(1998) 03 GAU CK 0027

Gauhati High Court

Case No: Writ Appeal No. 147 of 1996 in Civil Rule No. 2346 of 1995

Coal India Ltd. and Others	APPELLANT
Vs	
Tulashi Kumar Dutta	RESPONDENT

Date of Decision: March 5, 1998

Citation: (1998) 3 GLT 304

Hon'ble Judges: M. Ramakrishna, C.J; P.C. Phukan, J

Bench: Division Bench

Advocate: M.Z. Ahmed and B. Dutta, for the Appellant; N.M. Lahiri, G.N. Sahewalla, A.K. Goswami, B. Goyal and P. Bora, for the Respondent

Judgement

M. Ramakrishna, C.J.

Tulashi Kumar Dutta, the Respondent herein, was the Petitioner in Civil Rule No. 2346 of 1995, presented before this Court seeking certain relief, for the grounds taken therein. The matter arose out of a contract between the Petitioner and the Appellants 1 to 4, based upon a tender called for by the Appellants seeking to entrust the work of loading and unloading of coal belonging to Coal India Ltd., into the Railway wagons. Clause 14(a) of the tender notice dated 2.7.92, reads as follows:

14 (a) Contractors are advised to load wagons up to the loading height marked by the respective Colliery Managers.

(b) Tolerance for underloading/overloading shall be allowed maximum upto 5% of the c.c. of wagons.

(c) For underloading/overloading beyond 5% penalty will be imposed to the extent of penal freight charged by the Railway to CIL.

2. The Respondent offered to comply with the conditions of the tender and to execute the work subject to certain conditions. Though at the initial stage the contractor offered Rs. 13.85 P. as loading charges per Metric Tonne, on negotiation between the two parties, an agreement was reached to pay Rs. 11.50 per Metric

Tonne. Accordingly, the Respondent pursuant to the said contract began the work of loading and unloading of coal. The Appellants at the time of preparing and making payment of bills of the work done by the contractor, action was taken to deduct Rs. 3.10 P. per M.T. out of the said amount stating that there was an understanding between the two parties to deduct this sum of Rs. 3.10 P. per M.T. on account of overloading or underloading of coal. The Respondent made a representation not to do so. He has pointed out that he was agreeable to the deduction of Rs. 3.10 per M.T. only in case the Appellants were to certify in a given case that there was overloading or underloading of the coal, in which even the Appellants will be entitled to do so.

3. However, the matter came up for consideration before the tender committee on 14.7.93 (as per Annexure-B to the counter affidavit filed on behalf of the Appellants/Respondents in the Civil Rule). On reconsideration of the entire matter, the following decisions were reached by the Committee of five experts. It reads:

Therefore, under both the condition, contractors are being penalised on account of underloading and overloading and therefore the tender committee recommends that the rate quoted by the contractor at Rs. 11.50 per M.T. be accepted.

4. Even thereafter, when certain bills were submitted for making payment, the Appellants wanted to deduct a sum of Rs. 3.10 P. per M.T. on the pretext that there was overloading or underloading of the coal. Aggrieved by this action on the part of the Appellants, the Respondent moved the above writ petition challenging this action on the part of the Appellants. The learned Single Judge, referring to the several clauses of the tender notice and subsequent developments and considering the legal contentions on both sides, held that:

One can understand that the penalty is imposed on the contractor if there is difference in weight or in quantity and the contractor is penalised. The Court finds no reason whatsoever that the contractor be penalised because measurement or the weighment is taken on different basis particularly in view of the fact that the basis is not determined by the contractor but by the Respondents themselves. In above view of the matter 1 find no justification for the Coal India to pay lesser amount than Rs. 11.50 per metric ton as agreed upon by the Respondents with the Petitioner by way of loading charges. As such, I issue a writ of mandamus against the Respondents, directing Respondents to pay Rs. 11.50 as loading charges and also further direct the Respondents to pay any amount illegally withheld and/or deducted by the Respondents entitled by the Petitioner on and from 8th October 1992. The Respondents are directed to make payment of withheld amount deducted since 8.10.92 to the Petitioner. On the Petitioner submitting their statement of account. The amount withheld so far, and not paid, be paid by the Respondents on verifying the same within a period of 3 months from the date of submitting of the statement of accounts.

It is this order that is called in question in this appeal, for the grounds taken therein.

