

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.3047/2014**

Decided on : 6th February, 2015

GMR CHHATTISGARH ENERGY LIMITED Appellant

Through: Mr. Gopal Jain, Senior Advocate with
Ms. Padma Priya, Advocate.

versus

UNION OF INDIA & ORS. Respondent

Through: Mr. Sanjay Jain, ASG with Mr. Malaya
Kumar Chand and Ms. Rajul Jain, Advs.
for R-1/UI.

Mr. Anil Soni, CGSC and Mr. Naginder
Benipal, Adv. for R-2/Central Electricity
Authority.

**CORAM:
HON'BLE MR. JUSTICE V.K. SHALI**

1. This is a writ petition filed by the petitioner against the respondents for quashing the communication dated 19.06.2013 issued by the Ministry of Railways to Central Electricity Authority ('CEA' for short) as being totally arbitrary and violative of Article 14 of the Constitution of India. It has been further prayed that directions be

issued to the Railway Board for permitting the movement of imported coal from Vizag port to the petitioner's plant via Tilda Station of SEC Railway.

2. Briefly stated the fact of the case leading to the filing of the present writ petition are that the petitioner had proposed to set up coal based thermal power plant of 1370 MW (2 x 685 MW) at Village Raikheda, Tilda Block, Raipur, Chattisgarh. The feasibility report was submitted to the South Eastern Central Railway (hereinafter referred to in short as 'SECR') which was approved in principle. However, the plant could not be made operational on account of the fact that the domestic coal linkage was not provided. Since there was a prolonged delay in obtaining the immediate domestic long term coal linkage, the petitioner proposed to use the imported coal from South Africa till the time of obtaining the domestic coal linkage. The petitioner accordingly signed a Memorandum of Understanding with South African coal mines for supplying the requisite coal to the plant site till the domestic coal linkage was obtained. The imported coal was proposed to be moved from Vizag port via Titlagarh-Raipur railway station to the plant site which was at a distance of 13 km from the

Tilda station for the purpose of running thermal power plant. Necessary approval was sought from the Chief Operations Manager, SECR vide letter dated 29.03.2011. On 04.07.2011 the Railway Transport Clearance (hereinafter referred to in short as 'RTC') was issued to the petitioner by the Ministry of Railways for movement of imported coal from Vizag to the plant siding at Tilda wherefrom it was perhaps to be carried by road to the plant. In the said communication, it was specifically assured to the petitioner that the aforesaid RTC was valid for the full life of the project if commissioned or for five years in case project is not commissioned. On 13.10.2011, SEC Railway approved the detailed project report of the petitioner categorically mentioning that the imported coal can be moved via Tilda Station. The only requirement was that only 4.2 MT of coal volume was to be imported and it was to come via Vizag port. Based on the aforesaid assurance and the RTC, the petitioner approached the Railway Board for issuance of instructions to the concerned railways authorities on 25.01.2013 for undertaking the movement of imported coal from Vizag port to the plant site.

3. On 28.02.2013, the Ministry of Railways replied to the

petitioner that the imported coal to power houses in the country, as per the logistics plan issued by the Railway Board, the power plants in Chattisgarh State have been linked to Western Ports and the power houses wanting to move imported coal from the port outside the logistics plan, the approval of the CEA was required.

4. It may be pertinent to mention here that this was for the first time after the grant of RTC by the respondent No.1 that said respondent made a reference to the logistics plan of Railways for the movement of coal to the power plants in Chattisgarh.

5. On 14.03.2013, the petitioner without prejudice to its rights approached to Central Electricity Authority for its recommendation to permit the movement of imported coal from Vishakhapatnam port to the plant site. It was mentioned in the said representation dated 14.03.2013 by the petitioner to the Central Electricity Authority that the implications of changing the import of coal from Vizag port to any of the western ports, like Mundra Port, Dahej and Dharamtar would not only result in increase of cost of production of electricity which was assessed at between 380-600 crores, but it will bring an additional burden of increased ocean freight of approximately INR 46

crores apart from the increase of distance from the port of import to plant.

