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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 22.05.2019
Judgment pronounced on : 21 .08.2019

+ **LPA 169/2018**

COAL INDIA LIMITED

..... Appellant

versus

M/S. VIDARBHA INDUSTRIES POWER LIMITED & ORS.

..... Respondents

+ **LPA 173/2018**

UNION OF INDIA

..... Appellant

versus

M/S. VIDARBHA INDUSTRIES POWER LIMITED & ORS.

..... Respondents

Present : Mr. Jagdeep Dhankar, Sr. Advocate with Mr. Karan Singh Bhati, Mr. Hemendra Sharma & Mr. Kartikeya Vajpai, Advocates for Coal India Limited.

Ms. Maninder Acharya, ASG with Mr. Kirtiman Singh, CGSC, Mr. Waize Ali Noor, Mr.Sahil Sood, Ms.Shruti Dutt, Mr.Harshul Chaudhary, Mr.Pradeep Dhanda and Mr.Viplav Acharya, Advocates for UOI.

Mr. Akhil Sibal, Sr. Advocate with Ms.Aanchal Mullick, Mr. Pradeep Chhindra & Mr. Parinay Vasandani, Advocates for VIPL.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Since both these appeals have been filed challenging the orders dated 31.01.2018, 21.02.2018 and 07.03.2018, and have similar grounds they are being disposed of by a common order. LPA No. 173/2018 has been filed by the Union of India and LPA No. 169/2018 has been filed by Coal India Limited assailing the three orders mentioned above. For the sake of convenience, Union of India is hereinafter being referred to as appellant No. 1 and Coal India Limited as appellant No. 2.

2. The brief and necessary facts relevant for adjudication of the present appeals, as culled out from the pleadings of the parties on record, are as under:-

- a. An application was originally made for Coal Linkage by Reliance Mineral Resources Ltd. (hereinafter referred to as 'RMRL') to the Ministry of Coal on 05.05.2006 stating therein that Reliance Energy Limited (hereinafter referred to as 'REL') was selected as implementing agency for setting up 130MW coal-based Group Captive Power Plant (hereinafter referred to as GCPP) at Butibori Nagpur, through International competitive bidding. A request was made for long-term coal linkage with preferred source of coal as Western Coalfields Limited (hereinafter referred to as 'WCL').
- b. On 19.02.2007, a letter was received by appellant No. 1 from Vidarbha Industries Power Ltd. (hereinafter referred to as 'VIPL') informing them that the name of the company had been changed to Vidarbha Industries Power Ltd. from RMRL and request was made for additional long-term coal linkage, as it was decided to enhance the capacity of the GCPP from 130MW to 300 MW, so as to supply

power to Industrial Consumers of Butibori/Hingna and other industrial areas of Maharashtra Industrial Development Corporation (hereinafter referred to as 'MIDC'). Vide letter dated 07.03.2007, Appellant No. 1 sought clarification from the Ministry of Power as to whether VIPL (hereinafter referred to as respondent No. 1) is to be treated as Independent Power Plant (hereinafter referred to as 'IPP') or Captive Power Plant (hereinafter referred to as 'CPP'), as per the Ministry's guidelines. Vide OM dated 30.04.2007, Ministry of Power (hereinafter referred to as MOP) informed appellant No. 1 about the conditions which were required to be fulfilled by a CPP, as per Electricity Rules, 2005 viz.; (a) not less than 26% of the ownership to be held by captive user and (b) not less than 51% of the aggregate electricity generated in such a plant to be consumed for captive use. For an IPP status, the tariff policy of 2006 required that all future requirements of the power had to be procured competitively by the Distribution Licensee. The MOP left the discretion of deciding the status of respondent No. 1 on appellant No. 1.

- c. Appellant No. 1 thereafter requested respondent No. 1 to clarify whether their plant was IPP or CPP and submit the supporting documents.
- d. The Central Electricity Authority (hereinafter referred to as 'CEA') looked into the status of Respondent No. 1 and based on the documents submitted before it, opined, that as per the guidelines, the proposed project of Respondent No.1 could be categorized only as a Group Captive Power Plant and not as IPP. Respondent No. 1 who had been seeking to be classified as an IPP project, on 15.10.2007,

wrote to the Chairman, Standing Linkage Committee (Long Term) [hereinafter referred to as 'SLC(LT)'] stating therein that the Government of Maharashtra had recommended the project for coal linkage, by treating the project as GCPP and the power would be mainly supplied to Industrial consumers.

- e. In its meeting held on 06.11.2007, SLC(LT) recommended issue of Letter of Assurance (hereinafter referred to as 'LOA') to Respondent No. 1 as **GCPP** for its Butibori Plant, following the recommendations of MOP in this regard. One of the conditions of the LOA was that the end use of the total coal assured was for use as CPP.
- f. At this stage, it is relevant to point out that the two coal companies, Appellant No.2 - Coal India Limited and Singareni Coal Co. Ltd. (hereinafter referred to as 'SCCL') were directed that LOAs were to be granted to all the CPPs above 5 MW, but at the time of execution of the Fuel Supply Agreement (hereinafter referred to as 'FSA'), commissioning of the end use plant was to be ensured. It is important to highlight that since there was scarcity of coal at that time, 583 applications of the IPPs, which were pending, were not considered.
- g. Based on the recommendations of the SLC(LT), an LOA dated 24/25.06.2008 was issued by WCL in favour of Respondent No. 1 and as per clause 4 of the LOA, the same was valid for a period of 24 months, from the date of its issue.
- h. Respondent No. 1 sought approval from Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC') for sale of power/Power Purchase Agreement for its unit I, to Reliance Infrastructure Limited- Distribution. On 20.02.2013, the approval was

denied by MERC as this would amount to changing the status from GCPP to IPP.

