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BHARAT COKING COAL LTD.

v

STEEL ABRASERS AND ALLIED PRODUCTS LTD.

SEPTEMBER 6, 1994

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[S.C. AGRAWAL AND M.K. MUKHERJEE, JJ.]

Colliery Control Order, 1945 :

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Clauses 2(1), (5), 3,3A(4), 4, 4A, 5(1) and 12-A—Central Government's Notification—Tables I, II to VI—Explanatory Notes to Notification—Notes 10(i) and (ii), 12, 14 and 15.

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Coke and coal—Price fixation—Size of coke and coal—Obligation to sell as per ISI specification—Sale of hard coke—Levy of service charges—Permissibility of—Levy held covered by Note 14 of Notification—Absence of contract for supply of special size held not relevant—Distinction between coke and coal—Discussed.

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In exercise of the power conferred by the Colliery Control Order, 1945 the Central Govt. issued a Notification on December 27, 1991 fixing the prices for different types of coal and coke. The Notification read with the Order provided that (i) the size of coal or coke was to be according to ISI specification; (ii) the prices fixed were applicable to sale of coal at pitheads and of coke at coke oven plants; (iii) the notified prices for hard coke and soft coke were not to apply to small size coke; (iv) no colliery owner should sell and no person should purchase coal or coke at a price which was in excess of the notified price. However, under Note 14 of the Notification the colliery owners were entitled to realise additional charges as negotiated between producer and purchaser for undertaking special sizing or beneficiation of coal.

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The respondent, carrying on business of foundry casting for which purpose it was buying hard coke from the appellant company, filed a writ petition alleging that the appellant was illegally demanding and realising from it service charges besides the notified prices. The appellant contested that in view of the fact that the respondent was supplied hard coke of a specified size for which the appellant had to put in extra work and effort, like shifting and sizing after production of the coke in the plant, incurring

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extra expenditure and the notification permitted such a recovery.

The High Court held that recovery was not covered by Note 14 of the Notification because the said note had no application to the case as the respondent did not purchase special size of coal. Accordingly it issued a writ of Mandamus directing the appellant not to charge any amount other than fixed in terms of the Notification.

In appeal to this court, it was contended for the appellant that when Note 10(1) clarified that the prices fixed under the notification were applicable to sale at pitheads they would as regards coke, necessarily refer to sale at the coke oven plant. Since the coke as prescribed in the plant was required to be properly handled to attain the specification of foundry coke as laid down by ISI, the appellant could legitimately demand handling charges, besides the notified price, in terms of Note 14.

For the respondent, it was contended that appellant's reliance on Note 14 to justify the impugned demand was wholly misplaced because neither did the respondent ask for any special size of coke nor did the appellant undertake any process for its beneficiation.

Allowing the appeal and setting aside the judgment of the High Court, this Court

HELD : Terminologically coal as mined is known as 'run of the mine' and taking a cue from the same, the coke may be conveniently described as initially produced in the plant as run-of-the plant. The run-of-the plant has been categorised as hard coke of different classes and grades in Table I and their prices fixed accordingly in Table V of the notification depending upon its ash content. That the coke so produced has to be suitably handled to segregate those required for foundries according to ISI specification is evident not only from the statements made in the counter affidavit of the appellant, but also from the foreword of the ISI report. The exercise so undertaken by the appellant to screen the run-on-the plant which has an unspecified size distribution to get the extra large size, specially earmarked for foundry would certainly be one for special sizing within the meaning of Note 14. The contention of respondent that since he had not contracted for supply of special size it was not bound to pay for the same cannot be accepted as, in view of the definition of 'size' under the Order, the appellant is obligated to sell only according to specifications of ISI.

- A** The High Court failed to notice the definition of 'size' under the Order and the report of the ISI in this regard. [126-H, 127-A to C, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5917 of 1994.

- B** From the Judgment and Order dated 17.8.1993 of the Patna High Court in C.W.J.C. No. 2285 of 1992 (R).

Harish N. Salve, R.N. Sachthey, Anip Sachthey, Himanshu Munshi and C.D. Singh for the Appellant.

- C** S.B. Sanyal and S.B. Upadhyay for the Respondent.

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. Special leave granted.

- D** In this appeal, preferred by Bharat Coking Coal Limited (hereinafter referred to as the appellant) a Government Company within the meaning of Section 617 of the Indian Companies Act, 1956, and its General Manager, the only question that requires an answer is whether the appellant is entitled to realise service charges from its buyer while selling coke.

