

(2011) 07 BOM CK 0150
In the Bombay High Court
Case No : Appeal Against Order No. 6 of 2011

Coal India Ltd. and Western Coalfields Ltd.	APPELLANT
Vs	
Chintamani Agrotech (India) Ltd. and Union of India	RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Electricity Rules, 2005 — Rule 3
Environment (Protection) Rules, 1986 — Rule 8(3)

Citation : (2011) 5 ALLMR 838 : (2012) 2 BomCR 377 : (2011) 6 MhLj 404

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; M.G. Bhangde, Shyam Dewani, for Respondent Nos. 1 and 2 and S.K. Mishra, ASGI, for the Respondent

Judgement

R.K. Deshpande, J.—The Appellants are the Defendant Nos. 2 and 3 in Special Civil Suit No. 824/2010, whereas the Respondent No. 1 is the Plaintiff and Respondent No. 2 is the Defendant No. 1. This Appeal against Order preferred by Defendant Nos. 2 and 3, challenges the order passed below Exh. 5 by the learned 3rd Joint Civil Judge, Senior Division, Nagpur, on 22nd November, 2010, allowing the application for grant of temporary injunction filed under Order 39, Rule 1 and 2 read with Section 151 of C.P.C., by the Respondent No. 1/Plaintiff in Special Civil Suit No. 854/2010. By this order, the Appellants/Defendants are restrained from acting upon the letters dated 10.03.2010 and 9/13th September, 2010, issued by them to the Respondent No. 1/Plaintiff and doing any act of cancelling the Letter of Assurance and encashing the bank guarantee till the decision of the suit. The parties shall hereinafter be referred to according to their status in this appeal as "Appellants" and "Respondent."

2. The facts leading to the case are as under;

The Government of India, Ministry of Coal issued Office Memorandum dated 18th October, 2007, laying down New Coal Distribution Policy. As per this Policy, the

Letter of Assurance (LOA) having validity of 24 months is to be issued by the Coal India Ltd., (CIL) i.e. the Appellant No. 1, for the consumers/ applicants of Power Utilities, Captive Power Plants and others. The allottee of LOA is required to fulfill certain stipulated conditions and to meet the specified Milestones within a period of 24 months and thereupon to approach the Coal Company for entering into Fuel Supply Agreement (FSA). With a view to ensure that only serious and committed consumers approach for LOA, they would be required to furnish an "Earnest Money Deposit" (EMD) in the form of Commitment Guarantee and the same is to stand discharged upon the execution of FSA within a stipulated period. On failure to fulfill the commitments in the form of conditions and milestones within a stipulated period, there is a right conferred upon the Coal India Ltd., for forfeiting the EMD. The EMD could initially be kept at 5% of the value of annual Coal requirement and the Coal India Limited is empowered to decide different levels based upon the relevant factors with the approval of the Board of Directors of Coal India Ltd (CIL).

3. The Respondent No. 1 M/s. Chintamani Agrotech (India) Limited, is a company said to have been established in the year 2001 with the object of setting up an Integrated Sugar Plant with 250 TCD Sugar, 30 MW Power Plant and 2,00,000 liters Ethenol per day. It approached the CIL (the Appellant No. 1) through its subsidiary company i.e. the Appellant No. 2 Western Coalfields Ltd (WCL) for issuance of LOA in terms of New Coal Distribution Policy for supply of 1,51,000 MT of Coal per annum for its 30 MW Captive Power Plant at post BijoraDhanuk, Tah. Mahagaon, District Yavatmal, in the State of Maharashtra. In response to such request, the WCL appears to have processed the proposal and asked the Respondent No. 1 to furnish commitment guarantee either in cash or in the prescribed format of bank guarantee for an amount equivalent to 10% of the notified base price of annual Coal requirement asked for. It was by communication dated 25th /26th March, 2008, along with which the model LAO and the format of bank guarantee was enclosed.

4. The Respondent No. 1 company appears to have accepted the same and has furnished seven Commitment Guarantees (C Gs) on 7.7.2008 to WCL for total value of Rs. 2,39,18,400/-. On 19.08.2008, a LAO was issued by WCL to the Respondent No. 1 company for allotment of 1,51,000 MT of Coal per annum for its proposed 30 MW Captive Power Plant upon certain terms and conditions. The validity of this LOA is stipulated in Clause 4, for a period of 24 months from the date of issuance of LOA, upon expiry of which the LOA to stand annulled. It also prescribes the period and different levels of attaining the milestones specified.

5. This case concerns the compliance or attainment of four milestones and in respect of the same, the requirement prescribed is as under;

S.No

Activity/Milestone

Timeline from the date of LOA

documents to be submitted by the Assured on achievement of milestone

Issuing Authority

Waival

5

Environment Clearance

Within 6 months

Approved Terms of Reference (TOR)

Expert Appraisal committee (EAC) of MoEF (Central Govt.) for category "A" Projects or State

Expert Appraisal committee (EAC) for Category "B" projects as applicable

Within 12 months

Final clearance

MoEF (Central Govt.) for category "A" Projects or State Environment Impact Assessment Authority (SELAA) ? for category B projects, as applicable

6

Forest learanc Applicable

within 12 months

Recommendation for forest clearance

State Govt.

Within 24 months

Forest Clearance

MOEF (Central Govt.)