- i. Respondent No. 1 then sought approval for conversion from GCPP to IPP and the MIDC vide its letter dated 20.05.2013 approved the conversion. On 17.07.2013, Presidential Directives were issued to Appellant No. 2 for execution of FSA with IPPs of 78,000 MW capacity and a list of the IPPs and Thermal Power Plants was prepared by the MOP, but Unit I of Respondent No. 1 was not included in the said list. On 19.07.13, the MERC approved the conversion of Unit I of Respondent No. 1 from GCPP to IPP.
- j. On 23.07.2013, Respondent No. 1 wrote to MOP for recommending to appellant No. 1 for change in the category of Unit I from GCPP to IPP and for execution of Fuel Supply Agreement (FSA). On 03.10.2013, a similar request was made to SLC(LT).
- k. Vide OM dated 27.11.2013, MOP forwarded the letter of 03.10.2013 of M/s. Reliance Power Limited and letter dated 23.07.2013 of Respondent No. 1 to Appellant No. 1, wherein they requested to convert the 300 MW GCPP to IPP and for signing the FSA. As per the case of the appellants, when the matter was examined by them, it was observed that none of the conditions of the GCPP were fulfilled by Respondent No. 1 from the beginning itself, and that, the change to IPP could be effected subject to the condition that the entire power from the unit was sold to DISCOMs by way of long term PPA, through tariff based bidding.
- l. In its meeting held on 21.02.2014, the SLC(LT) recommended to the MOP for conversion of Unit I of Respondent No. 1 from GCPP to IPP

category, subject to furnishing necessary documents for fulfillment of consequential changes in the milestones, within two months and the delay in achieving the milestones, thus far, was condoned.

- m. The SLC(LT), though in its meeting dated 21.02.2014, permitted conversion, however, it did not specifically mention about the transfer of the earlier LOA. On 28.03.2014, Unit I was commissioned and on 11.08.2014, SLC(LT) condoned the delay in submission of MoEF documents by respondent No. 1. A meeting of the SLC(LT) was thereafter held on 12.03.2015 to review the status of existing coal linkages/LOAs etc. Agenda item No. 13 related to the issue of supply of coal to Unit I of respondent No. 1. In the said meeting, Respondent No. 1 brought out that it satisfied all conditions for supply of coal/LOA for Unit I. It had achieved all milestones and fulfilled all criteria for signing the FSA. The objection, however, raised by the Appellants was that Unit I did not fall within 78000 MW list of 'The Cabinet Committee on Economic Affairs' (hereinafter referred to as 'CCEA') and therefore, the FSA could not be signed. The Committee requested for inputs from MOP.
- n. Appellant No. 1 vide letter dated 06.10.2015, informed Respondent No. 1 that FSA for Unit I could not be executed as the Unit was not a part of the list of projects with 78000 MW capacity, Respondent No. 1 per contra claimed that they were however included in the list of 30000 MW IPPs mentioned in the Presidential Directive and were thus entitled to execution of FSA.
- o. MERC thereafter issued an order dated 20.06.2016, in case No. 91/2015, disallowing fuel cost to Respondent No. 1 to the extent of

Rs. 740 Crore due to non-availability of FSA for Unit I. An appeal filed before the Appellate Tribunal of Electricity was disposed of on 03.11.2016 limiting the cost of coal for Unit I to the same as that of Unit II (which had an FSA), till the signing of the FSA for Unit I. This order was challenged by the MERC in the Hon'ble Apex Court and we are informed by the parties that the matter is pending.

- p. The CCEA announced its approval to Coal Allocation Policy for Power sector on 17.05.2017. A Scheme was introduced on 22.05.2017, known as the "Scheme for Harnessing and Allocating Koyala Transparently in India" (hereinafter referred to as 'Shakti Scheme'). The aim of the Scheme was ushering a new Regime of auction-based coal linkages for power sector by fading away the old Regimes of LOA/FSA under the previous policy of 2007. However, to honour the commitments made in the previous Regime, a provision was made in Part A. The Scheme, was thus formulated in two parts. We quote the relevant portion of the Shakti Scheme as under:

“(A) Under the old regime of LoA-FSA:

- i. FSA may be signed with the pending LoA holders after ensuring that the plants are commissioned, respective milestones met, all specified conditions of the LoA fulfilled within specified timeframe and where nothing adverse is detected against the LoA holders. The outer time limit within which the power plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022, failing which LoA would stand cancelled. Coal supply to these capacities may be at 75% of ACQ. The coal supply to these capacities may be increased in future based on coal availability.*
- ii. The 583 pending applications for LoA need not be considered and may be closed.*

(B) The following shall be considered under a New More Transparent Coal Allocation Policy for Power Sector, 2017-SHAKTI (Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India):

(i)

(ii) CIL/SCCL may grant coal linkages on notified price on auction basis for power producers/ IPPs having already concluded long term PPAs (both under section 62 and section 63 of The Electricity Act, 2003) based on domestic coal. Power producers/ IPPs, participating in auction will bid for discount on the tariff (in paise/ unit). Bid Evaluation Criteria shall be the non-zero Levellised Value of the discount (applying a pre-notified discount rate) quoted by the bidders on the existing tariff for each year of the balance period of the PPA. Ministry of Coal may, in consultation with Ministry of Power, work out a methodology on normative basis to be used in the bidding process for allocation of coal linkages to IPPs with PPAs.”

- q. ‘Clause A(i)’ of the policy is regarding execution of FSA with pending LOA holders, if their plants were commissioned by a particular cutoff date, which is 31.03.2022 and other milestones were met, provided further that there was nothing adverse against them. ‘Part B’ on the other hand, related to a grant of coal linkages on notified prices on auction basis to power producers/IPPAs having concluded long term PPAs. Thus, this allocation was totally on the basis of competitive bidding.
- r. Based on the Shakti Scheme, Appellant No. 1 issued policy guidelines to appellant No. 2 and as per the case of the Respondent No. 1, he was eligible for execution of FSA under Part A(i) of the said policy. However, the FSA was not executed in favour of Respondent No. 1. Without prejudice to its rights, on 18/19.08.2017, respondent No. 1 submitted its Expression of Interest, pursuant to a notice by Appellant

No. 2, for auction of coal linkages in terms of Part B(ii) of the policy. The CEA, however, disallowed any quantity to respondent No. 1 on the ground that Unit II of Respondent No. 1 already had an FSA, while Unit I had an LOA.

