

Unknown Vs. Coal India Limited and ors

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Court : Kolkata

Decided On : Feb-15-2012

Appellant : Unknown

Respondent : Coal India Limited and ors

Judgement :

1

G.A. No. 1058 of 2011

Civil Suit No. 77 of 2011

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

SHYAM SEL and; POWER LIMITED

.....Plaintiff/Petitioner

Vs

COAL INDIA LIMITED and; ORS

.....Defendants/Respondents

For the Petitioner : Mr. Anindya Kr. Mitra, Advocate General Mr. Kalyan Bandhopadhay, Sr. Advocate with Mr. Abhrajit Mitra,

Mr. Jishnu Choudhury,

Mr. Mohit Gupta,

Mr. Abhijit Sarkar, Advocates

For the Respondents : Mr. P.C. Sen, Sr. Advocate with Mr. Kallimuddin Mondal,

Mr. Sourja Sadhan Bose,

Mr. Mikhil Kumar Roy,

Mr. Partha Basu, Advocates

Heard on : 01.02.2012

Judgment on : 15th February, 2012 2

I.P. MUKERJI, J.

This is an interlocutory application in aid of the above suit instituted in this Court by the plaintiff against the defendants. This suit is marked as C.S. 77 of 2011.

Before considering this application the claims in the plaint must be examined. They are as follows:

".....

(a) Mandatory injunction directing the defendant No. 2 to forthwith execute Fuel

Supply Agreement with the plaintiff in

furtherance of the Letter of Assurance dated 10th September 2008 being Annexure 1 hereto

and thereafter in discharging their obligations thereunder;

(b) The notice dated 22nd March 2011 being

Annexure HH hereto and the letter dated 26th March 2011 being Annexure EE hereto be

adjudged void, delivered up and cancelled;

(c) Perpetual injunction restraining the

defendant Nos. 1 and 2 from taking any step or further step in pursuance or furtherance of the notice dated 22nd March 2011 being Annexure

HH hereto or any similar notice;

(d) Perpetual injunction restraining the

defendant No.2 from giving any effect or

further effect to the notice of invocation of Bank Guarantee dated 26th March 2011 being

Annexure EE hereto or any other similar notice and/or from receiving any payment against the bank guarantee No. 02860007208 for Rs.

4,06,80,000/-;

(e) Perpetual injunction restraining the

defendant No.3 from making any payment

against the bank guarantee No. 02860007208

for Rs. 4,06,80,000/- to the defendant No.1 or defendant No.2;

(f) Cost;

3

(g) Any other or further relief which the

plaintiff is entitled to."

The cause of action arises in this way.

The plaintiff is in the process of building an integrated steel and power plant in Jamuria in district Burdwan in West Bengal. There, they are setting up a captive power plant. They needed coal and approached the first and second defendants. The second defendant wrote to them on 10th September, 2008. The description of this letter is very important. It is described as the "Letter of Assurance", in short LOA. The letter noted that the plaintiff required 4,52,000 tons of grade 'E' coal per annum for their 3 * 30 MW captive power plant to be located in the above place. There were many terms and conditions in this LOA contained in an annexure to that letter, which had to be fulfilled by the plaintiff within two years of signing of this agreement. They were described as the "milestones". These milestones were subsequently modified. Then, they would be required to sign a fuel supply agreement with the second defendant within three months of the above period. After signing of this agreement they would be supplied the above quantity of coal by the second defendant.

Before further discussing this application it is very essential to ascertain what is the legal status of the LOA. Is it a contract? Or does it contain statements or representations made by the second defendant?

In my opinion this cannot be a contract as contended by Mr. P.C. Sen, learned Sr. Advocate for the first and second defendants. A contract requires consideration. If this letter of assurance is considered in isolation there is no consideration. The plaintiff has to perform certain acts but there is no corresponding obligation on the part of the second defendant or any other defendant or defendants. Then, this letter of assurance may be said to be an agreement to enter into a further agreement, i.e., the fuel supply agreement. 4

Even then such an agreement would be void. [See the part "Acceptance subject to confirmation or Approval" under section 7 and the part "Reference to Further Agreement" and "Subject to Contract" under section 10 in Pollock and; Mulla's Indian Contract and Specific Relief Acts (Twelfth Edition)].