5. We have heard learned Counsel on both sides.

6. Mr. M.Z. Ahmed, learned Counsel appearing for the Appellants, who having taken us through the relevant clauses of the tender notice, the relevant orders passed after accepting the tender, including the grounds taken in the appeal, argued the following points:

(1) that, in the light of the deliberation and reconsideration of the entire issue, the expert committee, by virtue of the order made on 14.7.93 (Annexure-B to the counter affidavit in the Civil Rule), has arrived at a conclusion that on checking and verification at the Colliery loading point, if and when on taking measurement, underloading or overloading were detected, the Company shall be entitled to deduct Rs. 3.10 per M.T. Therefore, the learned Single Judge ought to have considered this aspect of the matter and to have recorded a finding in favour of the Appellants.

(2) The learned Single Judge failed to appreciate that the burden of showing that there is no either overloading or underloading of the coal, is shifted to the contractor, before a bill is prepared and submitted claiming the amount of money payable for the work.

(3) The conclusion of the learned Single Judge on facts is not tenable in law since the writ Court failed to appreciate the legal argument advanced on behalf of the Appellants (Respondents in the writ Court).

7. In view of the foregoing, Mr. M.Z. Ahmed, learned Counsel appearing for the Appellants submits that the findings recorded by the learned Single Judge be modified and the conclusion set aside.

8. Contrary to this argument of Mr. Ahmed, Shri N.M. Lahiri, learned senior counsel appearing for the Respondent (writ Petitioner) maintained, however, that the Appellants having not been able to make out a case for interference by this Court in appeal, the appeal may be dismissed.

9. Let us examine as to whether the Appellants have been able to make out a case that, considering the second point, the burden of proving that there was either underloading or overloading of the coal, is shifted to the contractor and that the burden has to be discharged by him.

10. With a view to ascertain the correctness of the submission of the learned Counsel for the Appellants, we have carefully considered not only the conditions of the tender notice, but also the reconsideration made by the expert committee on 14th July, 1993, a copy of which is produced and marked as Annexure-B to the counter affidavit in the writ petition. By a careful consideration of the same it is seen that the expert committee on reconsideration of the entire matter arrived at the

conclusion that the offer of Rs. 11.50 P. per M.T. made by the contractor shall be accepted. We have extracted this portion of the recommendation of the expert committee dated 14.7.93 in paragraph 3 above. 11. It is true that looking at the materials available in paragraphs 1, 2, 3 of the report of the expert committee dated 14th July, 1993 (Annexure-B to the counter affidavit) the material constituted a reiteration that in the event of weighment/measurement disclosed that there was either overloading or underloading of coal, a sum of Rs. 3.10 P. per M.T. shall be deducted out of the amount of the bill. But this material available in Annexure-B is not sufficient to enable this Court to arrive at the conclusion that the committee has shifted the burden to the contractor to show that there was difference in the weighment. In other words, it is not possible to accede to the contention of Mr. Ahmed, learned Counsel for the Appellants that by virtue of this condition in Annexure-B, the burden to show to the contrary is shifted to the contractor. On the other hand, the material is silent about this burden. All that the committee said in the course of the recommendation is that:

...in case of Electronic in-motion weighbridge is under breakdown the weighment will be done at Ledo weigh-bridge...

...

In case both the weigh-bridge are under breakdown loading height given by the respective collieries is the yard stick for penalising the contractor if it is less or more than the load line.

In other words, it goes to show that in the event of there is a difference in the weighment or measurement of the coal transported by the contractor, in which event the owner of the coal, namely, the Coal India Ltd., shall be entitled to deduct a sum of Rs. 3.10 P. per M.T. There is no doubt about that. But in a passive atmosphere not indicating that this burden of proving this aspect lies on the contractor, the Court will have to consider that the Coal India Ltd. having accepted the offer of Rs. 11.50 P. per M.T. made by the contractor, it is for the Coal India Ltd. to make out a case for the purposes of penalising the contractor. Therefore, the burden is on that party who asserts that there is a difference in the measurement. This is the normal practice in the common parlance of the law of contract. Applying the same principle of common parlance of the contract that the burden is upon the person who asserts that there is a difference, it is for the Coal India Ltd. to make out a case in a given situation as to the difference in the weighment or measurement of the coal transported by the contractor.

12. Though the learned Single Judge did not go into these details or intricacies in regard to the contract or subsequent developments culminating in the order made by the Coal India Ltd. on 14th July, 1993. While we have applied our minds to these several aspects and considering the same referring to the facts of this case, it is not possible to accept the submission of Mr. Ahmed, learned Counsel for the Appellants.

Therefore, this point is rejected.

13. Considering the other two points referred to above, we are clearly of the view that the learned Single Judge referring to the salient facts and the questions of law arising in the writ petition, has recorded appropriate findings on both these questions and the view taken by the learned Single Judge in the writ petition must be held to be correct.

14. The Appellants 1 to 4 have not been able to make out a case so as to persuade us to take a view different from the view expressed by the writ Court.

15. In the result, the appeal fails and it is dismissed, parties to bear their own costs.