2020 INSC 145

(Non-Reportable)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8153 OF 2009

M/s. S.K.J. Coke Industries Ltd.& Anr. ..….Appellants

Versus

Coal India Ltd. & Ors. …..Respondents

J U D G M E N T

ANIRUDDHA BOSE, J.

The core dispute in this appeal involves the question as to whether the appellants were required to pay the price of coal consumed in their manufacturing process at a preferential rate, known in the trade parlance as "linked price", or the price under a Liberalised Sales Scheme (LSS). The latter pricing mechanism is similar to open market price of coal. The predecessor in title of the first appellant were a firm under the trade name Mahabir Coke Industries. At the material time, they were engaged in production of low ash metallurgical coal at a location close to Guwahati. They wanted to be under the preferential pricing regime on the strength of an

arrangement with the respondent coal companies agreed upon in the year 1989. Under such arrangement Mahabir Coke Industries were permitted to lift 4000 metric tonnes of coal per month. Traditionally, the coal industry has been deeply regulated by the Government of India. The Colliery Control Order, 1945 was one of such regulating instruments. This Control Order has been replaced by Colliery Control Order, 2000 with effect from 1st January, 2000 but that factor is not of much significance so far as the present appeal is concerned. The basic coal mining industry is nationalised and largely controlled by the Coal India Ltd., a public sector undertaking. The appellants were approved linkage of said 4000 metric tonnes of low ash coal from Tirup and Tikak mines of North Eastern Coalfields (NEC). The said coal company is a subsidiary of Coal India Limited (CIL). The linking order was issued on 20th September, 1989. The respondent coal companies in course of hearing before us have sought to distinguish between "linkage" and "allocation". Their stand is that in the case of the appellants, there was monthly allocation of the said quantity of coal only for which they cannot claim preferential price. As cokeries, they were allocated coal suitable for use in steel plants

subject to availability. The respondents' case is that linkage at preferential price is given to the industries or thermal plants out of coal not suitable for use in steel plants. For that reason, according to the respondent coal companies, appellants were not given linkage but allocated specified quantity. Clause 3 of the 1945 Control Order empowered categorisation and gradation of coal by the Central Government. Clause 4 thereof authorised the Central Government to fix different prices of coal for different classes, grades, sizes of coal as also prices of different collieries.

2. On 16th June 1994, a notification was issued by the Central Government in pursuance of the aforesaid two Clauses of the 1945 Control Order stipulating the classes and grades in which coal and coke were to be categorised. That notification also stipulated the sale prices for such coal, at which they could be sold by the colliery owner at pitheads. Table I thereof provided gradation with grade specifications of different types of coal. There was no such grading in respect of coal produced in the State of Assam and certain other states in the North Eastern Region in that Table. We shall henceforth refer to

coal lifted by the appellants as “Assam coal”. The second Table (Table II) to this notification dealt with sale prices of different types of coal mainly on the basis of “Useful heat value in kilo calories per kilogram”. For coal from Assam and that region, price for ungraded coal with ash content not exceeding 25% was specified to be “not exceeding Rs.741.00 p.” NEC made provisional declaration of grade of Assam coal under Clause 3A(1) of the 1945 Control Order on 11th June 1997. By a further notification dated 26th August 1997 the revised prices thereof were notified. Thereafter, by another notification dated 24th February 1999, the gradation formalities for coal produced in Assam and other States in the said region was completed by effecting suitable amendments to the notification dated 16th June 1994. In Clause 9 (ii) of the 1994 notification, there was stipulation to the following effect for computing the price of coal depending upon their ash content:-

> “9. (i)…………………..
>
> (ii) In case of coal produced in the State of Assam, Arunachal Pradesh, Meghalaya and Nagaland the price payable shall be increased at the rate of Rs.1/- per tonne for each percentage of ash by which the ash

> content falls below 22 per cent. Similarly when ash content exceeds 25 per cent, the price shall be reduced at the same rate of Rs. 11 per tonne per cent of ash by which the ash content exceeds 25 per cent.”

3. The first appellant, whose predecessors were the petitioners before the First Court continued with receiving coal in terms of the notification dated 16th June, 1994 at the price stipulated therein till 18th January 1996. Admitted position is that coal lifted by the appellants had ash content below 25%. From 19th January 1996, the price NEC was charging the appellants stood substantially enhanced. The reason for this, according to the respondent companies, was that a Liberalised Sales Scheme (LSS) was implemented by the CIL under authorisation of the Central Government to that effect. The LSS under which price was enhanced was on the basis of a notification dated 9th January, 1996. That notification was followed by another notification dated 11th March, 1996. On the latter date, a Liberalised Sales Scheme (Modified) was introduced. The notification of 9th January, 1996 reads:-

> “S.O. 21(E). In pursuance of the provisions of clause 18 of the Colliery Control Order, 1945, as continued in force by section 16 of the Essential Commodities Act, 1995 (10 of 1955),

> the Central Government, having regard to the stock position of coal, hereby exempts the Coal India Ltd., Subsidiaries of Coal India Limited and the Singareni Collieries Company Limited in respect of coal sold by them under any Liberalized sale Scheme (LSS) of the Government of India from the provisions of clauses 4, 4A and 4B of the said order.
>
> This notification shall remain in force on and from the date of its publication in the official Gazette and until the 31st day of March, 1996."

