IN THE HIGH COURT AT CALCUTTA

(Constitutional Writ Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Krishna Rao

WPA 9647 of 2013

With

IA No. CAN 2 of 2018 (Old No. CAN 7221 of 2018)

With

CAN 3 of 2022

Rashmi Cement Limited & Anr.

Versus

Union of India & Ors.

Mr. Saptansu Basu, Senior Counsel
Mr. Rajesh Kumar Gupta
Ms. Mrinalini Majumdar
Ms. S. Thard

.....For the Petitioners

Mrs. Ashima Roy Chowdhury

.....For the Union of India

Mr. Aniruddha Mitra
Mr. Pradipta Bose

......For the Respondent.

Heard on : 11.08.2022

Judgment on : 25.08.2022

Krishna Rao, J.: The respondent nos. 4 and 5, namely, Eastern Coalfields Limited and the General Manager (Sales and Marketing), Eastern Coalfields Limited have filed the instant application for recalling of the Order dt. 24.02.2022 passed by this Court in WPA No. 9647 of 2013 on the ground that the Order dt. 24.02.2022 was passed without giving an opportunity of hearing to the respondents herein as the writ petitioner has not served any notice to the respondents herein before hearing of the instant writ application.

Counsel for the writ petitioner had admitted the fact that no notice was served upon the respondent nos. 4 and 5 and as such the Order dt. 24.02.2022 passed in WPA 9647 of 2013 is recalled.

CAN 3 of 2022 is **allowed**.

After recalling the Order dt. 24.02.2022, the writ petition is taken up for hearing.

The petitioners have filed the instant writ application praying for a direction for refund of the amount of Rs. 1,34,46,000/- forfeited by the respondent no. 4 on 20.07.2010. The petitioners further prayed for a direction upon the respondent for execution of Fuel Supply Agreement in respect of 6th, 7th & 8th Kilns of Unit-III of the petitioner's plant without insisting for bank guarantee prior to refund of the forfeited proportionate bank guarantee amounting to Rs. 1,34,46,000/-.

The respondent no. 1 has introduced a coal distribution policy to ensure long term coal supply to certain categories of industries for the development of such industries. Under the coal distribution policy, the coal companies under the Central Government required to enter into Fuel Supply Agreement (in sought hereinafter referred as FSA) with such industries.

The petitioner Company applied to the Central Government for the Coal Linkage for its Unit No. III, Kiln No. 4, 5, 6 & 7 having the capacity of 2x30,000 and 2x45,000 per annum respectively being the total capacity of 1,50,000 TPA.

The Standing Linkage Committee (Long Term) on Sponge Iron Unit in its meeting held on 06.09.2007 conveyed authorization to Coal India Limited/ Singerani Colliery Company Limited to issue Letter of Assurance on normative basis.

The name of the petitioner Company was also figured in the list of the units which have been approved for the issuance of Letter of Assurance. The decision of the Standing Committee on Sponge Iron was duly communicated to the petitioner Company as well as the Eastern Coal Fields Limited by the Ministry on 21.01.2008. The Eastern Cold Fields Limited vide their letter dt. 04.04.2008 intimated the petitioner Company to furnish a bank guarantee prior to issuance of Letter of Assurance and accordingly, the petitioner Company furnished bank guarantee of Rs. 2,24,10,000/- in favour of the Coal India Limited. The Eastern Coalfields Limited issued Letter of Assurance dt.

28.08.2008 wherein Eastern Coalfields Limited assured for supply of 1,80,000/- tones of D/E Grade Coal per annum to the Petitioner Company subject to fulfillment of other conditions including achievements of mile stones as stipulated in the Letter of Assurance.