- s. Aggrieved with the action of the appellants herein, in neither executing an FSA in respect of Unit I nor permitting Respondent No. 1 in participating in the auction under Part B(ii) of the Shakti Policy, Respondent No. 1 filed a writ petition bearing WP(C) No. 10614/2017 with the following prayers:

“a) Issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction, directing the respondent No.2 to execute the Fuel Supply Agreement as per Letter of Assurance dated 24.6.2008 9 (Annexure “P3”) read with the letter from WCL to SECL dated 11.11.2014 (Annexure “P-15”) and the Part A (i) of the SHAKTI policy (Annexure “P-24”).

b) Pending the hearing and final disposal of the Writ, the respondent No.2 be directed to ensure supply of coal to the petitioner from its subsidiary SECL, on the same terms which are contained in the model Fuel Supply Agreement.”

- t. Along with the writ petition, an interlocutory application bearing CM No. 46291/2017 was filed for interim relief. There were two reliefs claimed in the said application, which we quote as under:

“a) Direct respondent no.1 and 2 to earmark/ reserve/ block equivalent quantity of coal reserves of G9/G10 grade (computed @ 12.34 lakh tons/ annum) from SECL’s existing operating coal mines to secure the supply of coal to Unit-I of the petitioner’s plan over long-term and keep the same outside the purview of taking any decision by the respondents.

b) Direct the respondent no.2 to immediately commence, through its subsidiary SECL, the supply of G9/G10 grade coal @ 12.34 Lakh tons/ annum to Unit-I of the petitioner under the MoU route.”

- u. On 11.01.2018, MOP took a stand that the issue of LOA/FSA, to Respondent No. 1 after conversion from GCPP to IPP would be decided by Appellant No. 1. Appellant No. 2 filed a preliminary affidavit in the writ petition raising objections to the relief sought by respondent No. 1.
- v. On 19.01.2018, SLC(LT), after hearing the representatives of Respondent No. 1, recommended that LOA issued to respondent No. 1 as GCPP could not be transferred upon the conversion of the Power Plant (PP) into IPP. However, in the backdrop of adequate coal availability and to further the objective of Shakti Scheme, it recommended that Appellant No. 1 may explore the feasibility of the PP obtaining coal linkage as an IPP under the provisions of the Shakti policy.
- w. Before the recommendations could be approved by the competent authority, the interlocutory application was heard by the learned Single Judge on 31.01.2018. The learned Single Judge, after hearing the parties, was of the view that Respondent No. 1 had a prima facie case in its favour, for having an FSA executed. An interim order was thus passed, directing Appellant No. 2 to supply coal to Respondent No. 1 as prayed for in clause (b) of the interlocutory application, via its subsidiary i.e. the Southern Eastern Coalfield Limited. However, taking cognizance of the statement of the learned ASG that a similar situation had arisen in respect of another Coal Company and the said

case was under consideration by an Inter-Ministerial Committee (hereinafter referred to as 'IMC') to find a long term solution, the learned Single Judge restricted the interim order of supplying coal, till the final decision by the Committee. The interlocutory application was disposed of by the said interim order.

- x. Subsequently, on 15.02.2018, the Competent Authority accorded its approval to the recommendations given by the SLC(LT) on 19.01.2018. Two applications were thereafter moved by the parties. One application was for correction of two typographical errors in the order dated 31.01.2018. The same was allowed by order dated 21.02.2018 and the errors were corrected. On 21.02.2018, another application moved by Respondent No. 1 was also disposed of, bearing CM No. 6792/2018. This application was in the nature of seeking implementation of the order dated 31.01.2018. The said application was also disposed of directing the respondents therein to comply with the order dated 31.01.2018, within the next three days.
- y. Faced with an interim order against them, Appellant No. 1 moved a review application bearing RA No. 102/2018 for recalling the order dated 31.01.2018 and Appellant No. 2 moved an application bearing CM No. 7039/2018 to vacate the interim order. The main ground in the application as well as the review petition, respectively, was that the recommendations of SLC(LT) dated 19.01.2018 had been now approved by the competent authority on 15.02.2018 and since no LOA was in existence, no supplies could be sought by Respondent No. 1. The argument in essence was that the circumstances which prevailed on 31.01.2018 had undergone a change since on 31.01.2018, there

were merely recommendations against the respondent No. 1, but now the decision had been taken by the Competent Authority and hence the coal could not be supplied to Respondent No. 1. Thus, the order was sought to be recalled/vacated.

- z. The learned Single Judge, however, did not agree with the contentions of the appellants herein and dismissed the application as well as the review petition. The learned Single Judge relied upon certain documents filed by Respondent No. 1 to show that the LOA issued in 2008 was valid even for the IPP category, more particularly, because respondent No. 1 had all through been treated as a LOA holder and this position continued even at the time of conversion from GCPP to IPP. The learned Single Judge was also of the view that the Respondent No. 1 met all milestones and conditions specified in the LOA. As regards the final decision of 15.02.2018, the learned Single Judge observed that 15.02.2018 was merely a decision approving the recommendations given in the meeting held on 19.01.2018, which had been considered while passing the order on 31.01.2018 and thus this development made no difference to the order passed on 31.01.2018. The learned Single Judge reiterated his directions to issue coal to Respondent No. 1, of course, only at the notified price and subject to other conditions being fulfilled including a Bank Guarantee equivalent to 6% of the value of coal, which the learned Senior Counsel for the respondent No. 1 herein, undertook to abide by.
- aa. These three orders have been assailed before us by the Ministry of Coal and Coal India Limited, separately by way of the present two appeals.

