A M/S. B.S.N. JOSHI & SONS LTD.

v.

AJOY MEHTA & ANR.

Contempt Petition No. 245 of 2007

IN

B Civil Appeal No. 4613 of 2006

DECEMBER 19, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

C *Contempt of Court – Disputes arising out of contract for transportation of coal – Judgment passed by Supreme Court – Contempt petition filed alleging willful disobedience of the judgment – Held: Alleged contemnors did not read directions of the Court in their proper perspective – It was not a case where two interpretations of the judgment were possible –* D *Apology tendered by the alleged contemnors accepted – Direction passed in favour of the Petitioner.*

Respondent No.1 is Managing Director of Maharashtra State Power Generation Co. Ltd. (MAHAGENCO), a public sector undertaking. E **MAHAGENCO issued notice inviting tender for transportation of coal. The bid of Petitioner was not accepted on the premise that it did not fulfill the essential condition of having transported the prescribed minimum quantity of coal for the preceding five years.**

F **The matter came upto this Court, which vide judgment dated 31-10-2006 directed that a fresh look be given in regard to the eligibility of the Petitioner for purpose of the contract and if it satisfied the tender conditions, the contract be awarded in its favour for a** G **period of one year.**

On the allegation that respondents willfully disobeyed the said judgment passed by this Court, contempt proceedings were initiated against them. It was contended that the respondents gave a twist to the said

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judgment of this Court insofar as it proceeded on the basis that the five years period should be calculated from the date of the judgment and refused to grant contract in favour of the petitioner relying on an interim order passed by Court and further sought to take into consideration an irrelevant subsequent event.

On the aforementioned premise, it was contended that the respondents must be held to have committed gross contempt of this Court.

Disposing of the petition, the Court

HELD:1.1. Supply of coal and that too good quality of coal is essential for running of a thermal power station. It was with that intent in mind that this Court, either at the interim stage or final stage, did not intend to pass any order which would hamper transportation of coal resulting in stoppage of the functioning of the thermal power station. The respondents misconstrued the order of this Court for which there was no basis that they were bound by the interim order passed by this Court. [Paras 8 and 9] [1360-D-E]

1.2. One fails to understand as to how a fresh tender was floated to allot the work of liaisoning of coal and the same companies who had formed a cartel were allowed to carry on the contract job. [Para 10] [1361-B-C]

1.3. The petitioner was asked to file additional documents in support of its contention that it fulfilled the essential conditions of contract, if it so intended to do. It was, however, wholly unnecessary as only a fresh look was required to be given in regard to the eligibility of the petition for the purpose of awarding the contract wherefor the Scrutiny Committee was required to form an opinion as to whether the petitioner had substantially complied with the tender conditions, subject, of course, to the fulfillment of essential conditions. [Para 11] [1361D-E]

2. The respondents committed a serious error in

A calculating the quantity of coal transported for preceding five financial years from the date of the judgment. The date of the judgment was not at all relevant for the aforementioned purpose. The respondents did not explain how they understood the order of this Court
B wrongly as they had also proceeded on the basis that the five financial years should be counted from the date of calling for the tender and the date of the judgment separately. If they had any difficulty in understanding the direction of the court, they should have approached this Court for clarification but could not have arrived at such
C an absurd conclusion that what was necessary to be considered is handling of coal by the petitioner for the preceding five years from the date of passing of the judgment by this Court. What was necessary for them to consider was implementation of the directions issued by
D this Court in the backdrop of the events noticed by this Court. This Court in its judgment had not only taken into consideration the contentions raised by MAHAGENCO in regard to non-fulfillment of the essential conditions on the part of the petitioner but also implications thereof at
E some details. The respondents furthermore sought to take into consideration a purported subsequent event, viz, the letter dated 20.02.2007 issued by the Sanjay Gandhi Thermal Power Station, which was neither relevant nor decisive. [Paras 12 and 13][1361-E; 1362-C]

