learned Advocate for the ECL that in the tender document it is clearly mentioned that the intending party/bidder on his own responsibility, cost and risk visit and examine the site of work and on being satisfied only take part in the tender process. In Clause 30 of the tender document it is stated that the successful bidder shall deposit security which consists of two parts – performance security to be submitted by award of work and retention money to be recovered from running bills. Under Clause 32 it is specifically stated that the matters relating to any dispute or difference arising out of the tender and subsequent contract awarded based on the tender would be subject to the jurisdiction of District Court, where the subject work is to be executed. Thus, according to

the learned Advocate for the ECL the work is to be executed at Dhanbad and, therefore, Dhanbad District Court has the jurisdiction and similarly so far as the writ petition is concerned Jharkhand High Court has the exclusive jurisdiction. The writ petition is not maintainable before this Court. He also refers to Clause 6.1 of the agreement/contract wherein it is stated that if the contractor without reasonable cause or valid reason, commits default in commencing the execution of work within the stipulated date, the company would, without prejudice to any other right or remedy, be at liberty by giving 15 days' notice in writing to the contractor to commence the work, failing which to forfeit the earnest money deposited by him. Therefore, unconditional Bank guarantee can be invoked by the ECL according to the terms of the agreement and no order of injunction can be passed restraining the ECL from invoking Bank guarantee.

It is further submitted by the learned Advocate on behalf of the ECL that Clause 6.4 clearly states that on the happening of any event causing delay, it is the duty of the contractor to intimate immediately in writing the Engineer-in-Charge about the reasons of the delay. According to the contractor, safety and security measurement are to be carried out by the contractor. It is not the responsibility of the ECL to make arrangement for safety and security of the mining site. In spite of such fact the ECL deployed CISF personnel and other security

personnel at the site but the petitioner did not take any action with regard to additional safeguard of the mine.

Learned Advocate for the ECL submits that the petitioners in their letters and representations complained of non-availability of clear land due to presence of several structure and safety reasons. It was open for the petitioners to cancel or rescind the contract for mining operation but the petitioners were never inclined to rescind the contract so that the ECL could appoint another contractor for execution of the work. On the contrary, they have filed the instant writ petition against the show cause notice which is not maintainable per se because a writ against a show cause notice is not maintainable. The writ petition is premature as no legal right of the petitioner is not violated and last but not the least this Court has no jurisdiction to entertain the writ petition.

Having heard the learned Advocates for the parties and on careful perusal of the materials-on-record this Court finds that the petitioner have been trying to plead that this Court has the territorial jurisdiction under Article 226 of the Constitution on the ground that the National Green Tribunal, Eastern Region at Kolkata passed an order directing the ECL to take safety measures at the site of Kapasara mine at Dhanbad.

The jurisdiction of National Green Tribunal and the jurisdiction of the High Court under Article 226(2) are absolutely different. National Green Tribunal, Eastern Region is having the jurisdiction over Jharkhand. However Article 226(2) states:-

“The power conferred by Clause (1) to issue directions/orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.”

Article 226(2) thus provides that if a part of execution arises within the territorial jurisdiction of a High Court, the High Court has the jurisdiction under Article 226 of the Constitution even if the seat of the Government or the Local Body or Corporation within the meaning of State under Article 12 of the Constitution is not within those territories.

In the instant case, tender was floated for mining work in Kapasara mine within Mugma in the district of Dhanbad. The contract was executed in Dhanbad. Work was commissioned and partly done in Dhanbad. Therefore, the High Court of Jharkhand has the jurisdiction to entertain the writ petition. This Court has no

jurisdiction to entertain the instant writ petition. The order of a Tribunal cannot confer any cause of action for filing a writ petition.

The law on the point of judicial review of a Government tender or Government contract is no longer res integra. The law laid down in ***Tata Cellur –Vs.- Union of India*** reported in **1994 (6) SCC 651** and in subsequent decisions of the Hon'ble Supreme Court it is observed in unequivocal terms that the principle of judicial review would apply to the exercise of contractual powers by Government Bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. The power of judicial review in respect of a contractual obligation can be exercised on the following question only :-

Whether a decision making authority exceeded its powers?;

Committed an error of law;

Committed a breach of the rules of natural justice;

Reached a decision which no reasonable Tribunal would have reached or;

Abused its powers.

In the instant case, the petitioner failed to make out a case to attract any of the above provisions. Failure to perform a contractual obligation is a question to be determined by the law relating to contract and amenable to the jurisdiction of ordinary Civil Court. Moreover, I have already held that the Jharkhand High Court has the territorial jurisdiction over the instant writ petition. In view of such circumstances without dealing with the merit of the case this Court is of the view that the instant writ petition is liable to be dismissed on the ground of lack of territorial jurisdiction. Accordingly, the instant writ petition is dismissed summarily.

There shall, however, be no order as to costs.

(Bibek Chaudhuri, J.)