3. During the hearings, we have been informed by learned senior counsel for Appellant No. 2 and the learned ASG, that the Inter-Ministerial Committee had taken a decision on 18.07.2018. Copy of a letter dated 25.07.2018 was handed over to the Court in this regard. The letter was addressed by Appellant No. 1 to Appellant No. 2 as well as another Coal Company, namely SCCL, in whose case, a similar situation had arisen. Vide this letter the decision of the Committee was communicated. Attention of the court was drawn to para 2(a) of the said letter and it was submitted that it had been decided by Appellant No. 1 that all power plants which have a valid and already concluded long term PPA based on domestic coal, on or before 17.05.2017, but have not secured any coal linkage under Shakti Scheme or prior policy or through coal blocks, may be allowed to participate in the auctions, as envisaged in para B(ii) of the Shakti policy.

4. Based on this decision, the appellants vehemently argued that the inter-ministerial committee has now taken a policy decision, but respondent No. 1 has not challenged the same in any substantive proceedings and cannot therefore, oppose the present appeal. The argument was that in view of the said decision, the writ petition itself had become infructuous and while the respondents may have the remedy of challenging the said decision, but since the main relief in the writ petition does not survive, the interim order ought to be vacated.

5. Without prejudice to the said contention, the first and the foremost contention of Mr. Dhankar, learned Senior Counsel for appellant No. 2, is that the interim order passed by the learned Single Judge is in the nature of a mandatory injunction, which cannot be granted at an interim stage. He submits that the impugned order is beyond the jurisdictional competence of a

Court and is violative of Section 39 of the Specific Relief Act. He also submits that the interim order virtually tantamounts to re-scripting a commercial contract between the parties and mandating Appellant No. 2 to supply coal to Respondent No. 1, is beyond the scope of judicial interference. For this proposition, he relies on a recent judgment reported in ***2018 SCC OnLine SC 1048 titled Samir Narayan Bhojwani vs. M/s.Aurora Properties and Investments***, wherein the Apex Court has reiterated that a mandatory order is a drastic order and ought to be eschewed at an interlocutory stage and granting such an order would be in excess of the jurisdiction of the Court. More particularly, reliance is placed on paras 23 to 32 of the said judgment.

6. Learned senior counsel for the Appellants No. 2 submits that in any case, the impugned order has outlived itself, inasmuch as the learned Single Judge has directed the Appellant herein to continue to supply Coal to the Respondent herein till such time the Inter-Ministerial Committee took a final decision in the matter. Since the Committee has taken a decision on 18.07.2018, the Appellants are no more bound by this direction, but the directions for the interregnum need to be set aside as they are facing contempt proceedings also before the Single Judge.

7. The next contention of the learned senior counsel for the Appellant No.2 is that the entire basis of the claim of the Respondent was the decision rendered by SLC (LT) on 21.02.2014. It is contended that firstly, assuming this was a decision in favour of the Respondent No.1, the Respondent took no steps in furtherance of the said decision and filed the present writ petition only in the year 2017 and the writ petition is thus barred by delay and laches

and ought to have been dismissed by the learned Single Judge on this ground alone. Secondly, in any case, placing reliance on the said decision can be of no avail to the Respondent inasmuch as this is a decision which does not even remotely suggest that the Respondents had any right to execution of an FSA in their favour. In fact, the reading of the Minutes would reveal that there is no reference to an LOA much less about its conversion from GCPP to IPP. The learned Single Judge has erred in giving lot of weightage to the observations in this meeting by the SLC (LT) and has erred in observing that an attempt was made by the SLC (LT) to change its position subsequently in its meeting held on 19.01.2018. It is submitted that after the meeting on 21.02.2014, the SLC (LT) had addressed the issue of FSA to Respondent No. 1 and on 12.03.2015 had sought inputs in this regard from the MOP. Subsequently, the issue of execution of FSA came to be determined by the Ministry of Coal on 06.10.2015, when the appeal of Respondent No. 1 was rejected. Even the Ministry of Power have left the decision on the Ministry of Coal. After hearing the representative of Respondent No. 1, a conscious decision was taken by the SLC (LT) on 19.01.2018 and which has been finally approved by the Ministry of Coal on 15.02.2018. Thus, it was incorrect on the part of the learned Single Judge to place undue reliance on the Minutes of 21.02.2014.

8. The next contention on behalf of the Appellant No.2 is that the Learned Single Judge was clearly informed that the SLC (LT) in its meeting held on 19.01.2018 had taken a decision that the LOA issued to Respondent No. 1 as GCPP cannot be transferred, upon the conversion of the PP to IPP. There was effective participation in the deliberations by the representatives of Respondent No. 1. Apart from oral hearing, written submissions with

documents were also filed by the parties. However, the Respondent No. 1 has neither challenged the minutes of the meeting dated 19.01.2018 nor the final decision on the said minutes taken by the Ministry on 15.02.2018. In the absence of challenge to the final decision, it is not open for Respondent No.1 to seek execution of the FSA in its favour. It is also contended that there is no procedural infirmity or arbitrariness in the decision-making process and in the absence thereof, the decision itself is not open to question. In any case, since there is no challenge to the decision, the Respondents can have no plausible defense in the present appeal.

