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

Reserved on: 28th November, 2019
Pronounced on: 10th December, 2019

LPA 35/2013 & CM APPL. 614/2013 (stay)

ISNI ELECTRIC POWER COMPANY PVT. LTD.Appellant
Through: Mr. Purushaindra Kaurav, Senior
Advocate with Mr. Sunny Chaudhary,
and Ms. Anuradha Mishra,
Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Jasmeet Singh, CGSC for UOI
with Mr. Srivats Kaushal and Ms.
Tejaswini, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. The present appeal is directed against an order dated 21st November, 2011, passed by the learned Single Judge, dismissing the Appellant's writ petition being W.P.(C) No.174/2010. The present appeal also challenges a subsequent order dated 5th October, 2012 passed by the learned Single Judge, dismissing the Appellant's Review Petition No.49/2011.

2. The background facts are that the Appellant is a private limited company with its registered office in New Delhi. It has been promoted by M/s ISN

International Company ET, Atlanta in the US. The Appellant proposed to set up a 4000 Mega Watt ('MW') Thermal Power Plan ('TPP') in two phases at Chitrangi, District Singrauli, in Madhya Pradesh ('MP') through 100% foreign investment. It is stated that the proposed project was an 'inter-state' project. The TPP was expected to be set up in the 11th plan at the pithead of a coalmine. According to the Appellant, it obtained various approvals and permissions, including approval from the Ministry of Environment and Forests ('MoEF') and the Central Water Commission ('CWC').

3. It was contended in the aforementioned W.P.(C) No.174/2010 filed in this Court by the Appellant that the Ministry of Power ('MoP'), Government of India by an order dated 20th November, 2003, granted in-principle coal linkage for the project of the Appellant. As per the said order, the coal was to be made available from the Moher Block, which was to be opened for an annual capacity of 10 metric tons ('MT') of coal. The coal quantity linked to the proposed project, was 9 MT per annum.

4. The Appellant claims that on account of the difficulties created by the Government of Uttar Pradesh ('UP'), the power project, originally meant to be located in UP, was later relocated under the policies and guidelines of the Ministry of Coal ('MoC') at Chitrangi in MP.

5. By a letter dated 10th July, 2006, the Appellant requested the MoP for extension of time for execution of the Fuel Supply Agreement ('FSA'). The MoP, in turn, called upon the Appellant to take appropriate action within six months for firming up the project and in achieving financial closure.

6. According to the Appellant, as per the coal linkage order dated 20th November 2003, a fuel supply agreement was to be concluded within 2 years with the supplier namely Northern Coalfields Limited ('NCL'), a subsidiary of the Coal India Limited ('CIL').

7. On 23rd July, 2007, NCL issued a letter informing the Appellant that the amendment substituted by the Appellant in the draft of the Fuel Supply agreement was not acceptable to CIL/NCL.

8. On 2nd August, 2007, the Standing Linkage Committee ('SLC') held a meeting, where the proposal of the Appellant was taken up for consideration. It was recorded by the SLC that it had come across a report dated 31st July, 2007, of the Central Electricity Authority ('CEA'). The Committee took note of the report of the CEA, finding that the Appellant had not made any progress in the implementation of the project. The Committee also took note of the demand of the State of UP by its letter dated 1st August, 2007, informing that the coal linkage in respect of the Appellant may be cancelled and awarded to other better prepared project of the UP Government.

9. In response, the State of UP informed that two power projects at Bara (3x660 MW) and Karchhana (2 x 660 MW) were being developed through tariff based competitive bidding, which were in an advanced stage of preparedness.

10. It appears that the MoP also supported the government of UP. This was followed by a meeting of the SLC, which recorded in its minutes as under:

“SLC (LT) discussed the recommendations of MoP and Govt. of UP decided that the linkage granted to M/s ISN International for its 2000 MW capacity from NCL may be cancelled. The

Committee also recommended that keeping in view the recommendation of Govt. of U.P and Ministry of Power LoA for Bara for entire Capacity (1980 MW) and Karchhana Project (15t Phase 660 MW) may be issued, subject to the stipulation that these two projects would be commissioned during the 11th period".

11. In response to a letter dated 7th September, 2007 of the Appellant to the MoP for grant of coal linkage for its proposed power project, the MoP responded stating that:

“as the proposal is for coal linkage for a new project, fresh coal linkage application may be made as per the existing guidelines to the SLC (long term) headed by Additional Secretary, Ministry of Coal for consideration of the proposal.”

12. Thereafter on 28th January, 2008, the MoP issued an Office Memorandum (‘OM’), specific to the Appellant as under:

“again requested M/s. ISNI to expedite furnishing of the Detailed information of the status of the preparedness and other details regarding the proposed Thermal Power Project at Sidhi, Madhya Pradesh as was sought by the CEA vide their communication No.159/GC/BO/CE(TP&I) CEA/2007 dated 10.09.2007 (copy enclosed)

3. Ministry of Coal may like to take an appropriate decision on the request of M/ s. ISNI for their proposed 2000 MW TPP at Sidhi, Madhya Pradesh.”

(emphasis supplied)

13. The MoC, by an OM dated 22nd February, 2008, in relation to the Appellant’s case, sought more information from the States of MP and UP.

14. Meanwhile, the CEA offered comments on 1st May, 2008, stating *inter alia* that since the company had shifted their site from Singrauli in MP, the coal linkage granted for their project in UP needs to be cancelled. The MoC

sent a response dated 28th July, 2008 to the Appellant's communication dated 7th September, 2007.