- E** Steel Abrasers & Allied Products Limited, the respondent herein, carries on business of foundry casting and for that purpose it has to buy hard coke from the appellant. The production and disposal of coal and coke are controlled and regulated by Colliery Control Order, 1945 ('Order for short'), initially framed by the Central Government under Rule 81 (2) of the Defence of India Rules and being continued in force by Section 16(2) of the Essential Commodities Act, 1955. In exercise of the powers conferred by the Order, the Central Government issued a notification on December 27, 1991 fixing the prices at which different types of coal and coke, including hard coke, would be sold. Alleging that despite such fixation of price of hard coke by statutory notification the appellant was demanding and, for that matter, realising, besides the price, service charges the respondent filed a writ petition in the Patna High Court wherein it contended that such action on the part of the appellant, which was a 'State within the meaning of Article 12 of the Constitution of India, was wholly arbitrary and illegal and, accordingly, prayed for appropriate relief. In
- G** contesting the petition the appellant submitted that coal and coke were
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different commodities and in view of the fact that the respondent was required to be supplied foundry hard coke, which had a specified sized, it had to put in some extra work and effort like shifting and sizing after production of the coke in the plant, and that necessarily meant extra expenditure. According to the appellant recovery of such expenditure was not barred by the notification and, on the contrary, the notification permitted such recovery., The High Court accepted the contention of the respondent and issued a writ of mandamus directing the appellant not to charge from the respondent any amount other than fixed in terms of the notification dated December 27, 1991. Hence this appeal.

To answer the question raised in this appeal it is imperative to first refer to the relevant provisions of the Order and the notification issued thereunder. Clause 2(1) of the Order defines coal to include anthracite, bituminous coal, lignite, peat and any other from of carbonaceous matter sold or marketed as coal and also coke. It is pertinent to point out here that through the definition clubs coke and coal in fact the two products are distinct and different. Whereas is a stone like product excavated from the earth, coke is the processed product of coal obtained by indirect heating in Beehive ovens and bye Product ovens which are commonly known as 'coke oven plants'. Clause 2(2), defines 'colliery to mean any mine or open working where the getting of coal is the principle object and *includes a plant for the production of coke.* (emphasis supplied). According to Clause 2(5) 'size' when used in relation to coal shall have *the same* meaning as given in the *specification laid down by the Indian Standards Institution (ISI) from time to time.* (Emphasis supplied). Clause 3 empowers the Central Government to prescribe the classes, grades and size into which coal may be categorised and the specifications for each such class, grade or size of coal. Clause 3A(4) entitles the Coal Controller appointed under the Order to lay down the standards and methods of sampling and analysis of coal which alone shall be used in declaration of grades or sizes of coal. Clause 4 of the Order which empowers the Central Government to fix the price of coal reads as under :

"The Central Government may by notification in the official Gazette, fix the sale price at which, or the maximum or the minimum sale price or both, subject to which coal may be sold by colliery owners and any such notification may fix different prices-

- A (i) for different grades and sizes of coal and
(ii) for different collieries."

Clause 4A which deals with retention price of coal and coke is extracted below :

- B "The Central Government may having regard to all the relevant factors, including the geological and mining conditions of the mining technology employed in the collieries by the colliery owner, as well as the estimated cost of production of coal and coke produced by such colliery owner, fix, by notification in the Official Gazette, the retention price of respect of each class, grade or size of coal and coke produced and sold by such colliery owner."

- D Clause 5(1), so far as it is relevant for our purposes, provides that no colliery owner or his agent shall sell, agree to sell or offer to sell coal in excess of the price or the maximum price fixed under clause 4. The only other clause of the Order which requires mentioning here in Clause 12A. It provides that the Central Government may, through Gazette notification, specify the authorities competent to allot quota of coal to any person or class of persons and every such authority shall allot such quota subject to such instructions as the Central Government may issue from time to time.
- E In exercise of the above power, the Central Government has specified its Coal Controller to be the authority competent to allot quota of coal.

- F In pursuance of Clause 3 and 4 of the Order the Central Government issued the notification in question prescribing in table I thereunder the classes and grades into which coal and coke are to be categorised and in Table II to VI, the prices at which they are to be sold by the colliery owners at pit-heads. Following the tables are twenty explanatory Notes of which the Notes extracted below are relevant :

- G 10. (i) The prices notified herein are applicable only to sale of coal at pit-heads on FOR colliery siding basis or FOB purchaser's transport basis at the colliery loading point.