Therefore, it is quite easy for me to get over the argument of Mr. P.C. Sen learned Senior Advocate that the nature of contract between the parties was determinable, and that, the obligations under the LOA would come to an end after two years. Hence it is not specifically enforceable, under Sections 14(1) (a) (c) of the Specific Relief Act read with Section 41 (e) of the said Act together with Indian Oil Corporation Ltd. vs. Amritsar Gas Service And Others 1991 (1) SCC 533 and Star India Ltd. vs. Arup Borah and others 2003 (2) Arb. LR 202 and Rajasthan Breweries Ltd. vs. The Stroh Brewery Company 2000 (3) Arb. LR 509. There is no substance whatsoever in that part of the argument of the learned Counsel.

In my further opinion this letter of assurance is nothing but a set of representations made by the second defendant. The representations are that the plaintiff within two years of issuing the LOA should accomplish the "mile stones" mentioned in an annexure to that letter. That accomplishment should be to the satisfaction of the second defendant. Then they would enter into a fuel supply agreement with the plaintiff.

MILESTONES:

First of all it needs to be seen what are the conditions subsequent or milestones to be fulfilled by the plaintiff, in order to make themselves eligible, to be awarded the fuel supply contract? There were eleven of them to be achieved by the plaintiff over a period of 24 months. It is not that any of the milestones could be performed in 24 months. There were specific time limits for the accomplishment of each of the milestones. Each of these accomplishments had to be supported by 5

supporting documents like certificates, transfer documents, applications filed, certificate of incorporation and so on.

I consider it very important to tabulate these milestones as modified, the time limit for each, the documents to be submitted for each achievement and so on for the purposes of consideration of this application. 6

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Now, the question is to what extent these milestones were achieved by the plaintiff? According to Mr. Bandhopadhyay, learned Senior Advocate, the plaintiff acted on these representations. They had acquired land and taken steps for building of the integrated steel and power plant which had reached an advanced stage. In compliance with the prescribed milestones the plaintiff company had been incorporated and the necessary resolution of the Board of Directors for the project, taken. Efforts had been made to perform all the milestones prescribed. According to him, the plaintiff had altered their position.

He argued that it could be seen from the letter dated 21st January, 2009 of the second defendant to the plaintiff that their lack of satisfaction was confined only to clauses 5 and 6 of the milestones. In this regard, this defendant stated that the plaintiff had not obtained the necessary approval of the Pollution Control Board with regard to air and water. The no objection certificate from the forest department had also not been submitted. There was no other complaint. He submits that the law of promissory estoppel applies. He cites two decisions which I will deal later.

The above two alleged deficiencies were explained by the plaintiff in their letter dated 6th February, 2009. The following were stated regarding environmental and forest clearance:

"1) Environmental Clearance (Sl. No. 5 of

Milestone chart)_- Since our composite project is 1.10 million tonne Steel plant along with 500 MW power plant at the 1st phase, it is treated as category 'A' Project and Expert Appraisal Committee (EAC) of Mo EF (Central Govt) has

approved the terms of reference (ToR). A copy from the Web site of Mo EF is enclosed. It is expected that the official letter from Mo EF will reach us within a week when we shall be able to send you the same.

13

2) Forest Clearance (Sl. No.6 of Milestone

chart)_ - Total area of land acquired for the project are private land and fall under

"Tenancy Land" category that is why we have

earlier vide our letter No. SSL/Januria-

CPP/CCL/LOA/08-09 Dated 17.11.2008 submitted a self certified declaration on the issue. However, for your convenience a copy

from State Authority would be submitted

soon....."

On 22nd March, 2011 the LOA was cancelled by the second defendant. The following reasons were assigned:

"3. The Assured failed to fulfil few activities/milestones within the validity period of LOA.