9. Learned senior counsel for the Appellant No.2 vehemently contended that the writ petition is a gross abuse of the process of the Court inasmuch as, Respondent No.1 had earlier applied for grant of linkage to the SLC (LT) as an IPP but the SLC (LT) in its meeting held on 02.08.2007 had deferred their proposal in view of the fact that the plant was scheduled to be commissioned beyond the 11th Five Year Plan. In fact, for similar reason, applications of large number of IPPs were deferred. Thereafter, Respondent No. 1 sought LOA indicating the end use for GCPP and was successful in obtaining the LOA in the year 2008. However, the Respondent fulfilled no conditions of the GCPP for a long period of five years. In 2013, the Respondent sought approval from MERC for sale of Power/ Power Purchase Agreement from Unit I to Rinfra-D and when the approval was denied, it sought approval for conversion of Unit I from GCPP to IPP. The submission is that having now achieved conversion into IPP, the Respondent would have to wait in the queue of the other IPP Power Plants and can only come through the route of auction under Clause B of the Shakti Policy. Respondent No. 1 cannot be permitted to take advantage of its conversion to IPP having taken the LOA in

the GCPP category, at a time when IPPs were not even considered for grant of lots due to scarcity of coal.

10. It is next contended that the LOA was issued to Respondent No. 1 as GCPP and not IPP. Neither NCDP nor any stipulation in the LOA permits change in the category from GCPP to IPP or from one Sector/Segment to another. The only change that can be affected is in terms of Clause 5 of the LOA where the LOA can be assigned to any third person. It is further submitted that based on the LOA as a GCPP, the Respondent cannot claim execution of an FSA until he obtains an LOA in the category of IPP. The SLC (LT) can only act within the parameters of the NCDP and after having issued the earlier LOA it has become functus officio to that extent and cannot make any recommendation for change of the LOA to IPP category on the basis of the earlier LOA.

11. It is vehemently argued that the entire prayer in the writ petition is misconceived seeking execution of FSA inasmuch as an FSA can only be executed in favour of a PP who has a valid LOA and hence no interim relief can be granted. The Respondent No. 1, presently is not a holder of a valid LOA since the same has expired on 23.06.2010. Clause 4 of the LOA clearly provided that it would be valid only for a period of 24 months from the date of its issue. The LOA was issued on 24.06.2008 and by virtue of this clause, it ceased to be valid from 23.06.2010. Thus, in any case the Respondent No. 1 cannot claim the execution of an FSA, as it is not a 'holder of valid LOA'.

12. Ms. Acharya, learned ASG appearing on behalf of the Union of India has reiterated the contentions and submissions made by Mr. Dhankar, Senior Advocate. Additionally, she has argued that merely conversion of the Power Plant from GCPP category to IPP category does not ipso facto or

automatically connote that the LOA received as GCPP stands converted to an LOA for the IPP category. Since the LOA had been obtained by Respondent No. 1 as a GCPP and the same has ceased to remain valid after 24 months and there is no valid or subsisting LOA with Respondent No. 1 as IPP, it cannot be said that Respondent No. 1 is a 'LOA holder' and therefore, the prayer for executing the FSA cannot be granted in the absence of a valid LOA. The learned ASG has drawn the attention of this Court to the decision of the Ministry of Coal dated 15.02.2018, more particularly, paras 12, 16, 17 and 18 to point out the deliberations that were made by the SLC (LT) before making its recommendations against Respondent No. 1. Learned ASG submits that the SLC (LT) took into account the fact that all tangible and intangible benefits flowing from the issuance of LOA initially granted to GCPP had accrued to Respondent No. 1 at a time when many other power developers could not obtain LOA as IPP and were compelled to source through open market. Thus, a level playing field was denied to other IPPs, who were in the queue at that point in time and have not used the CPP to IPP conversion strategy to by-pass the long queue of IPPs. In para 17, it was observed that MOC had received a complaint which was also addressed to CBI and CVC, wherein it was indicated that due to non-availability of sufficient Power Grade Coal WCL sanctions for new power plants under IPP in the Vidarbha region of Maharashtra was not possible, and hence, Respondent No. 1 entered through the route of GCPP initially and now, is camouflaging the situation to convert into IPP to take advantage of the fuel cost difference between the two categories which is about 90 – 100 crores per annum. In fact, the CEA received information that the plant was synchronized on 25.06.2012 and achieved full load on 17.08.2012, while

respondent No. 1 stated that the plant had been shut till 2014 and there was no production during this time. What is of importance according to the learned ASG is, that the plant had at no point in time functioned as GCPP. The action of applying for execution of PPA for 600 MW much before the conversion to IPP indicates that respondent No. 1 had all along planned to operate as IPP only and this casts a serious doubt about its intention.

13. Learned ASG further argued that there is a difference between a Captive Power Plant (CPP) and Independent Power Plant (IPP). While in the case of the former, the power plant is set up to generate electricity primarily for its own use and the purpose of the industrial unit is to feed power to its own plant or unit for manufacturing goods etc. while in the case of the latter, electricity is generated to be sold to the end consumer, i.e., public through a Distribution Licensee. In the case of CPP, the mandatory qualification is that not less than 26% of the ownership is held by the captive user and not less than 51% of the aggregate electricity generated is consumed for captive use. While there is no such mandate for an IPP and 100% power generated is to be supplied for the public. In CPP, no regulation of tariff is required and the 49% power can be freely traded while in the case of IPPs, the Central or the State Electricity Regulatory Commissions regulate the power tariff. Even the Policies governing the two categories are different inasmuch as in CPP, the policy governing the field is dated 15.02.2016 and this lays down guidelines for auction of Coal linkages to non-regulated sectors while the Shakti Scheme has been formulated on 22.05.2017 for the IPPs. She submits that the Shakti Policy is aimed at ushering new Regime of auction base coal linkages and fading away the old Regime of LOAs and FSAs. Part A, according to her, of the Policy provides assurances to honour commitments

in the previous regime. A Presidential Directive was, in fact, issued, which had a list of IPPs with a capacity of 78000 MW and Unit I of Respondent No. 1 did not form a part of this list. Part A of the Shakti Policy is not applicable to CPP for which there is a separate auction policy for linkages. In fact, any private IPP under the Shakti Policy can procure a Coal linkage only through auction. Since, the Respondent No. 1 is not an LOA holder of IPP, it is not covered under Clause A(i) of the Shakti Policy. It is contended that the learned Single Judge has failed to appreciate that after the decision of 15.02.2018, which is unchallenged by respondent No. 1 the direction to supply coal or execute FSA cannot be granted in law.