- H (ii) Where coal is transported beyond a distance of 3 kms to the loading point, the coal companies shall be entitled to charge additional transport costs from the purchasers at following rates :..... (rest omitted).

12. The pit-head price of hard coke fixed in Table V and of soft coke fixed in Table VI are exclusive of duties of excise royalty, cesses, and sales tax on either the raw coal used for manufacturing the coke or on the Hard Coke or soft coke. The colliery owners shall be entitled to realise the amount of such duties of excise, royalty, cesses and sales tax and other taxes/levies, if any, from purchasers of Hard Coke and soft coke in addition to the prices fixed for them. When the impost is on the raw coal used for manufacture of coke, the sum realisable per tonne of soft coke or hard coke shall be ascertained by multiplying the rates of raw coal by 1.35 for soft coke and 1.50 for hard coke.

14. For undertaking special slaing or benefication of coal additional charges as my be negotiated between the purchaser and the producer may be realised over and above the fixed prices.

15. The prices fixed in Table V for Hard Coke and Table VI for soft coke shall not apply to small sized coke, coke breeze below 12 milimeters size, low temperature carbonization coke, pelletised coke or briquettes."

Since sizing of marketable hard coke has an important bearing on the issue involved in this appeal and since we have already notified that under the Order size of coal and coke is to be according to ISI specification, we may now profitably look to the Indian Standard (Third revision) relating to size analysis of coal and coke for marketing as adopted by ISI and published by Bureau of Indian Standards in 1979. The foreword of the report reads, *inter alia*, as follows :

"Coal as mined is termed as 'run-of-mine'. It has to be graded by screening or crushing and screening on the basis of size ranges. Similarly, coke as produced in various plants has an unspecified size distribution and has to be suitably size graded. For a rational and economic use of these important materials it is necessary to grade them and assign suitable nomenclature linked with popular trade names and based on size fractions so that it may be possible to market them with maximum advantage both to the producers and the consumers."

(emphasis supplied)

A The report then prescribes the standard nomenclature and size ranges of coal and coke for marketing and the methods of sampling and test for their size grading. The size analysis of hardcoke and its corresponding size ranges for marketing are given in Table 2 of the report, which is reproduced below :

B TABLE 2 SIZE ANALYSIS OF HARD COKE FOR MARKETING
(Clauses 3.1 and 5.1.1)

Sl. No.	Nomenclature	Size Range (IS Steev) (PS)	On Over-size	Tolerance Percent By Mass, Max On Undersize	(Trade Name)
(1)	(2)	(3)	(4)	(5)	(6)
(i)	Coke, extra large	-100	—	10	Foundry coke
(ii)	Coke, large	- 100 to - 25	5	10	BF coke
(iii)	Coke, medium	- 40 to + 25	5	10	Nut coke
(iv)	Coke, small	- 25 to + 10	5	10	Pearl coke
(v)	Coke, fine	- 10	5	—	Breeze

Note : Size ranges other than these may be specified for special uses."

E The procedure for size analysis of coke prescribed in the report is as follows :

F "Procedure for Size Analysis of Coke - Select appropriate sieves so that no size fraction exceeds 25 per cent by mess of the sample. Arrange them in a stack in a decreasing order of size apertures so that the sieve with the smallest aperture is at the bottom. Accurately weigh the sample and screen it in small increments at a time so that undersize passes to the next sieve and the apertures are not choked. Hand place the pieces of coke remaining on the screen and transfer the oversize to a suitable container. Remove the top sieve and repeat the operation on the next sieve. Continue this procedure using hand snaking only until the oversize on each sieve has been placed in a separate container.

G If necessary, re-stack the set of sieves and repeat the process for successive qualities until the entire sample has been granities."

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Mr. Salve, the learned counsel appearing in support of the appeal, submitted that when Note 10(1) clarified that the prices fixed under the notification were applicable to sale at 'pit heads, they would, as regards coke necessarily refer to sale at the 'coke oven plant, Since the coke as prescribed in the plant, was required to be properly handled to attain the specification of foundry coke as laid down by ISI, the appellant could legitimately demand handling charges besides the notified price, in terms of Note 14, argued Mr. Salve. To bring home his contention Mr. Salve relied upon the following averments made in the counter-affidavit filed on behalf of the appellant in the High Court :

" It is stated after indirect heating of coal in Beehive Oven (B.H.) and B.P. Plants coke is produced. After manufacture of coke further handling is required for sale of coke. It is stated that Pit Head Coke is an assorted sizes of coke having various size ranges. Coke below 1/2" size of 12 M.M. size constitutes upto 6 to 8 per cent of total Pit Head coke. As per Indian standard specification (I.S.) under size tolerance is 10 percent. Further Indian Standard specification for Foundry Coke is 4" (+ 100). This constitute about 80 per cent of the total product.