4. As pleaded in paragraph 22 of the appellant's writ petition, clause **2.3** of that Scheme specified that the declaration of source under "LSS" was not to affect rail loading for linked/sponsored consumers or coal supplies to road linked/sponsored consumers. The appellants continued to lift coal under protest on payment of such higher price. Subsequently on 16th November 1996, the linkage committee of the Coal India Limited in its 85th meeting took the following decision under agenda item nos. 23 and 24:

> "23. <u>'Linkage' of coal to SSF units & cokery units</u> –
>
> The Committee deliberated on the agenda items and decided that SSF units and cokery units which have been allocated coal by Coal India Ltd., should be treated as 'linked unit', in

the same manner as other linked industrial units in the non-core sector. The committee also decided that-

(a) Coal Clearance Letter/Coal Allocation Letters issued to SSF units and Cokery units should be treated as 'Linkage Advice Letters' which are issued to other non-core sector units;

(b) The present system of capacity assessment for SSF units by CMPOI and cokery units by a joint team of officers from Coal Co/CMPOI/CIL, should continue;

(c) All cokery units should be required to obtain sponsorship/recommendation letters from the concerned State Govts., in the same manner as sponsorship/recommendation is required for other non-core sector units.

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The agenda item was discussed by the Committee. As already decided in the previous agenda item (i.e. item No.23), all cokery units and SSF units who have been allocated coal by CIL, should be treated as 'linked' units.

Regarding the 'price' to be charged for supply of low ash coal to M/s. Mahabir Coke Industries, Guwahati, this matter should be decided by NEC-Assam as prevalent at any point of time."

5. On 12th March, 1997, a notification was issued by the Central Government in substance deleting clause 4 of the Control Order of

1945 from the notification dated 16th June 1994. The relevant portion of the notification dated 12th March 1997 stipulated:-

> "S.O. 190 (E). – In pursuance of clauses 3 and 4 of the Colliery Control Order, 1945, as continued in force by Section 16 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby makes the following further amendments to the notification of the Government of India in the Ministry of Coal No.S.O.- -453(E) dated the 16th June, 1994 on and from the date of publication of this notification in the Official Gazette, namely:-
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> In the said Notification:-
>
> (a) in the preamble:-
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> > (i) for the words and figures "clauses 3 and 4", the word and figure "clause 3" shall be substituted,
> >
> > (ii) the words and figures "and fixes in Tables II, V and VI below the sale price at which coal or coke may be sold by the colliery owners at pit-heads" shall be omitted.
>
> (b) Table II relating to non-cooking coal, Table V relating to hard coke, Table VI relating to soft coke and the Notes and the Annexure thereunder shall be omitted."

6. The appellants founded their writ petition projecting them as "linked consumer" and contended that they were to pay the price of

coal not beyond that notified on 16th June 1994. The reliefs asked for in their petition included a prayer for writ in the nature of mandamus commanding CIL and NEC to charge the appellants notified price as applicable to linked or sponsored units. Prayer was also made for refund of excess sum realised from them as LSS price.

7. Before the First Court, the respondents had run a case that till 12th March, 1997, price for NEC coal was fixed by the Government of India for linked consumers. It has been submitted before us on behalf of the coal companies that till 18th January 1996, prices for the linked consumers and for the consumers lifting coal on allocation had remained the same. For those other than linked consumers, price was fixed by the CIL with effect from 19th January, 1996 in accordance with the LSS as from that point of time, these coal companies were exempted from Clause 4 of the 1945 Control Order.

8. The main point argued on behalf of the appellants before the First Court was that in not charging the appellants coal price as applicable to a linked unit, the authorities had ignored the resolution adopted in the 85th meeting of the Linkage Committee for non-core sector consumers. As a corollary, the appellants contended that they

were not obliged to pay the LSS price as enhanced from 19th January, 1996. The First Court, however, rejected such plea referring to the second part of the aforesaid resolution of the Linkage Committee. Under that part, the appellants were required to pay the “price prevalent at any point of time”. The case of the appellants that “price” referred to in that part was “linkage price” was not accepted by the First Court. The reasoning of the First Court would appear from the following passage of the judgment:-

> “After taking into consideration all relevant facts and circumstances and having regard to the submission made by learned counsel for the parties, this Court, however, finds it difficult to appreciate the grievance raised herein on behalf of the writ petitioner. The very basis of the claim of the writ petitioner, as referred to earlier, is the resolution adopted in the 85th meeting. It was specifically mentioned that while the petitioner could be treated as a linked unit, the price was to be charged as decided by the NEC, Assam as prevalent at any point of time.”