F 3. The respondents did not read the directions of the court in their proper perspective. They could not have considered the directions contained in the interim order passed by this Court. The interim order merged into the final order. In any event, even the said interim order was subject to the decision of the court and, thus, one fails
G to understand as to how the interim order was found to be continuing despite passing of the final order. As the matter was required to be considered afresh, as far as the purpose of considering the eligibility of the petitioner is concerned, they committed a serious error insofar as the
H eligibility criteria were applied from the date of the

judgment. They furthermore did not notice that having regard to the overall situation and particularly in view of the opinion of the Scrutiny Committee that the petitioner had substantially complied with the conditions and, thus, the general power of relaxation should have been used. It is, therefore, not a case where two interpretations of the judgment of this Court were possible. [Paras 14 and 15] [1362-C; 1363-A]

4. The apology tendered by the respondents is accepted for the time being and it is directed that contract for a period of one year be granted to the petitioner in terms of the judgment dated 31.10.2006. [Para 16] [1363-C]

5. It is distressing to see that MAHAGENCO had been encouraging formation of a cartel and, thus, allowing the rate of transportation of coal to go high up. Unless a power generating company takes all measures to cut down such malpractices, the generation cost of electricity is bound to go higher and ultimately the same would be passed on to the consumers of electricity. It is hoped as a public sector undertaking it would take adequate and appropriate measures to meet the said contingency in future. [Para 17] [1363-D-E]

CIVIL APPELLATE JURISDICTION : Contempt Petition (C) No. 245 of 2007.

IN

Civil Appeal No. 4613 of 2006.

Vikas Mehta for the Petitioner.

Altaf Ahmed, A S. Bhasme, Brajesh Pandey and Varun Thakur for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J.1. This contempt proceeding has been initiated against respondent Nos. 1 and 2 for alleged wilful disobedience of this Court's order dated 31.10.2006, the operative portion whereof reads as under:

"...We, therefore, intend to give another opportunity to

A MAHAGENCO. It shall consider the offer of Appellant upon consideration of the matter afresh, as to whether it even now fulfils the essential tender conditions. If it satisfies the terms of the tender conditions, the contract may be awarded in its favour for a period of one year; but such contract shall take effect after one month from the date of the said agreement so as to enable the private Respondents herein to wind up their business. This order is being passed in the interest of MAHAGENCO as also the private Respondents herein."

2. The Maharashtra State Power Generation Co. Ltd. (for short "MAHAGENCO") issued a notice inviting tender, inter alia, for coal liaisoning, quality and quantity supervision of its thermal power station. One of the conditions laid down therefor is as under:

"(ii) The Bidder should have executed the work of total minimum quantity of 5 (Five) Million Metric Tons per year for preceding 5 years. Besides this bidder should have executed the work of total quantity of 10 (ten) Million MT's in any of the preceding 5 (Five) years. Above execution of work should be on behalf of State Electricity Board and/or NTPC and/or other State or Central Undertaking and/or the private Power Generating Companies as their liaison agent/coal agent, with regard to receipt and supply of the coal including supervision on dispatch, loading, movement of the coal upto destination by Railway only."

The term "year" occurring therein is said to be the financial year. Petitioner along with various others submitted its tender, inter alia, on the premise that the petitioner did not fulfill the essential conditions of having transported the quantity of minimum five lakh tonnes of coal for the preceding five years, its offer was not accepted.

3. A writ petition was filed before the Madhya Pradesh High Court, which having been dismissed, Civil Appeal bearing No. 4613 of 2006 was preferred by the petitioner upon obtaining special leave.

One of the questions which arose for consideration before this Court was as to whether MAHAGENCO committed a serious error in not taking into account the quantity of coal supplied by the petitioner to the Andhra Pradesh Power Generation Corporation Limited; as it appears from its letter dated 15.06.2005 that the petitioner had supplied the following quantity of coal:

"S. No.	Period	Name of Colliery	Quantity in MT
01.	11.09.2003 to March 2004	M/s MCL Talcher	3172750.00
02.	01.10.2003 to 31.03.2004	M/s MCL, Ibvalley Area	316930.00
			3489680.00
03.	01.04.2004 to 10.09.2004	M/s MCL Talcher	2774455.00
04.	01.04.2004 to 30.09.2004	M/s MCL Ibvalley Area	389732.00
			3164187.00"

By a judgment and order dated 31.10.2006, this Court held:

> "It is, therefore, evident that total quantity of 62,64,135 metric tones of coal had been handled by Appellant for them.
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> The intention of introduction of the said clause becomes self-evident from the aforementioned note. It may be true, as was observed by the High Court, that the Respondents in the tender documents did not categorically state that the block of 365 days *in respect of handling* of coal by the tenderes shall be taken into consideration. It

A is also true that the Corporation must be held to be aware as to what was the true intent and purport of the said term."