6. The CEA examined the request of the petitioner and recommended to the Railway Board on 27.05.2013 permitting the petitioner to move the imported coal from Vizag port to their power plant from Tilda station. Thus, this approval by the CEA to the proposal of the petitioner, which was not in line with the so called logistics plan of the respondent No.1/Ministry of Railways, tantamounted to approval of their plea that the change of port for importing the coal from east to west would result in substantial increase in the electricity tariff. Despite the aforesaid approval having been granted by the CEA as well as the RTC having been granted for the full life time of the project, the respondent No.1 vide communication dated 19.06.2013 rejected the request of the petitioner to carry the coal from Vizag port to Tilda.

7. The petitioner made representations on 14.11.2013 and 23.12.2013. However, nothing was heard from the respondents. On 21.03.2014, the petitioner went to the extent of making a request to the respondent No.1 seeking permission to allow at least one rake per

day for the purpose of commissioning of the plant so that it does not suffer any financial loss on account of the delayed commissioning of project. Since nothing was heard or done by the respondent No.1 favourable to the petitioner, they were constrained to file the present writ petition challenging the communication of the respondent dated 19.06.2013.

8. The respondent/Ministry of Railways filed their reply affidavit wherein it was stated by them that the permission of RTC was granted to the petitioner subject to the logistics plan although the factum of the logistics plan was not mentioned in the approval in principle granted by the respondent No.1. It was the case of the respondent No.1 that the RTC was granted in anticipation of doubling of TIG-RSD section and since this could not be done, therefore, the petitioner could not be permitted to carry the coal from vizag port. It was also averred that the port location had to be changed due to the logistics plan and all other thermal power plants in and around the area where the petitioner's plant was set up were also being similarly treated for the purpose of import of coal from the western ports and no special treatment could be accorded to the petitioner.

9. It has been stated that all these factors clearly show that the RTC was issued only as first stage clearance and could not be treated as clearance having been granted by the respondent No.1 after due deliberation once and for all, so as to enable it to force the petitioner to import the coal only from eastern port.

10. Similarly, the respondent No.1 took the plea that the petitioner is yet to complete the project of its siding at Tilda. Annual reports had not been submitted which was a precondition to grant of RTC. It was also averred that the decision to shift the port of import from east to west was in public interest as all other power plants in Chattisgarh area have been permitted to import the coal from western ports. Thus, the petitioner did not deserve to be accorded any special treatment.

11. The petitioner in its rejoinder refuted the averments made by the respondents in the counter affidavit contending that the RTC was only a first time clearance in principle and that was subject to the logistics plan. As a matter of fact, it was stated by the petitioner that the clearance which was granted was without any reservation and was valid for the entire life of the project and it was on the basis of these assurances having been granted by the respondents that the petitioner

invested huge amount of money for setting up not only the thermal plant, but in erecting the siding at Tilda also.

12. It was averred by the petitioner that the petitioner's case could not be equated with that of the cases of the other power plants on account of the fact that in the case of the petitioner, a definite promise was made on the basis of which it had altered its position and therefore its case was distinguishable as compared to the cases where the RTC was yet to be issued. So far as the applicability of the logistics plan is concerned, it has been averred that the logistics plan is referred to for the first time only after the permission in principle had been granted and, therefore, after having granted the RTC without any reservation, it was not open to the respondents to retrace their steps so as to deny the benefit of the same to the petitioner.

13. It was also averred by the petitioner that the shifting of port of import of coal from east to west is not subserving any public interest inasmuch as not only the cost of power generation gets increased, but the production of the thermal electricity becomes costlier and it was no argument on the part of the respondent No.1 that the petitioner remains unaffected by the said increase inasmuch as it could transfer

the said additional burden to the end consumer. On the basis of the aforesaid facts, the petitioner prayed for quashing of the letter dated 19.06.2013.