4. Due to incomplete/partial submission of the required documents related to under mentioned milestones before the expiry of LOA period, the LOA is being cancelled and

forfeiture of commitment guarantee will take place as per terms of the LOA issued to you. i) Milestone No.1: Existence of business entity: Submitted Ministry approval letter upon

change of name after expiry of LOA period.

ii) Milestone No.3: Technical and; Feasibility

Studies: Submitted addendum for Water and

land requirement in the DPR for the CPP after the expiry of LOA period. The same was not

mentioned in the DPR initially submitted on

17/11/2008.

iii) Milestone NO.5: Environment Clearance:

Submitted Environment clearance granted by

Mo EF for integrated steel plant along with 2* 250 MW CPP whereas the LOA was issued for 3

* 30 MW CPP.

iv) Milestone No.6: Forest Clearance: Submitted after expiry of LOA period.

v) Milestone No.7: Water allocation: Submitted sanction letter for firm water allocation after expiry of LOA period from 1000 MW thermal

14

power project along with integrated steel plant whereas the LOA was issued for 3 * 30 MW CPP. vi) Milestone No.8- Funding of investment, as identified in the DPR: Submitted photocopy of in-principle sanction of term loan proposal for Rs.240 Crores for 90 MW CPP after expiry of

LOA period.

5. In view of the above, it is hereby notified in terms of clause 3.4.1 of LOA that the LOA

under reference is being cancelled/withdrawn followed by encashment of commitment

guarantee (CG) for Rs. 40680000/- in

accordance with the terms and conditions of

LOA."

Mr. P.C. Sen, learned Senior Counsel appearing for the first two defendants submits that the representations made in the LOA were conditional. The petitioner was required to fulfil all the milestones set by the second defendant. If they did not, which they have not, the second defendant was under no obligation to fulfil their assurance by executing the fuel supply agreement. Cancellation of the LOA was proper.

PROMISORY ESTOPPEL:

The point in this case is very interesting. It involves the law of promissory estoppel.

The principle of promissory estoppel is this. In a formal legal relationship between two parties, if one party by words or actions or conduct intends to alter a legal relationship and induces another party to adopt a course of action, changing his position, then the other party will not be permitted, if it is inequitable, to resile from those words or actions or conduct. If those words and actions constitute a promise, the maker of the promise will not be allowed to retract from it. In certain cases the maker of the representation is compelled by the Court to fulfil the promise. This is a rule of evidence. But it has now become 15

an element of our substantive law. Our Supreme Court has recognised this principle of law in Union of India and others Vs. Godfrey Philips India Ltd. and The Union of India and others Vs. India Tobacco Co. Ltd. and Union of India and others Vs. The Vanzir Sultan Tobacco Co. Ltd. etc. AIR 1986 SC 806, M/s. D. Navinchandra and; Co., Bombay and another Vs. Union of India and others AIR 1987 SC 1794, Delhi cloth and; General Mills Ltd. Vs. Union of India AIR 1987 SC 2414, cited by Mr. Bandhopadhyay. Reference may also be made to the leading cases of The Union of India and; Ors. - vs - M/s. Anglo Afghan Agencies etc. reported in AIR 1968 SC 718 and M/s. Motilal Padampat Sugar Mills Co. Ltd. -vs- The State of Uttar Pradesh and; Ors. reported in AIR 1979 SC 621.

The Supreme Court has made it explicit that the Government or a statutory body and the private individual squarely fall within the above principle. (Century Spinning and Manufacturing Co. Ltd. and; Anr. - vs. - The Ulhasnagar Municipal Council and; Anr. reported in AIR 1971 SC 1021(Paragraph 11 and; 12)).

Now, two circumstances are to be seen. The first is whether the plaintiff altered its position and the second is whether the representations made by the second defendant were conditional and the plaintiff is in breach of any condition?

Clause 2 of the LOA stipulated that the plaintiff undertook to accomplish the milestones mentioned in the annexure to the letter, as modified later within 24 months from the date of its issuance. Under Clause 2.2 the plaintiff was required to submit a statement whether the milestones had been achieved within the time stipulated. 2.3 reserved the right to the second defendant to verify this statement. Each of the milestones mentioned in the annexure had a different time limit for its accomplishment. It was specified in Clause 3.4.1 that if any milestone was delayed beyond the specified time, the second defendant would have the right to cancel the LOA. Such cancellation could be put into effect by giving the plaintiff at least seven days' notice. If all the milestones, were achieved 16

within the stipulated time the second defendant would sign a fuel supply agreement with the plaintiff within three months of expiration of the validity period of the LOA, as provided in Clause 1.2.