14. The next contention of the learned ASG is that the Learned Single Judge erroneously held that the situation altered after the letter of CEA dated 03.12.2015, wherein it was clarified that Respondent No. 1 is covered in the list of 30000 MW capacity. She submits that the decision of 21.06.2013 was of the Cabinet Committee on Economic Affairs, which had decided as a matter of policy that FSAs would be executed only with power project of 78000 MW capacity, while the letter of the CEA was a mere letter, with no authority to formulate any policy decision.

15. The next contention of the learned Additional Solicitor General is that supply of coal to Respondent No. 1 at notified price as directed by the interim order, in the absence of a valid LOA/ FSA, would amount to a differential treatment towards other power projects which are compelled to procure coal from forward E-Auction and other such modes. This would lead to a situation of opening flood gates where other power producers may approach to obtain coal through MOU route. It is also pointed out that the coal was being supplied to Respondent No. 1 by CIL and its subsidiaries

through 'forward E-auction, especially meant for IPPs' and other auctions in the open market and Respondent No. 1 had already booked required quantities under the said auctions. It is, thus, submitted that the interim order directing the Appellants to supply coal at notified price to Respondent No. 1 is illegal and should be set aside.

16. Per contra, Mr. Akhil Sibal learned senior counsel for the respondent No. 1 submits that the learned Single Judge has rightly granted the interim order and in law, such orders can be granted if the facts and circumstances of a case so require. He relies upon the judgment of the Apex Court in the case of ***Dorabhji S. Cawasji Cooper (1990) 2 SCC 117***, wherein the Hon'ble Supreme Court has held that the interim mandatory injunction can be granted in exceptional circumstances where withholding it would, in fact, carry a greater risk of injustice than granting it and thus, such injunctions are not merely limited to securing *status-quo ante* only. Learned counsel argued that the power of a writ court to grant injunction is based on principle of justice, equity and good conscious and the extra-ordinary power are not restricted by the conditions imposed in the CPC. In support of this, he relies on the judgment of the Apex Court in the case of ***Ramesh Chandra Sankhla vs. Vikram Cement, (2008) 14 SCC 58***. Thus his contention is that there is no hard and fast rule that interim orders in the nature of mandatory injunction can never be granted by a Court.

17. In response to the argument of the Appellants that the interim orders have outlived their operation, in view of the decision of the IMC on 25.07.2018, learned senior counsel submits that this argument can be made by the Appellants only before the learned Single Judge and cannot be argued in the present appeal as the decision of the IMC is not subject matter of

challenge either in the writ petition or in this appeal. He further submits that the said decision is infact based on the decision of 15.02.2018 and only reiterates that the LOA is not transferred on conversion of the status of a Power Plant from GCPP to IPP. According to him, this argument has been expressly rejected by the learned Single Judge and therefore, this decision of 25.07.2018 does not come in his way of prosecuting the writ petition or defending the present appeal.

18. Learned senior counsel for Respondent No. 1 further contends that the Appellants have themselves all along treated Respondent No. 1 as an LOA holder for its Unit I. In several meetings, it is recorded that delay in achieving milestones have been condoned and all milestones have been met. Therefore, the entire premise on which the SLC (LT) has made its recommendations on 19.01.2018 and which is approved by the authority on 15.02.2018 is unsustainable. The transfer of the LOA for IPP category is implied and there is no pending consideration. The writ petition is premised on the Respondent No. 1 having a valid subsisting LOA in its favour and therefore, he has rightly sought a direction for execution of the FSA. Thus, any subsequent internal decision by the Appellants to refuse to treat him as LOA holder is not even required to be challenged. The argument is that the recommendation of 19.01.2018 and the decision dated 15.02.2018 are merely internal and self-serving decisions, with no legal force and are *non-est* in law.

19. Mr. Sibal, vehemently contended that there is no merit in the contention of the Appellants that there is no valid subsisting LOA as the same has lost its validity after 24 months from 24/25.06.2008 and that the said LOA was for GCPP. He submits that the Ministry of Power on

27.11.2013 had recommended to the Ministry of Coal for conversion of Unit I from GCPP to IPP for the purpose of signing the FSA, subject to the entire power being sold to a DISCOMs, by long term power purchase agreement through tariff base bidding. The SLC (LT) in its meeting held on 21.02.2014, had agreed for conversion to IPP after considering the recommendations of the MOP. In the said meeting, specific note was taken of the expiry, if any, of the LOA and also of the legal opinion given by the learned Solicitor General, apart from the fact that the delay in achieving the milestone was expressly condoned. All that remained was submission of necessary documents for fulfilment of consequential changes in the milestone. He further submits that in fact, this decision of the SLC (LT) was approved by the Competent Authority within Coal India Limited. WCL, a 100% subsidiary of Coal India vide its letter dated 01.04.2014 had sought documents from Respondent No. 1 as applicable to 'IPP LOA holders', which were duly submitted. He points out that on 11.08.2014, the SLC (LT) in its meeting recommended even for the condonation of delay in submission of the documents and this was, in turn, approved by the Competent Authority. On 11.11.2014, the WCL confirmed the achievement of all milestone by Respondent No. 1, consequent upon their conversion from GCPP to IPP. The only reason given by MOC in their meeting dated 12.03.2015 for not executing FSA was that Respondent No. 1 was not included in the list of 78000 MW category approved for signing of the FSA vide CCEA decision dated 21.06.2013 and that the inputs of the MOP were awaited in this regard. The reason at this stage, for non-execution of FSA was not that Respondent No. 1 was not a LOA holder which is a stand which is now being taken by the appellants. In fact, on 03.12.2015, CEA had