14. During the course of arguments, it transpired that the letter dated 19.06.2013 of which quashing has been sought was actually addressed to the CEA which in principle had given an approval for import of the coal from Vizag port despite being at variance with the logistics plan. Therefore, CEA was also impleaded as party. The CEA in its reply has supported the case of the petitioner although they did not file any formal reply, but in principle supported the stand of the petitioner.

15. It may also be pertinent to mention that during the pendency of the writ petition, the Ministry of Railways filed an additional affidavit of one Sh. H.S.Bajwa, Director Traffic Transportation, Railway Board praying to supplement the stand taken by them on the basis of the logistics plan.

16. The oral submissions with regard to the RTC being a first time clearance in principle which was ultimately to be subject to logistics

plan of the Railways was sought to be enforced. Further the question of short of capacity movement on the Vizag-Tilda Line was also raised to wriggle out from their earlier stand. The aforesaid affidavit was filed by the respondent No.1 without seeking permission of the court and, therefore, was objected to by the learned senior counsel for the petitioner.

17. The learned senior counsel for the petitioner had despite objection in principle to the admissibility of the said additional affidavit, had filed reply to the same and contended that the policy governing the RTC was not new but was formulated on 09.12.2004 and it was contended that by granting permission or rather RTC, the respondents were now trying to wriggle out of the same by giving reasons which not only are not germane to the position and are also extraneous and, therefore, cannot be taken into consideration.

18. On the basis of the aforesaid pleadings, the contention of Mr.Gopal Jain, the learned senior counsel for the petitioner, has been two-fold.

a) The first and foremost submission has been that the respondents having chosen to give RTC to the petitioner on the basis of which the

petitioner has invested not only considerable amount of money, but has also erected railway siding, are now bound by the doctrine of promissory estoppel and the respondents cannot after having permitted the petitioner to change his position retrace their steps unilaterally by deviating from the terms and conditions of the RTC. In this regard, supplemental argument of the learned senior counsel for the petitioner has been that the RTC was to remain valid and subsisting for the entire life of the project and this was specifically mentioned in the letter dated 04.07.2011 by virtue of which the RTC was granted. It has been contended by the learned senior counsel that at the time when the clearance was granted, admittedly, the logistics plan was in position and therefore the respondents had granted the RTC to the petitioner with their eyes open and in the teeth of the existence of the logistics plan which now cannot be altered or deviated from. It was also contended by him that even at the stage when the petitioner was required to transport coal from Vizag to the Tilda, the respondent did not talk about these impediments for the transportation but rather referred the petitioner to the CEA for the purpose of approval as a pre-condition for transporting the coal from

Vizag to Tilda. It is contended that even this requirement was complied with by the petitioner inasmuch as not only the approval was granted by the CEA but they had also taken note of the fact that the shifting of the port from east to west as envisaged in the logistics plan would result in considerable enhancement of valuation of the project. It has been contended by him that the contention of the learned ASG that the petitioner can offload the extra burden to the customer is not in public interest and therefore this cannot be permitted to be done.

b) The learned senior counsel for the petitioner has also placed reliance on the judgments of the Supreme Court in i) SVA Steel Re-rolling Mills Ltd. Vs.State of Kerala & Ors. in Civil Appeal Nos.10103-10106 of 2010 decided on 06.02.2014; ii) State of Bihar & Ors. v. Kalyanpur Cement Ltd.; (2010 3 SCC 274 and iii) Mohinder Singh Gill v. Chief Election Commissioner; (1978) 1 SCC 405.