The petitioner company duly fulfilled all mile stones/ requirement as stipulated in the Letter of Assurance and requested the Eastern Coalfields Limited to execute Fuel Supply Agreement. Initially the petitioner Company envisaged construction of kiln nos. 4, 5, 6 & 7 having capacity of 2x30,000 and 2x45,000 per annum (TPA) respectively being total capacity of 1,50,000 TPA due to technical compulsion. The Petitioner Company vide letter dt. 30.03.2010 intimated to the Eastern Coalfields Limited that the petitioner Company had been issued the Letter of Assurance by the Eastern Coalfields Limited dt. 28.06.2008 for 1,80,000/- tones of D/E Grade Coal per annum for the petitioner's Plant against 4 kilns, out of which two of the capacity was initially proposed to be 30,000 TPA each and for the other 2, the capacity was proposed to be 45,000 TPA each. The petitioner for the technical reasons made modification by adding one (1) kiln i.e. total 5 kilns each having capacity of 30,000 TPA by keeping the same total capacity. The petitioner requested the Eastern Coalfields Limited to take note of such modification.

An inspection was conducted by the Eastern Coalfields Limited at the Plant of the petitioner Company and a show cause notice was to the petitioner company on 03.05.2010, as to why the proportionate commitment guarantee for the 6th and 7th kilns should not be invoked. On receipt of the show cause notice, the petitioner had submitted reply to the same on 05.05.2010 by explaining the details the reason for modification of the capacity of two kilns though maintaining the total capacity and requested for not to forfeit the performance guarantee for the 6th and 7th kilns and to allow the petitioner Company to operate all kilns with the same capacity i.e. 1,50,000 TPA in terms of the Letter of Assurance. The Eastern Coalfields Limited vide letter dt. 18.06.2010 informed the petitioner Company that since capacity and quantity has been approved by the Ministry, Eastern Coalfields Limited had no authority to accept such modification as requested by the petitioner. The Eastern Coalfields Limited further advice the petitioner to approach the respondent Ministry for approval of such modification. As per the advice of the Eastern Coalfields Limited, the petitioner Company approached the Ministry for said modification.

The Petitioner Company vide letter dt. 25.06.2010 requested the Eastern Coalfields Limited to extend the time for getting approval from the Ministry regarding modification of 4th, 5th, 6th and 7th kiln of its Sponge Iron Plant Unit-III and also informed that the bank guarantee has been extended for another 6 months.

The Eastern Coalfields Limited without waiting for the approval from the Ministry invoked proportionate bank guarantee and forfeited Rs. 1,34,46,000/-

on 20.07.2010 from the State Bank of India, Commercial Branch, Park Street, Kolkata.

The Government of India, Ministry of Coal vide letter dt. 06.09.2010 informed the petitioner that the proposal submitted by the petitioner dt. 16.06.2010 has been examined by the Ministry and the competent authority had decided to place the proposal before the Standing Linkage Committee (Long Term) for Sponge Iron for its view in the matter.

The Eastern Coalfields Limited vide letter dt. 16.12.2011 informed the petitioner Company about the approval for extension of SSA for the kiln 4th and 5th of the Unit-III of the petitioner plant. The petitioner Company by letter dt. 14.02.2011 intimated the Eastern Coalfields Limited about the readiness and willingness for execution of FSA at the earliest and accordingly, the FSA was duly executed by and between Eastern Coalfields Limited and the Petitioner Company with respect of Kilns No. 4th and 5th but supply of coal was not commenced by the Eastern Coalfields Limited.

Due to delay on the part of the authorities in holding meeting, the petitioner vide letter dt. 24.06.2012 requested the Ministry for taking appropriate action for conducting meeting of the SLC (LT) immediately and further to advice Eastern Coalfields Limited to make interim arrangement to supply normative quantity of Coal to the petitioner company till the next meeting of the SLC (LT) is held. As no action was taken by the Ministry as per the request made by the petitioner Company and accordingly, the petitioner

Company again made a detailed representation on 17.11.2011 to the Chairman of SLC (LT) informing the difficulties facing by the Company due to severe shortage of Coal and requesting for consideration of the request of the petitioner but inspite of the same no access action has been taken on the request of the petitioner.