clarified that Unit I was included in the category of LOA holders and covered in the balance 30000 MW capacity plants for signing of the FSA. The CEA /MOP had provided the commissioning status of the projects of the LOA holders and which expressly included Unit I of Respondent No. 1. Learned senior counsel, thus, contends that this document alone, *de-hors* any other document, confirms the stand of Respondent No. 1 that all the Authorities treated Unit I of Respondent No. 1 as a LOA holder, having achieved all the milestones as recently as up to July 2017. However, it was only when Respondent No. 1 sought to participate in the auction under the Shakti Policy, without prejudice to his rights, that he was informed that he was ineligible to participate. In essence, the argument of Mr. Sibal is that if Respondent No. 1 was not a valid LOA holder, where was the necessity of considering his case in so many meetings and condoning the milestones achieved. He has brought to the notice of this court minutes of various meetings, where recommendations have been made in his favour by the SLC (LT) and delay in achieving milestones have been condoned as well as it is mentioned that Respondent No. 1 fulfills the criteria as a LOA holder.

20. Learned senior counsel contends that the only reason why Respondent No. 1 is not included in the Presidential Directive list is because at that stage, he was still a GCPP and conversion to IPP had not taken place for which Respondent No. 1 cannot be faulted.

21. Mr. Sibal contends that the guiding principle regarding interference in an appeal against an interim injunction order, which is discretionary, is well settled by a catena of decisions, more particularly, ***Wander vs. Antox 1990 (Supp.) SCC 727*** and ***Mohd. Mehtab vs. Khushnuma Ibrahim Khan 2013 (9) SCC 221*** and as per these judgments there should be no interference in a

discretionary order, unless the view taken by the learned Single Judge is not a possible view.

22. The present petition, as highlighted above, was filed seeking a direction to the respondents therein to execute FSA in favour of the petitioner in terms of the LOA dated 24/25.06.2008. The present petition is still pending adjudication before the learned Single Judge. What is assailed before us by way of the present appeal are two orders dated 31.01.2018 and 07.03.2018. The order dated 31.01.2018 is an order whereby the learned Single Judge has granted interim relief to the respondent herein and has directed respondent No. 2 in the writ petition i.e. Coal India Ltd. to supply coal to the petitioner via its subsidiary which is Southern Eastern Coalfield Limited. The direction was, however, limited to the period till the inter-ministerial Committee, which was examining a similar issue in the case of another company, was to take a final decision. Vide order dated 07.03.2018 the Learned Single Judge has dismissed the interlocutory application filed by Coal India Ltd. for vacation of stay and a review application filed by Union of India, for recall of the interim directions.

23. We need to emphasis that by way of the review petition, the UOI had brought to the notice of the learned Single Judge that the recommendations of the SLC(LT) had now been accepted by the competent authority and a final decision had been taken on 15.02.2019, viz. the LOA issued to the petitioner as GCPP could not be transferred only because the power plant stood converted to IPP. The petitioner in the writ petition had, however, drawn the attention of the learned Single Judge to certain documents which were communications and recommendations in its favour. The learned Single Judge taking an overall view of the matter, reiterated that the

petitioner therein fulfilled the conditions for execution of the FSA in its favour, and therefore, did not recall the order dated 31.01.2018.

24. Having heard the parties and examined the position of law, we agree with the contention of the appellants that the learned Single Judge could not have passed an interim order directing supply of coal to the petitioner therein, till the issues raised by both sides, and some of which we will enumerate hereinafter, are adjudicated upon and decided finally in the writ petition. The direction to supply coal to the respondent in our view amounts to allowing the writ petition finally. It is well settled that an interim relief which amounts to granting final relief cannot be granted by any court, as held by the Supreme Court in *Samir Narayan Bhojwani (supra)*. We quote the relevant paras as under:-

“23. The said ad-interim arrangement continued during the pendency of Notice of Motion. However, while finally disposing of the Notice of Motion No. 147/2013, the learned Single Judge of the High Court vide judgment and order dated 9th October, 2017 passed a mandatory order directing the appellant to hand over 8 flats and 16 parking spaces to respondent No. 1/plaintiff. For passing such mandatory order the learned Single Judge placed reliance on the decision of this Court in *Gaiv Dinshaw Irani v. Tehmtan Irani*¹, holding that the Courts ought to mould the relief in accordance with the changed circumstances for trying the litigation or to do complete justice. The view so taken by the learned Single Judge commended to the Division Bench.

24. What has, however, been glossed over by the High Court is that the Settlement Agreement dated 4th November, 2016 and the Consent Terms dated 29th September, 2017 have been entered into between the respondent No. 1/plaintiff and respondent No. 2/defendant No. 1 *inter partes*. That could not be thrust upon the appellant/defendant No. 2 who had executed a separate agreement with respondent No. 2/defendant No. 1. The appellant could be bound only by the agreement dated 10 March, 2003 in his favour and executed by him. Admittedly, the said agreement is the subject matter

of arbitration proceedings, *inter alia* because respondent No. 2 had failed to discharge its obligation thereunder. The appellant has already parted with the possession of flats to respondent No. 2 in furtherance of agreement dated 10th March, 2003 and respondent No. 1/plaintiff could be accommodated only against those flats. Asking the appellant to hand over additional 8 flats and 16 parking spaces by way of mandatory order, would be to superimpose the liability of respondent No. 2/defendant No. 1 on the appellant for discharging its obligation qua respondent No. 1/plaintiff in relation to the agreement entered between them dated 22nd September, 1999 and including Settlement Agreement dated 4th November, 2016 and Consent Terms dated 25th September, 2017, to which the appellant is not a party.

25. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. This Court in *Dorab Cawasji Warden v. Coomi Sorab Warden*,² has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In paragraphs 16 & 17, after analysing the legal precedents on the point as noticed in paragraphs 11-15, the Court went on to observe as follows:

“16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted

or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.”