19. So far as the respondents are concerned, the learned ASG has tried to put stress essentially on the aspect of logistics plan and contended that at the time of when the RTC was granted, the said

clearance was granted only in principle for the purpose of setting up of siding at Tilda and it had to be read as subject to the logistics plan and the plan envisaged doubling of the railway track from Vizag to Tilda which could not be done for various reasons. Therefore the movement of the goods including import of coal from Vizag port to the Tilda could not be carried out smoothly and in an orderly manner and the port of import had to be diverted to west coast. It has also been contended that the petitioner is not being discriminated on that score because all other thermal power plants set up in and around the plant of the petitioner were being permitted to import coal only from the west coast only and, therefore, the petitioner cannot raise the plea of arbitrariness and discrimination under Article 14 of the Constitution of India. It was also contended that so far as the enhancement of the cost of generation of power is concerned, that was not an impediment because it is ultimately to be borne by the customer and therefore, this argument of the petitioner does not have any merit.

20. It has also been contended that the decisions which have been taken by the respondents are in the public interest and they have not

been taken with a view to penalize the petitioner.

21. I have considered the submissions made by the learned senior counsel for the petitioner as well as of the learned ASG and have also gone through the record.

22. Before dealing with the submissions urged by the learned senior counsel for the petitioner, it may be pertinent to refer to the doctrine of estoppel.

‘Estoppel’ is a rule of equity to prevent a person from taking advantage of a condition or situation when, with knowledge of the facts, he has so conducted himself as to lead the other party to believe that he would not do as he did. It is thus an appeal to conscience of court and ordinarily involves some element of wrongdoing on the part of the person sought to be estopped which would render it inequitable to permit him to take advantage of his prior conduct.

The doctrine of promissory or equitable estoppels is well established in Administrative Law and in Constitutional Law. It represents a principle evolved by equity to avoid injustice. Explaining the principle, Wade (Administrative Law {9th Edition}) states: “The basic principle of estoppels is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth.”

“Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated. (Indira Bai v. Nand Kishore; (1990) 4 SCC 668, 670”

23. A perusal of the aforesaid doctrine would show that the doctrine of promissory estoppel is a doctrine which has been invoked by the Courts in a number of cases where a party on the basis of a representation of the other side has changed his position and incurred liabilities. The said doctrine is invariably permitted to be invoked when a party in case is not protected by the said doctrine would seriously be prejudiced and subjected to great injustice.

24. In the present case also, there is dispute about the fact that the petitioner had got approved his proposal for setting up of a thermal plant of 1370 MW (2 x 685 MW) at Village Raikheda, District Raipur, Chhattisgarh near Tilda Station. According to the petitioner, it had invested almost Rs.8,000 crores in not only setting up the plant, but also a siding at Tilda-Bilaspur Section for the purpose of offloading the imported coal for which it had entered into a

Memorandum of Settlement for supply of coal for running the power plant successfully and generating electricity. This coal was sought to be imported by the petitioner from Vizag port which was the nearest port to the project site. The necessity for importing the coal arose on account of the fact there was a shortage of domestic coal linkage for running the thermal plant. Accordingly, keeping all these parameters in view, the petitioner had applied with the respondent No.1/Ministry of Railways seeking RTC for carrying the coal from Vizag port to the Tilda i.e. up to their siding and thereafter to be transported by road at a distance of 12-13 kms at which the project site was situated. This permission was granted by the respondent No.1 vide letter dated 04.07.2011 subject only to the condition that the project ought to have been commissioned or if it was not commissioned, then it had to be done necessarily within a period of five years from the date of grant of permission.

25. It is not the case of the petitioner or that of even the respondents that at the time when the permission was granted the plant was functioning. The plant was yet to be commissioned, therefore, it had a period of five years within which the plant had to

be commissioned. It may also be pertinent here to mention that the aforesaid permission which was granted by the respondent No.1 was without any reservation or reference to the fact that it was subject to the logistics plan or any other condition which will empower it to review the decision.

26. On the contrary, the respondents had specifically assured the petitioner that the aforesaid RTC was granted to them for the life of the project itself. That being the position, the respondent No.1 could not be permitted to contend now that this permission which was granted to the petitioner on 04.07.2011 was subject to the condition of logistics plan and the logistics plan envisaged two things : i) the permission which was granted to the petitioner was only to be treated as a permission in principle and was subject to the condition that the respondent No.1 was anticipating to double the railway line from Vizag to Tilda which would have resulted in increased movement of the goods from point of start to the point of termination. Such a condition does not find mention in the letter of approval granted by the respondent No.1 in favour of the petitioner.