It is stated that loading is not possible at Pit-Head. Therefore shifting, sizing either by manual or by forklifting and storing in different loading points is undertaken either manually or by vehicles. The colliery owners are spending substantial money to carry out despatch of coke according to specification as improper handling of coke may result in breaking. The operations required before despatch to suit Indian Standard Specification generates substantial rejection. The expenditures incurred in screening, stacking, loading and transportation into despatchable container is termed as handling charges."

While dealing with the contentions of Mr. Salve, Mr. Sanyal, appearing for the respondent, did not dispute that as regards coke pit heads as referred to in Note 10(1) would mean coke oven plants. He, however, contended that besides the prices as notified, the appellant could claim only transportation charge if the coke was transported beyond a distance of 3 KMS to the loading point under Note 10(2) and the duties and levies referred to in Note 12. According to Mr. Sanyal Mr. Salve's reliance on

- A Note 14 to justify the impugned demand was wholly misplaced for the simple reason that neither did the respondent ask for any special size of coke nor did the appellant undertake any process for its beneficiation. In other words, according to Mr. Sanyal, the appellant sold to the respondent coke of 'specified' size as mentioned in the table and not of 'special size' so as to attract the provision of Note 14. While on this point he referred to the note as appearing in the table to contend that if the appellant had supplied coal of special size in terms of the note it might have laid any claim under Note 14.

C Having carefully considered the respective contentions of the learned counsel in the light of the material on record we are inclined to accept the contentions of Mr. Salve in preference to those of Mr. Sanyal. From a combined reading of the relevant clauses of the Order and the Notes appended to the notification referred to earlier we may draw the following conclusions :

- D (i) The Central Government may, by Gazette Notification, fix the sale price for different grades and sizes of coal and coke and for different collieries, including plants for the production of coke.
- E (ii) The prices so fixed are applicable to sale of coal at pit heads and not of coke at coke oven plants.
- (iii) Prices given in table V of the notification for hard coke shall not apply to small sized hardcoke and other types of cokes as mentioned.
- F (iv) No colliery owner shall sell and no person shall purchase coal or coke at a price which is in excess of the notified price.
- G (v) However, besides the price so fixed the colliery owner is entitled to realise (a) costs for transportation beyond a distance of 3 KMS to the loading point at the specific rates, (b) excise duty, royalty, cess, sales tax and other taxes/levies if any and (c) additional charges as may be negotiated between the producer and the purchaser for undertaking special sizing or beneficiation.

H Terminologically coal as mined as known as 'run of the mine' and taking a cue from the same we may conveniently describe the coke as initially produced in the plant as run of the plant'. The 'run-of- the plant'

has been categorised as hard coke of different classes and grades in Table I and their prices fixed accordingly in Table V of the notification depending upon its ash content. That the coke so produced has to be suitably handled to segregate those required for foundries according to ISI specification is evident not only from the statements made in the counter affidavit of the appellant but also from the foreword of the ISI report as quoted earlier. The exercise so undertaken by the appellant to screen the run-of-the plant which has an unspecified size distribution to get the extra large size, specifically earmarked for foundry would certainly be one for special sizing within the meaning of Note 14. The contention of Mr. Sanyal that since the respondent had not contracted for supply of special size it was not bound to pay for the same cannot be accepted as, in view of the definition of 'size' under the Order, the appellant is obligated to sell only according to specifications of ISI. The note referred to in the table of ISI notification does not come in aid of Mr. Sanyal as it only empowers the ISI to specify different size ranges for special uses besides those specified in the table and has no bearing to the issue involved in the appeal.

Coming now to impugned judgment we find that in negating the contention of the appellant based on Note 14, the High Court observed that the said Note had no manner of application to the facts of the case as the respondent did not purchase special size of coal. Unfortunately, in making the above observation the High Court failed to notice the definition of 'size' under the Order and the report of the ISI in this regard.

For the foregoing discussion we allow this appeal, set aside the impugned judgment of the High Court and dismiss the writ petition filed by the respondent. There will, however, be no order as to costs.

T.N.A.

Appeal allowed