4. It was, however, found that other tenderers, viz., M/s. Nair Coal Services Ltd., Nagpur, M/s. Nareshkumar & Co. Ltd., Nagpur and M/s. Karamchand Thapar & Brs. Ltd., Mumbai had B formed a cartel.

Alleged contemnor Shri Ajoy Mehta, Managing Director of MAHAGENCO (Respondent No. 1 herein) in a note dated 19.08.2005 stated as under:

"On perusal of rates of M/s Nair Coal Services Ltd., C Nagpur, M/s Nareshkumar & Co Ltd., Nagpur and M/s Karamchand Thapar & Brs. Ltd., Mumbai, it is apparent that they have formed a cartel. The rates quoted by these firms are nearly 51 crs. to 52 crs. more than that quoted by LT. As a goodwill gesture the above parties were called D for negotiations. However, they have refused to match the L1 rates.

In view of above it is in public interest and in the interest of MAHAGENCO a Govt. owned, public utility that the work is allocated to the lowest qualified bidder namely E M/s B.S.N. Joshi & Co."

Ultimately, however, the said proposal was not accepted.

5. Despite the fact that a cartel was formed, the contract was awarded to the members thereof. In the aforementioned context, this Court observed:

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"While saying so, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tender which is economically beneficial to it. It may be true G that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the H rate quoted by others. Whether an employer has power of

relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

It was on the aforementioned premise, the Civil Appeal was allowed by this Court.

6. Mr. Vikas Mehta, learned counsel appearing on behalf of the petitioner, in support of the contempt petition, would argue:

(i) Alleged contemnors had from the very beginning gave a twist to the said order insofar as it proceeded on the basis that the five years period should be calculated from the date of the order of this Courts.

(ii) MAHAGENCO refused to grant a contract in favour of the petitioner relying on or on the basis of the interim order passed by this Court.

(iii) A different stand is being taken now that the petitioner should not be allotted any contract in view of a subsequent event, viz., the letter dated 20.02.2007 issued by the Sanjay Gandhi Thermal Power Station.

On the aforementioned premise, the learned counsel would submit that the alleged contemnors must be held to have

committed gross contempt of this Court.

7. Mr. Altaf Ahmed, learned senior counsel appearing on behalf of the alleged contemnors, on the other hand, would contend that:

(i) the alleged contemnors might have committed a mistake in properly understanding the order of the court, but the same would not mean that they have committed contempt of the court.

(ii) The term "year" having been found by this Court to mean a financial year, even if the figures supplied by the petitioner are taken into consideration, it cannot be said to have satisfied the essential conditions for grant of contract of transportation of coal.

In any event, the learned Senior Counsel would submit that the alleged contemnors are ready and willing to abide by any direction which may be issued by this Court.

8. Supply of coal and that too good quality of coal is essential for running of a thermal power station. It was with that intent in mind that this Court, either at the interim stage or final stage, did not intend to pass any order which would hamper transportation of coal resulting in stoppage of the functioning of the thermal power station.

9. The alleged contemnors, in our opinion, misconstrued the order of this Court for which there was no basis that they were bound by the interim order passed by this Court. For the sake of clarity, we may notice the interim order dated 27.03.2006 which reads as under:

"Learned counsel for the petitioner submits that the main petition is coming up for final hearing on 17th April 2006. Learned counsel appearing for respondent Nos. 2 & 3 submits that for purposes of generating power, coal supplies have to be continued to the respondents failing which the entire generation of electricity shall come to a standstill. Keeping in view this fact, the respondents are permitted to go ahead with their tender process including

award of contract. They are free to make whatever arrangement they want to make in this behalf to ensure continued supply of coal to them. *It is, however, made clear that whatever arrangement is made by the respondents the same will be subject to the final decision of this Special Leave Petition."*

[Underlining is ours for emphasis]

10. We, therefore, fail to understand as to how a fresh tender was floated to allot the work of liaisoning of coal and the same companies who had formed a cartel were allowed to carry on the contract job. We may, however, place on record that the contracts were awarded on the condition that the same would be subject to the final outcome and decision of this Court.