27. Similarly, at the time when the permission was granted by the

respondent No.1 to the petitioner, the logistics plan was already in existence but there was not even an iota of mention with respect to the same the letter dated 04.07.2011 granting RTC to the petitioner that the said RTC is to be treated as subject to the logistics plan. Therefore, the respondents cannot plead now that the logistics plan being a part of the RTC to wriggle out of their commitment of permitting the petitioner to transport the imported coal from Vizag port (rail head) to Tilda (their siding) and from Tilda Station to the project site. If this stand of the respondent No.1 is upheld then not only it will be against the doctrine of promissory estoppel but it will not attach any seriousness or finality to the decision of the respondents. Such a casual approach of the respondents will have disastrous effect on the project and its founder.

28. It is no argument on the part of the respondent No.1 that they had convened a meeting of all the stake holders namely the CEA or NTPC or the concerned railway authorities and arrived at a conclusion that all the imported coal which is to be utilized by the existing or prospective thermal plants set up in the Chattisgarh region should be supplied through western port.

29. The contention of the learned ASG was that there was no discrimination between the petitioner and the other plant holders is totally bereft of any logic. The reason for this is that so far as the petitioner is concerned, its case is based on the doctrine of promissory estoppel. In the case of the petitioner, RTC has already been issued while as in the case of others, there is no RTC having been issued by the respondent No.1. Therefore, the petitioner's case cannot be equated with that of other plant holders who are yet to be granted RTC on the same lines on which the RTC has been granted to the petitioner. Therefore, the plea of non-discrimination does not hold any water. On the contrary, the actions of the respondents clearly show an arbitrariness in changing their decision.

30. On the contrary, the respondent No.1 when approached by the petitioner seeking permission to transport the imported coal from Vizag port to their siding at Tilda, they were asked to obtain the approval of the CEA. The CEA is a specialized body which is having expertise of going into the question of resources and the raw material and advise the Ministry of Railways after examining the proposal of the parties as to whether the proposal given by a particular plant

holder is feasible or not. Even at this stage, when respondent No.1 was approached by the petitioner for the purpose of grant of permission to carry their imported coal from Vizag to Tilda, the respondent No.1 did not find it fit to raise the question of logistics plan.

31. The petitioner approached the CEA, gave the requisite information and also brought to the notice of the CEA that in case their port of import is shifted from east to west then, not only the distance between Vizag port and the ports to which they are likely to be shifted on the west coast of the country would be almost doubled, but it would also entail additional expenditure to the tune of Rs.380-600 crores apart from the increase in the freight charges to the tune of Rs.86 crores. The CEA after receipt of the proposal had also approved the transportation of the imported coal from Vizag port to the Tilda and accordingly granted the necessary approval.

32. Once the CEA had recommended the case of the petitioner for import of coal from Vizag port to Tilda that should have been the end of the matter and the respondents ought not to have raised any query or rejected the proposal. But the respondents still took the stand that

they are to go according to the logistics plan.

33. Thus action of the respondent No.1 is arbitrary, bereft of any logic or reasoning and seems to be actuated by ulterior motives that despite the petitioner having been referred to CEA for the purpose of obtaining the approval and the letter in this regard having been obtained, yet the respondent No.1 was trying to wriggle out of the same by taking flimsy pretexts. One of the flimsy pretexts which was taken for the purpose of wriggling out of the assurance given by them was that the additional burden which the petitioner bears will eventually have to be borne by the consumer and therefore, no serious prejudice would be caused to the petitioner even if the imported coal is permitted to be routed through the western port.