In my opinion, these representations were conditional, yet clear and unequivocal.

Now, let us see what the Supreme Court said in the cases cited, on promissory estoppel. The Supreme Court in the case of Union of India and others Vs. Godfrey Philips India Ltd. and The Union of India and others Vs. India Tobacco Co. Ltd. and Union of India and others Vs. The Vanzir Sultan Tobacco Co. Ltd. etc. in AIR 1986 SC 806 said as follows:

"11. "The law may therefore now be taken to be settled as a result of this decision that where the Government makes a promise knowing or

intending that it would be acted on by the promises and, in fact, the promisee, acting in reliance on it, alters his position the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promise, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."....."

This doctrine is reiterated in the case of M/s. D. Navinchandra and; Co., Bombay and another Vs. Union of India and others reported in AIR 1987 1794. In the case of Delhi cloth and; General Mills Ltd. Vs. Union of India reported in AIR 1987 SC 2414, the Supreme Court opined that to avail of the doctrine of promissory estoppel a promisee need not show that he acted to his detriment. It only need be shown by him that he acted on the representation of the promisor and altered his position. I read the relevant part of paragraph 18 of the judgment as follows:

17

"18. All that is now required is that the party asserting the estoppel must have acted upon the assurance given to him. Must have relied upon the representation made to him. It means, the party has changed or altered the position by relying on the assurance or the representation. The alteration of position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel. The Court, however, would compel the opposite party to adhere to the representation acted upon or abstained from acting. The entire doctrine proceeds on the premise that it is reliance based and nothing more."

The Supreme Court said in the most clearest terms "the Court however, would compel the opposite party to adhere to the representation acted upon or abstained from acting."

In my judgment, if a representation is conditional, a person cannot be said to be acting in terms of it unless the conditions stipulated in the representations are fulfilled. Consequently, if the conditions are not fulfilled the party cannot be said to have altered his position acting on the representation so as to compel the other

party to make good his representation. This principle necessarily follows as a corollary to the parent principle.

SUBSTANTIAL COMPLIANCE:

But, a situation may arise when there are innumerable conditions to be fulfilled, as in this case. There is one time period for one condition or milestone, another time period for another. For example, land had to be obtained within six months, forest clearance within 24 months, environment clearance within 12 months. What should be in law the position of the party who upon acting on the representations has fulfilled a substantial part of the conditions? Would the position of that person be the same as the one who has been unable to fulfil a single condition, as a result of which an LOA is cancelled? Should substantial 18

compliance with the conditions, be taken as, acting in terms of the representations and altering one's position? If the law were that in spite of fulfilling the conditions in a substantial way, a person could be deprived by the representor of the benefits of the representations, it would indeed produce quite unjust results. Therefore, in a case like this when there are several conditions attached to the representations, the doctrine of substantial compliance applies.

Now, the question to be answered is whether the plaintiff was able to achieve the milestones, substantially?

It appears that on 17th November, 2008, the plaintiff wrote a letter to the General Manager (Sales and Marketing) of the second defendant. They mentioned in the letter that according to the LOA a bank guarantee for Rs. 4,06,80,000/- had been furnished. The extent to which the milestones had been achieved was mentioned in an annexure to the letter. Each milestone is referred to against its serial number.

It appears from this annexure that the plaintiff asserted that they were a lawfully incorporated company thus complying with serial no. 1. Their Board of Directors had taken the necessary decision under serial no. 2 to make the investment for which the supply of coal was sought. Necessary documents were also attached in support of the above claim. With regard to serial no. 3 of the milestones a

technical feasibility report was furnished. With regard to the status of land acquisition in serial no. 4 the plaintiff was able to assert possession of land. Serial no. 5 related to environmental clearance. The plaintiff stated that a final clearance from the Central Government agency would be furnished in due course. With reference to forest clearance in serial no. 6 the plaintiff was able to assert that they had obtained the recommendation for forest clearance and would achieve it in 12 months. Serial no. 7 related to water allocation. With reference to this serial number the plaintiff said that the water allocation letter had been issued by the Irrigation and Waterways Department, Government of West Bengal 19

and that they would be able to get the sanction letter from the State Water Supply Authority. With regard to the funding, commissioning of plants etc. required by serial no. 8, 9, 10 and 11, the plaintiff submitted the resolution of the Board of Directors, copies of agreement loan sanction letter and so on to satisfy the second defendant.