15. In the above background, the Appellant filed the present petition.

16. This Court has heard the submissions of Mr. Purushaindra Kaurav, learned Senior Counsel appearing for the Appellant and Mr. Jasmeet Singh, learned CGSC appearing for the Respondents and has also perused the documents placed on record. The Court is of the considered view that no ground has been made out by the Appellant for interference in the impugned order of the learned Single Judge.

17. In the impugned order, the learned Single Judge rejected the contention of the Appellant that the old policy with regard to grant of in-principle linkage of coal on long term basis should be applied to the Petitioner's case even after the framing of the new policy.

18. The learned Single Judge also referred to the decision of this Court in ***Ram Chander Educational Society v. Delhi Development Authority 177 (2011) DLT 653*** and held that this was not a case for invocation of the principle of 'promissory estoppel'. The Appellant failed to show that the new guidelines were bad in law, and that it could not seek to overcome that requirement. The impugned order of the Respondent No.2 is self-explanatory. Indeed, the Appellant does not appear to have taken much steps in the project proposed by it.

19. Consequently, the decision taken by the Respondents, cancelling the in-

principle linkage was indeed neither arbitrary nor illegal. The fact that on 7th September, 2007, the Appellant applied again for an in-principle coal linkage is not in dispute. The learned Single Judge found that as a matter of fact since the clearance of the CWC was obtained by the Petitioner only on 25th May, 2009, its case for linkage under the new coal distribution policy could not till then have been granted by the CEA.

20. The contention of learned Senior Counsel for the Appellant is that the progress of the project was not a pre-existing condition for signing the fuel supply agreement (FSA), and it was wrong on the part of the Respondent Nos.2 and 4 to delay the project by imposing conditions. Therefore, they were bound by the doctrine of 'promissory estoppel' in honouring the coal linkage granted to the Appellant. This argument cannot be accepted. In the minutes of the meeting, the SLC notes that not much progress had been made by the Appellant after it was granted the coal linkage, naturally proceeding to set up the proposed project. The fact that the Appellant did not attain financial closure for CWC clearance and also did not enter into any agreement with NCL, despite grant of extension of time has not been successfully countered by the Appellant. In the circumstances, the decision taken by the SLC to cancel the in-principle coal linkage granted to the Appellant cannot be said to be arbitrary or illegal. In view of the foregoing, no grounds have been made out for interference in the impugned order of the learned Single Judge.

21. Learned counsel for the Appellant sought to place reliance on the judgment in *State of Bihar v. Kalyanpur Cement Ltd.* (2010) 3 SCC 274 to

urge that the doctrine of principle of estoppel would be attracted in the facts and circumstances of the case. This Court has carefully examined the decision of the Supreme Court in *State of Bihar v. Kalyanpur Cement Limited (2010) 3 SCC 274*.

22. Having examined the said decision in some detail, the Court finds that it is distinguishable on facts. On facts it was found that the failure of the Appellant State of Bihar to issue the necessary notification within a reasonable period of the enforcement of the Industrial Policy, 1995 had rendered its decisions cancelling the sales tax exemption granted to the Respondents arbitrary. It was held that the decision-making process that culminated in those orders was ‘seriously flawed’.

23. The facts in the present case are entirely different as already discussed hereinbefore. The linkage here was granted in principle by order dated 20th November, 2003 with specific conditions of starting of coal production from 2010-11. As far as the source of coal supply was concerned, it was to be from the NCL which was to take up the proposed project ‘only after a firm commitment regarding coal price ensuring minimum 12% IIR as per Government directive’. As part of the general conditions of linkage under para 4(c) the order dated 20th November, 2003 by the MoC, it was mandatory to conclude the sale within a period 2 years from the date of issuance of the said order. Admittedly this condition was never met. There was another letter dated 7th August, 2006 from the Ministry of Coal to the Petitioner requiring it to take “appropriate action within 6 months of issuance of this letter for firming up the project and achieving financial

closure, so that the Ministry of Coal could confirm the coal linkage for the quantity already approved in principal.’ This too admittedly was not complied with.

24. Learned counsel for the Appellant sought to suggest that the learned Single Judge erred in recording that the Appellant by its letter dated 7th September, 2007 had applied for fresh coal linkage. A reference was made to the reply to ground ‘V’ in the review petition and the reply thereto by the Respondents admitting that no such application in terms of the new policy had been received from the Appellant.

25. Even keeping aside the above aspect of the matter, the fact that the Appellant did not comply with the conditions on which coal linkage was granted is sufficient to decline the relief sought for by the Appellant in the writ petition. The grant of coal linkage was itself conditional and, therefore, there was no obligation to continue to keep it available to the Appellant. The Court finds that the decision of the Supreme Court in ***Sethi Auto Service Station v. Delhi Development Authority (2009) 1 SCC 180*** explaining the legal position, would apply to the facts of the present case as well.

26. Learned counsel for the Appellant finally placed reliance on the decision of the Division Bench of this Court dated 23rd November, 2009 in LPA 231 of 2008 (***Southern Petro Chemical Industries Corporation Ltd. v. Union of India***). Again, the case turned on its own facts as is explained in para 23 of the said judgment which reads as under:

“23. The decision of each of the Petitioners to place orders of

import on 22nd February 1997 is evidenced by the letters of intent placed by each of them on their importers, copies of which have been placed on record. This Court is satisfied that acting on the above statement of the Minister made on the floor of the Parliament, which is not a mere announcement but in fact the communication of the decision of the Government of India, the Petitioners had placed orders for imports for the entire year 1997-98. This has to be taken to be an altering of the position of the petitioners relying upon the statement made on behalf of the Respondent in Parliament on 21st February 1997.”

27. For the reasons already noticed hereinbefore the said decision is distinguishable in application of the facts of the present case.

28. There is no merit in this appeal and is accordingly dismissed. The pending application is disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 10, 2019

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