9. The stand of the appellants before the Division Bench was that since Assam coal remained ungraded under the 16th June 1994 notification and the relevant entry in the Table I was removed only on 24th February 1999, the coal companies did not have authority to

grade the coal prior to that date. Before the Division Bench, appellants' case was that since there was no specification as regards gradation under Clause 3 by the Central Government, the coal companies could not have had exercised their power for such gradation as also price specification in terms of Clause 3A thereof. The authority cited before the Division Bench of the High Court was the case of **Ashoka Smokeless Coal India Pvt. Ltd. vs. Union of India** [(2007) 2 SCC 640]. This judgment has been referred to before us also in support of the argument of the appellants that there could be no pricing discrimination in respect of two sets of non-core consumers. This was a case where constitutionality of e-auction system was challenged and that was the focus of that decision. Paragraph 161 of the said report was relied upon before us in which it has been held and observed:

> "161. The effect is that today, while the core sector (92%) on its own and non-core non-linked SSI/tiny units (through NCCF/other agencies) (1%) are being supplied coal at a fixed price, on the other hand, the non-core linked SSI/tiny units (4%) are being subjected to differential treatment, without any rational classification, by supplying the coal to the latter on the price to be ascertained by the trader-

> controlled process of e-auction and thereby putting the petitioner units on a par with the trader. The scheme of e-auction is, therefore, ultra vires Article 14 of the Constitution of India."

10. The Division Bench of the High Court in appeal instituted by the appellants found that the said decision did not have any impact so far as appellant's claim was concerned once the dual system of pricing was found to be acceptable. This is the judgment which is under appeal before us. We also confirm this view of the Appellate Bench as we find such view to be the correct view so far as applicability of the ratio of the case of **Ashoka Smokeless Coal India (supra)** is concerned.

11. It has also been urged before us on behalf of the appellants that in the Resolution of 16th November 1996, the appellants had been specifically referred to as "linked consumer" and in that context the expression "price" as contained in the second part of the Resolution ought to imply the price for linked consumers only. The case of **CCT, Ranchi and Another Vs. Swarn Rekha Cokes and Coals (P) Ltd. and Others** [(2004) 6 SCC 689] was relied upon by the learned

counsel for the appellants mainly for interpretation of the aforesaid Resolution (agenda item no.24). The appellants seek to contend that while interpreting a provision by which a legal fiction is created, the Court must ascertain the purpose for which the fiction was created and having done so, Court should assume those facts and consequences exist, which are incidental to and inevitable corollaries for giving effect to such fiction. The rationale behind the appellants' citing this decision is the wording of the aforesaid Resolution of 16th November 1996. It has been specified in agenda items 23 and 24 of that Resolution that all cokery units which have been allocated coal by CIL ought to be treated as linked units. The appellants have argued that once they were treated as a linked unit, the price benefit attached to a linked unit should automatically follow. From the said Resolution, however, we find a specific agenda item concerning the first appellant, and the Resolution as adopted specifically stipulates that the price to be charged from the appellants was to be decided by the NEC Assam as prevalent at any point of time. In view of this specific treatment of pricing along with reference to the first appellant as a linked unit, in our opinion, said Resolution has to be construed to

mean that treatment of the appellant as a linked unit was for the purpose of regular supply of coal and the pricing factor was separated from such deemed linking. This would be apparent from the decision taken against agenda item no.23, in which reference has been made to SSF units and cokery units which had been allocated (emphasis supplied) coal, and it was these units which were to be treated as linked units. The distinction between "allocation" and "linking" clearly emerges from the said decision of the linking committee. It is a fact that the first appellant's treatment as a linked unit was a fiction. But such fiction was replaced by reality on the basis of a specific provision in the Resolution (agenda item no.24) so far as pricing is concerned. As the Resolution dealt with "linking" and "pricing" separately, the fictional linking could not be extended to actual pricing. The respondents have taken consistent plea that the expression "linked" has been loosely used and for non-core sector units, it meant allocation of specified quantity of coal only. In paragraphs 16 and 17 of NEC's affidavit-in-opposition to the writ petition, it has been stated:-

“16. At the said meeting, the decision was taken to treat SSF and cokery units including Mahabir Coke as a “linked units”. Such treatment as a linked unit do not mean grant of actual linkage. So, Mahabir Coke cannot claim to be a linked unit. The advantage of being treated as a linked unit was that Mahabir Coke will be assured for monthly supply of 4000 MT coal per month by NEC. The said resolution/decision also provides that the price to be charged for supply of low ash coal to Mahabir Coke will be decided by NEC on the basis of price prevalent at any point of time i.e. current price prevailing at the time of supply.

