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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 1601 of 2012

1. M/s. Shri Ram Electricity LLP, A Limited Liability Partnership incorporated under Limited Liability Partnership Act, 2008, having its Registered Office at Vanijya Bhawan, 1st Floor, Sai Nagar, Devendra Nagar Road, Raipur Chhattisgarh.
2. M/s. Akshay Ispat Udyog Pvt. Ltd. (Formerly known as Akshay Investment Pvt. Ltd) having its registered office at A-3, Farista Complex, Rajbandha Maidan, G.E. Road, Raipur, Chhattisgarh.

---- Petitioners

Versus

3. Union of India, Through the Secretary, Ministry of Coal, Having his office at Shastri Bhawan, New Delhi - 110001
2. M/s. South Eastern Coalfields Ltd. (A Public Sector Undertaking) Through Chairman-cum-Managing Director, Having its registered office at SECL Bhawan, Seepat Road, Post Box No. 60, Bilaspur Pin 495006, Chhattisgarh.
3. M/s. Coal India Limited (A Public Sector Undertaking) Through Chairman-cum-Managing Director, Having its registered office at 10, Netaji Subhash Road, Kolkata - 700001
4. Union Bank of India, Ajit Tower, Near Sindhi School, Paramsagar Para, Raipur, Chhattisgarh and Head Office at : 239, Vidhan Bhavan Marg, Central Office, Nariman Point, Mumbai 21.
5. Oriental Bank of Commerce, Raipur (Main) Tatyapara Chowk, G.E. Road, Raipur, Chhattisgarh and Having Head Office at: E-Block, Harsh Bhawan, Cannaught Place, New Delhi.

---- Respondents

For Petitioner	:	Shri Amrito Das, Advocate.
For Respondent No. 1	:	Shri Narendra Kumar Vyas, Assistant Solicitor General.
For Respondent No. 2 and 3	:	Dr. N.K.Shukla, Senior Advocate with Shri Shailendra Shukla and Shri O.P.Agrawal, Advocates.

Hon'ble The Acting Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order On Board

Per Navin Sinha, Acting Chief Justice

17/03/2015

1. The Petitioners assail order dated 3.9.2012 canceling the Letter of Assurance (hereinafter referred to as 'the LoA') dated 25.6.2010 on the ground of failure to achieve milestones within the stipulated time. Challenge is also laid out to the consequential order dated 6/7.9.2012 invoking the commitment guarantee for Rs. 1,28,25,000/-.

2. Learned Counsel for the Petitioners submits that Petitioner no.2 applied on 19.5.2006 for Long Term Coal Linkage for its proposed captive power plant. On 25.3.2008 it was asked to furnish commitment guarantee equivalent to 10% of the notified base price of annual coal requirement. The Petitioners executed commitment guarantee for Rs.1,28,25,000/- on 24.6.2008. Subsequently Respondent No. 3 came out with an option on 5/7.9.2009 for LoA holders to forego 50% of their annual coal requirement which was to be met from imported coal, in which case the commitment guarantee furnished to the extent was to be released within 30 days. The Petitioners furnished additional commitment guarantee of Rs. 13,50,000/- on 24.5.2010. LoA was then issued on 25.6.2010 for supply of 2,25,000/- TPA of F-Grade coal for its 40 MW captive power plant. The Petitioner No. 2, which was original applicant at this stage entered into Limited Liability Partnership Agreement dated 21.9.2010 with Petitioner No. 1.

3. On 21.4.2011, additional commitment guarantee of Rs. 76,95,000/- was furnished since the application for transfer of the LoA to Petitioner No. 1 at the request of Petitioner No. 2 remained pending with the authorities. Further additional commitment guarantee for Rs. 51,30,000/- was deposited on 23.8.2011. The request for transfer of the LoA in the name of Petitioner No. 1 was ultimately approved by the Ministry of Coal on 14.9.2011. On 14.2.2012, a policy decision was taken by the Standing Linkage Committee (Long Term) that henceforth assured coal supplies would be guaranteed only to those who have Long Term Power Purchase Agreement with DISCOMS, making persons like the Petitioner who desired assured coal supply for captive power plant ineligible to be considered. The contract between the parties thus stood frustrated pursuant to the fresh policy decision by the Respondents which also renders the Petitioners liable for refund of the commitment and additional commitment guarantee

4. On 21.6.2012 the Petitioners exercised option to forego purchase of 50% of the imported coal as per option dated 5/7.9.2009 and sought refund of 50% of the commitment guarantee furnished by it. Without considering the aforesaid two issues, the Respondents on 3.9.2012 cancelled the LoA without giving the mandatory seven days notice as provided in the LoA. The commitment guarantee was also sought to be encashed prematurely on 6/7.9.2012 before expiry of seven days notice period. In the meantime, the commitment guarantee for Rs. 13,50,000/- stood encashed after which interim orders were passed by the Court on 12.9.2012 restraining further encashment during pendency of the writ application.