Being aggrieved with the said Act of the authorities, the petitioner Company had preferred a writ application before this Court being WP No. 305 (w) of 2012 and the said writ petition was disposed of by the Coordinate Bench on 02.02.2012 by directing the Ministry to consider and disposed of the proposal made by the petitioner for modification of configuration of kilns. In terms of the order passed by Coordinate Bench of this Court, the Ministry had issued a letter dt. 10.05.2012 wherein it was informed to the petitioner that the change of configuration as 3x30,000 TPA has been approved by the respondent Ministry and in the said letter Eastern Coalfields Limited and Coal India Limited where advice to take necessary action. On receipt of the letter dt. 10.05.2012 issued by the Ministry, a letter was sent to the Eastern Coalfields Limited on 06.06.2012 requesting for taking necessary action in terms of the letter dt. 10.05.2012 wherein it is mentioned that the petitioner Company has fulfilled all the mile stones condition for the revise capacity of 3x30,000 TPA. In the said letter, the petitioner Company also informed the Eastern Coalfields Limited that the kiln nos. 6th, 7th and 8th are in running condition and producing Sponge Iron and the petitioner Company requested the Eastern Coalfields Limited to execute FSA and refund or adjust the forfeited amount of

Rs. 1,34,46,000/- at the time of execution of FSA with respect of Kiln nos. 6, 7 and 8. The Eastern Coalfields Limited has not taken any action for execution of FSA with respect of 3 Kiln nos. 6, 7 and 8 in Unit-III of the petitioner's Plant, the petitioner Company had sent reminder to the Eastern Coalfields Limited on 13.08.2012 requesting for expedite the execution of FSA in terms of approval of the respondent Ministry. In spite of the same the Eastern Coalfields Limited (ECL) did not take any action for execution of FSA.

A meeting was held between the representative of the Petitioner Company and the concern authority of Eastern Coalfields Limited (ECL) wherein the Petitioner's Company was advised by Eastern Coalfields Limited (ECL) to submit the project report, copies of the letter dt. 10.10.2012, 30.12.2011, 01.08.2011 and 24.09.2009 of the West Bengal Pollution Control Board regarding consent to operate and renewal of the factory license indicating operational status of Plant and copy of the resolution of the Board of Directors of the Petitioner Company. The Petitioner Company had supplied all the documents to the Eastern Coalfields Limited (ECL) but inspite of the receipt of the same the Eastern Coalfields Limited (ECL) had not come forward for execution of FSA.

Vide Letter dt. 28.08.2008, the Eastern Coalfields Limited had informed the petitioner that as per the request made by the petitioner Company issuance of Letter of Assurance requiring 1,80,000 per annum (TPA) of D/E Grade Coal for its 30,000 TPA (4^{th} kiln) + 30,000 TPA, (5^{th} Kiln) + 45,000 TPA, (6^{th} kiln) +

45,000 TPA, (7th kiln) Sponge Iron units located at Gajasimul, Jitusole, Jhargram, District West Medinipore is provisionally assured to Endeavour of coal supply subject to the conditions made in the said letter. Clause 3.2 of the said letter reads as follows:-

> "The Commitment Guarantee (CG) shall be initially valid till four (4) months after the expiry of the LOA period of twelve (12) months. Thereafter, the CG shall stand converted into the Contract Performance Guarantee (CPG) that would be the condition precedent to signing of the FSA, in which case validity of the CG shall be extended in accordance with the terms of the FSA. For the avoidance of any doubt, the Assured shall be liable to submit the extra guarantee that may result from the difference between the CPG under FSA and the CG under the LOA."

Clause 3.4.2 of the said letter reads as follows**:-**

> "The Assurer shall have the right to encash the CG in the event of failure by the Assured to sign the FSA within three (3) months of the expiry of validity of the LOA or of satisfactory achievement of all the milestones, as shown in Annexure 1, whichever is earlier."