11. Our attention has been drawn to the fact that the petitioner was asked to file additional documents in support of its contention that it fulfilled the essential conditions of contract, if it so intended to do. It was, however, wholly unnecessary as only a fresh look was required to be given in regard to the eligibility of the petition for the purpose of awarding the contract wherefor the Scrutiny Committee was required to form an opinion as to whether the petitioner had substantially complied with the tender conditions, subject, of course, to the fulfillment of essential conditions.

12. Alleged contemnors, in our opinion, committed a serious error in calculating the quantity of coal transported for preceding five financial years from the date of the judgment. The date of the judgment was not at all relevant for the aforementioned purpose. The alleged contemnors did not explain how they have understood the order of this Court wrongly as they had also proceeded on the basis that the five financial years should be counted from the date of calling for the tender and the date of the judgment separately. If they had any difficulty in understanding the direction of the court, they should have approached this Court for clarification but could not have arrived at such an absurd conclusion that what was necessary to be considered is handling of coal by the petitioner for the preceding five years from the date of passing of the

A judgment by this Court.

13. What was necessary for them to consider was implementation of the directions issued by this Court in the backdrop of the events noticed by this Court. This Court in its judgment had not only taken into consideration the contentions B raised by MAHAGENCO in regard to non-fulfillment of the essential conditions on the part of the petitioner but also implications thereof at some details.

They furthermore sought to take into consideration a purported subsequent event, viz, the letter dated 20.02.2007 C issued by the Sanjay Gandhi Thermal Power Station, which was neither relevant nor decisive.

14. The alleged contemnors, therefore, in our opinion, did not read the directions of the court in their proper perspective.

We say so:

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(i) because they could not have considered the directions contained in the interim order passed by this Court. The interim order merged into the final order. In any event, even the said interim order was subject to the decision of the court and, thus, we fail E to understand as to how the interim order was found to be continuing despite passing of the final order.

(ii) As the matter was required to be considered afresh, the purpose of considering the eligibility of the petitioner is concerned, they committed a F serious error insofar as the eligibility criteria were applied from the date of the judgment.

(iii) They furthermore could not have ignored the note of the alleged Contemnor No. 1 that the other respondents in the Civil Appeal had formed a G cartel. They furthermore did not notice that having regard to the overall situation and particularly in view of the opinion of the Scrutiny Committee that the petitioner had substantially complied with the conditions and, thus, the general power of relaxation H should have been used.

15. It is, therefore, not a case where two interpretations of the judgment of this Court were possible. A

16. Before us an additional affidavit has been filed by Shri Ajoy Mehta, Contemnor No. 1, stating:

> "17. I, therefore, respectfully submit that we have not flouted the orders passed by the Hon'ble Court and we shall abide by all directions given by this Hon'ble Court including awarding of the contract to M/s BSN Joshi & Sons Ltd., Petitioner herein, if this Hon'ble Court so directs." B

Keeping in view the aforementioned statement made before us, we accept the apology tendered by the alleged contemnors for the time being and direct that the contract for a period of one year be granted to the petitioner in terms of our judgment dated 31.10.2006. C

17. We are distressed to see that MAHAGENCO had been encouraging formation of a cartel and, thus, allowing the rate of transportation of coal to go high up. Unless a power generating company takes all measures to cut down such malpractices, the generation cost of electricity is bound to go higher and ultimately the same would be passed on to the consumers of electricity. We hope a public sector undertaking would take adequate and appropriate measures to meet the said contingency in future. D E

18. The contempt petition is disposed of with the aforementioned directions.

B.B.B. Petition disposed of. F