5. It was thus contended that in view of the policy decision of the Respondents dated 14.2.2012, confining assured coal linkage only to such applicants who had Long Term Power Purchase Agreement with DISCOMS excluding purchasers of coal for captive power plants, the LoA dated 25.6.2010 stood frustrated and the Petitioners were entitled to refund of the entire commitment guarantee and additional commitment guarantee furnished by it. Without prejudice to the aforesaid, it was submitted that in the alternative, pursuant to the option dated 5/7.9.2009 to forego purchase of imported coal and consequent option exercised by the Petitioners on 21.6.2012, they were nonetheless entitled to refund of the commitment guarantee/ additional commitment guarantee to the extent of 50% which has also been wrongly denied. It was next submitted that in absence of the mandatory seven days notice before cancellation of the LoA required under clause 3.4.1 of the LoA, renders not only the cancellation of LoA illegal but even encashment of the commitment guarantee illegal. The Petitioners are not only entitled to refund of the encashed commitment guarantee but are also not laible to pay any further commitment guarantee or additional commitment guarantee.

6. It was next submitted that the Petitioners had achieved all milestones within the period of 24 months reckoned from the date of LoA i.e. 25.6.2010. It had duly intimated the Respondents also of the same on 22.6.2012 delivered in their office with receipt obtained. The Respondents have not specifically denied the document but have vaguely sought to contend that no such communication was ever received by them.

7. The last submission was that the commitment guarantee had been furnished to the Chairman-cum-Managing Director, Coal India Limited, Kolkata, Chairman-cum-Managing Director, South Eastern Coalfields Limited, Bilaspur and South Eastern Coalfields Limited, Kolkata. The commitment guarantee could therefore have been encashed by any of the aforesaid three and not by the Senior Manager (Finance) of the South Eastern Coalfields Limited at Kolkata. Reliance in support of the submission was placed on (1999) 8 SCC 436 (Hindustan Construction Company Limited v. State of Bihar).

8. Learned Senior Counsel for Respondents 2 and 3, opposing the application submitted that the option to forego purchase of imported coal under the decision dated 5/7.9.2009 was available only to those who had signed the Fuel Supply Agreement (hereinafter called 'the FSA') and not to persons like the Petitioner who were merely at the stage of LoA and with whom the FSA may or may not be signed. It was next submitted that the minutes of the Standing Linkage Committee (Long Term) dated 14.2.2012 did not deny assured coal linkage to captive power plants. Its applicability was confined to those who desired long term power purchase agreements and had consequentially entered into agreements with DISCOMS for supply of power. It is therefore wrong for the Petitioner to contend that by virtue of the decision dated 14.2.2012, the contract between the parties and the consequent LoA stood frustrated.

9. It was next submitted that the Petitioner did not achieve milestones within the stipulated time evident from its own communication dated 21.6.2012 addressed to the Chhattisgarh Environment Conservation Board asking to convene a public hearing so as to obtain environmental clearance for its 40 MW captive power plant at village Seoni, Block Baloda, District Janjgir-Champa. The milestones were to be achieved within 24 months from the date of LoA i.e. by 25.6.2012. It stands to reason that if the time period for achieving milestones was to expire in four days and environmental clearance was still wanting on 21.6.2012, there was no occasion for the Petitioner to write to the Respondents on 22.6.2012 that all milestones had been achieved. The issue whether the letter dated 22.6.2012 was received in the office of the Respondents and considered or not, is therefore irrelevant.

10. Learned Senior Counsel further contended that the LoA was not cancelled on 3.9.2012 with immediate effect. The communication itself states that it was intended to be cancelled for failure to achieve milestones. The communication for encashment of the commitment guarantee on 6/7.9.2012, before expiry of seven days was an inadvertent error. There has been no premature encashment of commitment guarantee and which error was rectified by a fresh communication dated 10.9.2012 to the bank after expiry of the seven day period under the LoA.