The Petitioner Company vide letter dt. 30.03.2010 had informed the Eastern Coalfields Limited with regard to the modification to facilitate the operation of the 4th, 5th, 6th and 7th kiln by keeping the total capacity same as mentioned in the Letter of Assurance. The Eastern Coalfields Limited instead of considering the request made by the petitioner company had issued the show cause notice dt. 03.05.2010 on the ground that the Company failed to install 5th/6th kiln for the capacities for which the Letter of Assurance was issued and also informed the Petitioner Company that the same is violation of the Provisions of Clause 3.4 of the Letter of Assurance and as such the bank guarantee is liable to be forfeited. In reply to the show cause notice the petitioner has submitted that only to facilitate the operation of the kilns, the petitioner Company has modified the capacities slightly keeping the total capacity same as be mentioned in the Letter of Assurance. The company in the reply further stated that the Company has added one kiln i.e. kiln no. 8 which the Company is not claiming any additional Coal. The petitioner requested the Eastern Coalfields Limited not to forfeit the bank guarantee for 6^{th} and 7^{th} kiln and allow the petitioner to operate the kiln with the same capacity of 1,50,000 TPA as per letter of assurance capacity. The Eastern Coalfields Limited vide their letter dt. 18.06.2010 requested the Company to arrange for approval from the appropriate authority i.e. the Ministry of Coal within 15 days from the date of receipt of the letter. The Ministry vide letter dt. 06.09.2010 informed the petitioner, the proposal of the Petitioner Company was examined by the Ministry and the competent authority has to decide the proposal and the same is to be placed before the SLC (LT) for Sponge Iron. Vide letter dt. 10.05.2012, the Government of India Ministry of Coal inform the petitioner that the Ministry and the competent authority has approved to take on record the change in configuration subject to the following condition;

(i) *The Letter of Assurance holder has to be fulfilled all the mile stones conditions for revise capacity of 3x30,000 TPA.*
(ii) *No additional coal will be allowed on the change in configuration.*
(iii) *It will be a onetime exercise and no further request for enhancement/ reduction/ change in configuration will be expected.*

Vide letter dt. 24.09.2012, the General Manager, Coal India Limited requested the Eastern Coalfields Limited for taking appropriate action as per the direction given by the Ministry of Coal dt. 10.05.2012 but inspite of the direction of the Ministry and the request made by the Coal India Limited, the Eastern Coalfields Limited has not taken any steps and had forfeited the bank guarantee of Rs. 1,34,46,000/-.

Per contra, the Counsel for the respondent nos. 4 and 5 submits that the petitioner vide its letter dt. 05.05.2010 admitted that they have done modification in the construction of Kiln without approval of competent authority. It is further contended that the petitioner had violated the terms and conditions of the Letter of Assurance by construction kilns of different capacities in breach of the terms and conditions of the contract. The Counsel for the respondent nos. 4 and 5 further submits that as the petitioner has violated the terms and conditions of the contract and accordingly the respondents have invoked the Bank Guarantee.

It is further submitted that the respondents herein have invoked the Bank Guarantee on 20.07.2010 but the writ petitioner has not challenged the invocation of the said Bank Guarantee. The Counsel for the respondents further submits that during the pendency of the writ petition, the petitioner has filed an application for amendment being CAN No. 7221 of 2018 wherein the petitioner has admitted that :

> *"11. The applicants, however, states that by passage of time there has been a change in policy of the Eastern Coalfields Limited as regards sales and distribution of Coal. At present supply of coal is through "E-Auction". In the backdrop as aforesaid, the applicants no longer insist for execution of coal supply agreement in its favour."*

Ld. Counsel for the respondents further submits that the petitioner cannot seek any remedy against invocation of the Bank Guarantee as admittedly the petitioner has committed breach of the contract. It is further contended that the respondent no. 4 has acted in terms of the express power under the Letter of Assurance. Ld. Counsel for the respondents submits that on inspection it was found that the petitioner instead of constructing 6th and 7th kilns with capacity of 45,000 TPA each, had constructed 30,000 TPA each and an additional kiln of 30,000 TPA and thus the petitioner failed to achieve the milestone in terms of the Letter of Assurance with respect of two kilns.