It seems that the second defendant was satisfied with the progress made by the plaintiff in its achievements with regard to environment and forest clearance. In their letter dated 21st January, 2009 the second defendant reacted to the above submission of the documents made by the plaintiff by saying the following:

"1) Environment clearance (Sl. No. 5) ::

Approval for environmental clearance for air and water from state Pollution Control Board for the year 2008-2009 not submitted.

2) Forest Clearance (Sl. No. 6) :: Forest

clearance not submitted. NOC from state forest department is mandatory."

They had nothing to say regarding compliance with the work against other serial number.

The plaintiff replied by their letter 6th February, 2009. An extract of this letter is quoted above. It appears that the plaintiff was convinced that they would be able to obtain the environment and forest clearances soon.

By their letter dated 22nd March, 2011, the second defendant cancelled the LOA. They said at the outset that the letter of LOA had expired on 9th September, 2010. The plaintiff had failed to submit documents to testify the achievement of all the milestones before the expiry of the LOA. For milestone no. 1, 3, 6, 7, 8 the second defendant said that the documents were submitted after the validity period of the LOA. Nothing was said regarding Item No. 2, 4, 9, 10 and 11. 20

Referring to the milestone No. 5 relating to environment clearance they said that environment clearance was obtained for 2# 250 MW CTP whereas the LOA was issued for 3# 30 MW CPP.

In my opinion no case can attract the principles of promissory estoppel more profoundly than this case. The plaintiff, on the available evidence has been able to show substantial compliance with the conditions or milestones, thereby altering their position. After an entrepreneur had taken all the steps to get the integrated steel and power plant set up, it would be denied supply of coal because some documents were submitted later. In my judgment the second defendant ought to have accepted the belatedly submitted documents and further, should have asked the plaintiff to regularise the environment clearance. Without doing that they cancelled the LOA which means that they have taken back their representations, as a result of which the plaintiff will be deprived of supply of coal.

The second defendant and its holding company the first defendant Coal India Ltd. and their group entities are monopoly distributors of coal to factories and plants in our country. Being monopoly suppliers they should be most careful in making representations and even more careful in resiling from those representations. This kind of an unreasonable retraction is bound to cause substantial loss to a party who has substantially complied with the conditions. The plaintiff is one such party. I think it would be very unjust if after all the efforts that the plaintiff has taken to achieve the milestones and in setting up its integrated plant, they are deprived the supply of coal.

CONCLUSION

Therefore, I am minded to confirm the interim order in this application passed by Sanjib Banerjee J. on 6th April, 2011. This is what His Lordship held: 21

"Since it is evident that the plant is in the process of being commissioned and substantial work has been carried out and since the withdrawal of the letter of assurance would put the project in serious jeopardy, the letter of termination dated March 22, 2011 is stayed unconditionally for two days and from April 9, 2011 onwards subject to the deposit of a sum of Rs. 4,06,80,000/- by the plaintiff with Advocate representing the defendants. The relevant instrument of payment should be a banker's cheque or demand draft and not a personal cheque and should be made out in favour of the Central

Coalfields Limited. The instrument may be encashed by the payee but the proceeds will not be

immediately appropriated."

I confirm this order and pass a further order that this sum of Rs. 4,06,80,000/- will be kept by the Advocate-on-Record for the above defendants in an interest bearing short term deposit earning the highest rate of interest and no part of it is to be parted by the Advocate-on-Record or the bank without the leave of Court.

This application is allowed to the above extent. No order as to costs. All observations and findings are prima facie.

Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(I.P. MUKERJI, J.)

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