11. The Petitioner has not made any assertion in its pleadings that invocation of commitment guarantee by the Senior Manager (Finance) was without jurisdiction. Had the pleadings been made, the Respondents could have answered it appropriately. Hindustan Construction Company Limited (supra) was distinguishable on its own facts.

12. We have considered the submissions on behalf of the parties. The LoA was awarded to the Petitioner on 25.6.2010. According to its terms and conditions, milestones were to be achieved within 24 months i.e. by 25.6.2012. On 21.6.2012, the Petitioner wrote to the Chhattisgarh Environment Conservation Board seeking environmental clearance for its captive power plant requesting for a public hearing. It stands to reason that these formalities could not have been completed in four days time after which the period for achieving milestones would have lapsed. There was no occasion for the Petitioner to write to the Respondents on 22.6.2012 that it had achieved all the milestones. The submission that since environmental clearance had been sought, and the rest was for the authorities to fulfill, it would amount to achievement of milestones by the Petitioner has only to be stated to be rejected. In the circumstances, the issue whether the letter dated 22.6.2012 was delivered to the Respondents and/or not considered by them loses its relevance. It becomes an admitted fact from the documents of the Petitioners themselves that they failed to achieve milestones within the time schedule. This alone was a sufficient ground for cancellation of the LoA and invocation of the commitment guarantee. The Respondents did not cancel the LoA on 3.9.2012 with immediate effect. The Petitioners were put on notice that for failure to achieve milestones the LoA was proposed to be cancelled. The invocation of the commitment guarantee seven days later on 10.9.2012 after issuing a corrigendum fulfills the requirement of the LoA in the facts of the case, the non-fulfillment of milestones not being in dispute.

13. The contention on behalf of the Petitioners that the minutes of the Standing Linkage Committee (Long Term) dated 14.2.2012 led to frustration of the LoA dated 25.6.2010 by restricting the FSA only to long term power purchase agreement holders with DISCOMS does not merit consideration in view of the clear stand taken by the Respondents that it pertains to independent power purchasers and not to captive power plants and that no decision had been taken therein to stop assured coal linkage to captive power plants.

14. The contention of the Respondents that the option to forego purchase of imported coal given on 5/7.9.2009 was not available to captive power plant purchasers is not acceptable. The covering letter including the contents of the policy leave us in no doubt that the benefit was available to LoA holders also and was not restricted in its applicability to only those who had signed the FSA. This view is reinforced from separate columns with regard to import surrender options for LoA holders and FSA holders. The Petitioner therefore prima facie appears to have an arguable case when it contends that after it exercised option on 21.6.2012 to forego purchase of imported coal, it is required to be considered for proportionate reduction and refund of its commitment guarantee/additional commitment guarantee.

15. The submission on behalf of the Petitioner that invocation of commitment guarantee on 6/7.9.2012 by the Senior Manager (Finance) Kolkata was not in accordance with law is not supported by proper pleadings. Learned Senior Counsel for the Respondents has rightly submitted and we accept the submission that had specific averments been made, they may have answered it on facts. Reliance on Hindustan Construction Company Limited (supra) leaves us unimpressed as it came to be delivered on its own facts on "special equities" of the case, as the Supreme Court arrived at the conclusion that the lapses were on part of the defendants who were not possessed of sufficient funds for completion of works and the allegation that the Appellant Corporation had abandoned the works was found to be not correct. Such is not the case presently. On the converse, we have arrived at the finding that the Petitioners themselves failed to achieve milestones within the stipulated time. It would be a highly anomalous position to arrive at the finding that the

Petitioners admittedly failed to achieve the milestones and yet direct refund of the commitment guarantee/additional commitment guarantee only on the ground that the invocation was faulty.

16. We therefore find no merit in the writ application except to the extent that the claim of the Petitioner for proportionate reduction of commitment guarantee/ additional commitment guarantee is concerned by reason of exercise of option by it on 21.6.2012 to forego purchase of imported coal. The Respondent-South Eastern Coalfields Limited is directed to examine the claim/grievance of the Petitioners to that limited extent and pass appropriate reasoned and speaking order within a maximum period of 12 weeks from the date of receipt and/or production of a copy of this order.

17. It is expected that if the Respondents find justification in the claim or in any part of the claim, necessary consequential orders shall be issued simultaneously. The Respondents shall not encash the commitment guarantee/additional commitment guarantee till such fresh decision or before expiry of twelve weeks, whichever is earlier.

18. The writ application is allowed only to the extent indicated.

ACTING CHIEF JUSTICE **JUDGE**

Amit