(emphasis supplied)

26. The Court, amongst others, rested its exposition on the dictum in *Halsbury's Laws of England*, 4th edition, Volume 24, paragraph 948, which reads thus:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”

27. The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the *prima facie* material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the *status quo ante* be restored by way of an interim mandatory injunction. (See *Metro Marins v. Bonus Watch Co. (P) Ltd.*³, *Kishore Kumar Khaitan v. Praveen Kumar Singh*⁴ and *Purshottam Vishandas Rahejav. Shrichand Vishandas Raheja (Dead) through LRS.*⁵)

28. In the factual scenario in which mandatory order has been passed against the appellant, in our opinion, is in excess of jurisdiction. Such a drastic order at an interlocutory stage ought to be eschewed. It cannot be countenanced.

29. Reverting to the decision in *Gaiv Dinshaw Irani*, (supra), relied upon by the High Court, the Court moulded the relief in favour of the party to the proceedings to do substantial justice whilst finally disposing of the proceedings and did not do so at an interlocutory stage. In other words, reliance placed on the principle of moulding of relief is inapposite to the fact situation of the present case.

30. Resultantly, the invocation of principle of moulding of reliefs so also the exercise of power to grant mandatory order at an interlocutory stage, is manifestly wrong. To put it differently, while analysing the merits of the contentions the High Court was swayed away by the consent agreement between the respondents *inter partes* to which the appellant was not a party. Thus, he could not be bound by the arrangement agreed upon between the respondents *inter se*. The appellant would be bound only by the agreement entered with respondent No. 2 dated 10th March, 2003 and at best the tripartite agreement dated 11th September, 2009. The respondent No. 2 having failed to discharge its obligation under the stated agreement dated 10th March, 2003, cannot be permitted to take advantage of its own wrong in reference to the arrangement agreed upon by it with respondent No. 1/plaintiff and including to defeat the claim of the appellant in the arbitration proceedings.

31. It would have been a different matter if the High Court were to continue the ad-interim arrangement directed in terms of order dated 3rd December, 2012 and as corrected on 17th December, 2012, until the final disposal of the suit. However, by no stretch of imagination, the appellant could be directed to hand over 8 additional flats and 16 parking spaces to respondent No. 1 with whom the appellant has had no independent agreement in that regard. The fact that respondent No. 1 would get a right in the suit property in terms of agreement dated 22nd September, 1999, Settlement Agreement dated 4th November, 2016 and Consent Terms dated 25th September, 2017 with respondent No. 2, cannot be the basis to set up a claim against the appellant and, especially because complying with the directions in the impugned order would result in bestowing advantage on respondent No. 2 who has failed to discharge its obligation under the agreement dated 10th March, 2003 with the appellant.

32. In view of the above, we have no hesitation to conclude that the High Court committed manifest error and exceeded its jurisdiction in granting interlocutory mandatory injunction against the appellant.”

Thus, in our view, the interim order directing supply of coal should not have been granted, till the final adjudication of the writ petition.

25. There cannot be a quarrel with the settled law that interference in a discretionary relief should be in exceptional cases and on this aspect we are in complete agreement with learned senior counsel for the respondent. However, it is equally well settled, as observed by us above, that an interim relief cannot be such that it amounts to granting final relief to a petitioner. In the present case, the impugned orders have virtually allowed the writ petition, without even adjudicating the rival contentions of the parties and more particularly the issue, whether the respondent has any right to demand that coal should be supplied to him in a particular category, on the basis of an LOA of 2008, whose validity itself is questionable today. Thus, in our

view, the judgments relied upon by the learned senior counsel for the respondent would be of no avail to the Respondent and the impugned orders certainly call for an interference.

26. Since the merits of the writ petition have to be adjudicated by the learned Single Judge, we are carefully treading on a path where we are not making any observations on the merits of the case, lest it prejudices either side before the Learned Single Judge and the observations made herein are only a *prime facie* view, to test the correctness of the interim orders.

27. There is no dispute between the parties that FSA can be executed in favour of a party, only if there is a valid and subsisting LOA in its favour. We, *prima facie*, agree with the learned senior counsels for the appellants that in the absence of a valid and subsisting LOA, there cannot be a direction for execution of an FSA. Therefore, it becomes important that the validity of the LOA is adjudicated not only in terms of the period for which it was valid as per Clause 4, but also in view of the fact that when the LOA was issued, the respondent was admittedly in the category of GCPP but subsequently thereto the respondent sought conversion to IPP category. *Prima facie*, we also agree with the contentions of the appellants that the recommendations of the SLC (LT) have now culminated into a decision by the Competent Authority, but there is no challenge to the said decision by the respondent and this may have a bearing on the adjudication of the writ petition. Thus, only after these issues are decided in the pending substantive writ petition in favour of the writ petitioner, his right to seek execution of FSA would arise.

28. In view of the facts and circumstances, the direction of the learned Single Judge in the order dated 31.01.2018 as reiterated in the order dated 07.03.2018 to the Appellants more particularly, to Appellant No. 2 cannot be

permitted to operate till the decision is rendered in the writ petition. The two orders dated 31.01.2018 and 07.03.2018 thus deserve to be quashed.

29. In view of the observations made above, the appeals are allowed and the impugned orders dated 31.1.2018 and 7.3.2018 are hereby quashed and set aside. It is made clear that we have not expressed any opinion on the merits of the case.

C.M. Appl. No. 12556/2018 (ex-parte stay) in LPA 173/2018

C.M. Appl. Nos. 12543/2018 (ex-parte stay), 28074/2018 (for directions) and 35042/2018 (for directions) in LPA 169/2018

30. All pending applications are disposed of accordingly.

JYOTI SINGH, J

G.S. SISTANI, J.

AUGUST 21, 2019
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