34. This argument of the respondent No.1 that the ultimate burden is to be borne by the customer is not only highly unreasonable but also illogical. This is on account of the fact that any action of a Government body must be initiated keeping in mind the larger public interest. The respondent No.1 has taken the plea that their action of shifting the port of import from east to west was actuated by subserving the public interest. But I find that instead of serving the

public interest, the very action of the respondent No.1 is anti public inasmuch as it will result not only in enhancement of cost of production of electricity, but will also result in causing great deal of inconvenience and loss of resources to the petitioner. This cannot be permitted to be done at the whims and fancies of the respondent No.1.

35. One of the arguments which has been raised by the respondent No.1 is that the permission which was granted to the petitioner and which was valid for a period of five years was subject to the condition that they were to submit the annual reports. It has been alleged by them that the petitioner did not submit its annual reports. This aspect has been contested by the petitioner by contending that this is factually incorrect. They had submitted the reports on 01.07.2012, 25.06.2013 & 24.07.2014. The details in this regard have not only been averred in the rejoinder affidavit but also copies of the same have been placed on record as Annexure P-1 to P-6. This contention of the respondent No.1 that the non submission of annual report also was a ground to be taken into consideration for non granting them the benefit of the letter dated 04.07.2011 is untenable in law.

36. Last but not the least, the respondent No.1 has taken a plea that

they have taken a plea that they have filed an additional affidavit and in the additional affidavit they have tried to supplement the denial of import of coal from Vizag port by giving additional reasons which have been amplified in the said additional affidavit. The additional reasons given by the respondent No.1 in the additional affidavit cannot be taken cognizance of on account of two reasons.

37. Firstly, this additional affidavit has been filed by the petitioner without obtaining the permission of the court or without any direction from the court. The pleadings in a writ petition essentially consist of averments made in the petition by way of an affidavit, the counter affidavit/reply affidavit filed by the respondent and the rejoinder thereto filed by the petitioner. In the instant case, all these processes were completed yet the respondent No.1 of their own without any rhyme or reason and without obtaining any permission of the court, chose to file the additional affidavit. In the additional affidavit, they have tried to give the reasons as to why the port of import has been shifted from east to west and as to how it does not impact the decisions taken by them which was communicated to the petitioner vide letter dated 04.07.2011. The court does not find it necessary to

go into the finer details of the averments made in the additional affidavit for the simple reason that this was not done on the direction of the court. Even if it is taken into consideration, what is essentially to be seen is the decision taken by the respondent No.1 vide letter dated 19.06.2013 sent by them to the CEA which does not give the reasons as to why they have shifted the port of import of coal from east to west. The reasons for the same cannot be supplied by way of an affidavit. It ought to be evident in the letter itself.

38. The learned senior counsel for the petitioner has relied upon the judgment of Mohinder Singh Gill V. Chief Election Commissioner; (1978) 1 SCC 405 and has contended that the action of a party has to be adjudged on the basis of the reasons provided in the order itself and not by the supplementary reasons in the shape of an affidavit. This judgment squarely fits in with the facts of the present case. In the instant case, the impugned order dated 19.06.2013 by virtue of which the port of import has been shifted from east to west and communicated to the CEA, does not have any basis whatsoever as it does not give any reasons why this has been done. Therefore, in my view, the judgment in Mohinder Singh Gill's case, the letter dated

19.06.2013 cannot be relied upon as a reasoned order passed by the respondent No.1.

39. In totality of circumstances, I feel that the action of the respondent No.1 in issuing the letter dated 19.06.2013 to the CEA shifting the port of import from Vizag to western port is totally arbitrary, discriminatory, illegal and without any basis whatsoever and accordingly the said letter is quashed and a writ of mandamus is issued to the respondent No.1 to permit the petitioner to import coal from Vizag port up to Tilda station as envisaged in the letter dated 04.07.2011. Further, the respondents are bound by the doctrine of promissory estoppel. Accordingly, the writ is allowed in terms of the prayer.

V.K. SHALI, J

FEBRUARY 06, 2015/dm