17. There are nearly 200 Cokery units, in India out of them only three cokery unit, including cokery unit of Mahabir Coke, are located at Assam. Mahabir Coke, along with other two cokery units have been getting low ash Assam coal which is of superior grade than what the other cookeries of all over India have been getting from their respective coal companies. Normally all other cookeries are getting the higher ash content coal. The other cookeries located outside Assam get coal having ash content of 25 – 30%, whereas the cookeries located in Assam are getting low ash coal of NEC having ash content of only 7%. The other cookeries located outside Assam take supply of low ash coal from NEC, under LSS for blending the same with higher ash content coal which they have been getting from other coal companies. All other cookeries including three cookeries of Assam, who are buying the same low ash coal as supplied to Mahabir Coke, have been paying the LSS price as notified from time to time.”

12. Learned counsel for the appellants has brought to our notice the following observations of the Division Bench in different parts of the judgment:-

> "At the time the Linkage Committee stipulated that the price payable by the appellant company would be as per the prevailing rate to be decided by the fifth Respondent, no coal company had any authority to supersede the price fixed by the Central Government by a notification issued under the Colliery Control Order, 1945. At the highest, such conditional treatment of the appellant company as a linked unit, could come into play only if the price of coal was deregulated by the Central Government; *ipso facto* by reason of the Linkage Committee decision of November 16, 1995 the appellant company could not be charged at a rate in derogation of what the Central Government notified."
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> xx xx xx xx xx xx
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> "The price of Assam coal at Rs. 741/- per MT (subject to the variation on account of ash content) became inoperative upon the notification of March 12, 1997."
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> xx xx xx xx xx xx
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> "The appellants remain liable to pay the difference in price on the basis of price fixed by the respondents subsequent to the notification of March 12, 1997."

13. In our opinion, the exemption granted by the Central Government by the notification dated 9th January, 1996 to Coal India and their subsidiaries from the provisions of Clauses 4, 4A and 4B of the 1945 Control Order in respect of sale of coal under LSS, the fetter imposed by the aforesaid notification of June 1994 got effectively removed. Specific stand taken by the respondents is that the linking of the first appellant was only in respect of the quantum of coal to be obtained by them and they were not entitled to price benefits of linked consumers. For the appellants, it was only a case of allocation. Thus, the point of time from when the appellants became liable to pay LSS rate would be the time when LSS price was raised after 9th January 1996. Prior to that date, we have already reproduced the coal companies' submission that the linked price and non-linked price had remained the same. So far as the aforesaid observations in the impugned judgment is concerned, such reasoning does not appear to us to be correct. But our views on this point would not advance the case of the appellants. That is so because in our opinion, it was within the power of the NEC to enhance the price for LSS consumers upon

CIL and their subsidiaries being exempted from Clause 4 of the 1945 Control Order on and from 9th January 1996.

14. It appears that a liberalised pricing system has been prevailing since the year 1993. We find no reason to disbelieve the coal companies when they assert that there was only allocation of coal in favour of the first appellant. Thus the appellants did not have vested legal right to preferential pricing as linked consumers. The 9th January 1996 notification empowered Coal India Ltd. and their subsidiaries to charge price to consumers beyond that notified on 16th June 1994 in respect of Assam coal. The appellants were in the non-core sector. Around that point of time only parity between LSS price and linked price was broken and the first appellant was required to pay the LSS price. So far as allocation is concerned, the agenda 24 of the 85th meeting of the linkage committee retained the supply volume. But that Resolution is in tune with the NEC's stand taken before us that LSS price ought to be charged to the appellants. The factual argument of the appellants that the two other cokery units in Assam were not linked, are of no relevance. The appellants have not been able to sustain a case before us that their linking agreement covered

both allocation and pricing as is the case of other linked consumers. So far as the other cokery units are concerned, it has been clarified by the learned counsel for the coal companies that they lift coal of high ash content between 25-30% which would automatically take them out of the price advantage specified in Table II of the 1994 notification. We accordingly do not find any reason to set aside the judgment of the Division Bench.

15. The appeal is accordingly dismissed. No order as to costs. The interim orders, if any, shall stand dissolved.

……………….……….…..J.
(Deepak Gupta)

…………………………..J.
(Aniruddha Bose)

New Delhi,
Dated: 7th February, 2020.