Ld. Counsel for the respondents submits that the petitioner had not informed initially about the such deviation and the petitioner before construction of kilns of 30,000 TPA each did not have any prior sanction or intimation from the Ministry of Coal or the Coal India Limited or to the respondent no. 4. It is further contended that the petitioner has constructed the additional kiln i.e. 8 kiln which does not comes within the purview of the Letter of Assurance. Ld. Counsel for the respondent nos. 4 and 5 submits that it is admitted by the petitioner that there is a change in policy of the respondents with regard to sale and distribution of coal and the amount cannot be reverted as Bank Guarantee in favour of the petitioner and thus the writ petition filed by the petitioner is liable to be dismissed.

Heard, the Ld. Counsel for the respective parties and perused the materials available on record.

The team of the respondent nos. 4 and 5 have conducted inspection of the unit of the petitioner on 23.03.2010 and on inspection the following kilns were found:-

Serial No.	***Kiln No.***	***Capacity***
1	*4th*	*30,000 TPA*
2	*5th*	*30,000 TPA*
3	*6th*	*30,000 TPA*
4	*7th*	*30,000 TPA*

Immediately after the inspection, the petitioner has made a request to the respondent for modification of capacity 4th, 5th, 6th and 7th kiln of sponge plant. In the mean time on 03.05.2010, the respondent no. 4 had issued show cause notice upon the petitioner informing the petitioner that the petitioner failed to install 5th and 6th kiln for the capacities for which LOA was issued and as such as per the provisions of the Clause 3.4 of the Letter of Assurance, the proportionate commitment guarantee for the 5th and 6th kiln is liable to be forfeited. On receipt of the representation of the petitioner, the respondent no.

4 vide their letter dt. 18.06.2010 informs the petitioner that since capacity and quantity was cleared by Ministry of Coal/ Coal India Limited and thus the ECL is not the authority to accept the modification as requested by the petitioner. In the said letter, it was further advised to the petitioner to approach the Ministry of Coal for getting appropriate approval. As per the advice of the respondent no. 4, the petitioner had approached the Ministry of Coal for modification and accordingly on 10th May, 2012, the Ministry of Coal had granted approval to the petitioner. After the approval from Ministry, the petitioner had requested the respondent no. 4 for modification but the respondent no. 4 failed to consider the request of the petitioner inspite of the approval of the Ministry.

As per the advice of the respondent no. 4, the petitioner had approached the Ministry for modification and the same was within the knowledge of the respondent no. 4 but inspite of waiting the decision of the Ministry, the respondent no. 4 had invoked the Bank Guarantee of the petitioner. The violation on the basis of which the respondent no. 4 has invoked the Bank Guarantee, the Ministry of Coal has granted approval to the petitioner for modification and as such this Court is of the view that the petitioner is entitled to get back the amount of Rs. 1,34,46,000/-. The petitioner admits that due to passage of time there has been a change in policy of the Eastern Coalfield Limited as regard sale and distribution of coal and at present the supply of coal is through "E-Auction" and thus it would not be proper for this Court to direct the respondent no. 4 for execution of agreement in respect of 6th, 7th and 8th kiln.

In view of the above, the respondent no. 4 is directed to return the amount of Rs. 1,34,46,000/- to the petitioner within a period of six (6) weeks from the date of communication of this order.

WPA No. 9647 (w) of 2013 is **disposed of** and accordingly **CAN 2 of 2018 (Old CAN 7221 of 2018)** is **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)