8

Funding of investment, as identified in the DPR

Within 18 months

Board's resolution on the amount of equity investment in the CPP and/or Sanction Letters from the Bank/Financial Institution

Company Secretary under the Company Seal and/or Bank or Financial Institution

In case of Proprietary/ Partnership firm, Bank statement of the Proprietor/ Partners for the last twelve months shall be submitted for justification of the equity commitment.

Notice to proceed for the main plant and equipment

(a) for CPP within 24 months

Notice to Proceed/ Work Order/ Contract.

(b) for end use plant within 24 months

Notice to Proceed/ Work Order/ Contract.

Where the mother enduse plant is already in operation, a certificate for the same from a Chartered Engineer/ Company Secretary

An undertaking was taken from the Respondent No. 1 to complete all the activities within a total period of 24 months including any Force Majeure Act, that may occur during the validity period of LAO, in terms of Clause 2.1 of the LOA. Though, column 3 above regarding timeline specifies the period for completion of stages of each milestone, Clause 3.3. provides some relaxation in it and if any activity/milestone is not completed within the period stipulated, the Respondent No. 1 is liable to furnish Additional Commitment Guarantee of 1/10th of the amount of CG, for each such non performed or incomplete milestone. Failure to attend such milestones within the total period of 24 months is to result in cancellation or withdrawal of LOA and encashment of C Gs by WCL, in terms of Clause 3.4.1 of LOA.

6. It is not in dispute that the validity period of 24 months commenced from 19.8.2008 i.e. from the date of issuance of LOA and it ended on 18.8.2010. According to the Appellants, the Respondent No. 1 Company failed to fulfill the commitments or to complete the aforementioned four milestones within a total period of 24 months, as stipulated in Clause 2.1 of the conditions of LOA and hence the LOA stood automatically annulled as per Clause 4 prescribed therein. Accordingly, invoking Clause 3.4.1 of LOA, a letter of cancellation of allotment and encashment of C Gs was issued on 10.08.2010 and 9th /13th September, 2010 and this is the subject matter of challenge in Special Civil Suit No. 854 of 2010 by the Respondent No. 1 Company.

7. The Respondent No. 1 filed an application under Order 39, Rule 1 and 2 read with Section 151 of CPC for grant of temporary injunction, restraining the Appellants/Defendants from acting upon the letter dated 10.03.2010 and 9th /13th September, 2010 and thereby doing any act of cancelling the LOA and consequently encashing the bank guarantee in the peculiar facts and circumstances of the case. The application was opposed by the Appellants/Defendants.

8. The trial Court by its order dated 22.11.2010 has allowed the application Exh.5 restraining the Defendants from acting upon the letters dated 10.03.2010 and 9th /13th September, 2010 and thereby doing any act of cancelling the LOA and encashing the bank guarantee pending decision of the suit. The trial Court

recorded the finding that the Respondent No. 1 Company has prima facie shown that it has completed almost all the milestones as prescribed by LOA and as far as incomplete milestones are concerned, like environment clearance, the Plaintiff is not at the fault. About the forest clearance, it has been held that the Plaintiffs have prima facie shown that their project is not on the forest land and therefore, the Forest Department has informed their no objection and this fact is made known to the Defendants. The prima facie finding is recorded that the Respondent No. 1 Company is serious in erecting its Power Plant and the object of securing CG was only to secure that only seriously interested parties should approach for obtaining coal linkages. It has been held that though the Respondent No. 1 Company initially decided to erect a Sugar, Ethenol and Power Plant, it has decided not to erect Ethenol Plant and this fact is not considered by the Appellants. It has been held that prima facie the Respondent No. 1 Company has tried to complete all milestones and the Appellants have not considered the bona fides while deciding to cancel the LOA and encashing the bank guarantee. It has been held that if the injunction is granted, the Appellants are likely to suffer an irreparable loss. The reference is made to the decisions cited and to the proposition that the law does not compel a man to do what he cannot possibly perform and the benefit of Force Maejure Clause is not being made available to the Respondent No. 1 company which is unreasonable, unfair and irrational.

9. Two questions falls for consideration to judge the prima facie case;

(A) whether the Plaintiff has failed to fulfill or attain 4 milestones i.e. (i) environment clearance; (ii) forest clearance; (iii) funding of investment; (iv) notice to proceed for end use plant, as assured within a period of 24 months from 19.08.2008 to 18.08.2010 as stipulated in Clause 2.1 of LOA ; and

(B) whether the no fulfillment of any one or more of the four commitments/ milestones within a period of 24 months should result in cancellation or withdrawal of LOA and encashment of C Gs as stipulated in Clause 3.4.1 of LOA.

10. The contention of Shri S.C. Mehadia, the learned Counsel for the Appellants is that, there is total failure on the part of the Respondent No. 1 company to attain four milestones within the validity period of 24 months prescribed in LOA and upon such non fulfillment, the LOA stood automatically annulled in terms of Clause 4, after expiry of the validity period. According to him, Clause 2.1 of LOA is mandatory and it leaves no jurisdiction with the Appellants to extend the period or alter the terms of LOA. He submits that the fulfillment of milestones is dependent upon the subjective satisfaction of the Appellants based upon the objective assessment of compliance of the requirements. It is the further case of the Appellants that the question of substantial compliance does not arise and even partial fulfillment of milestones within the stipulated period attracts consequences of annulment under Clause 4 and cancellation of LOA and encashment of C Gs as per Clause 3.4.1 of LOA. According to the Counsel, the Respondent No. 1 company has accepted the conditions stipulated in Clause 2.1, 3.4.1 and Clause 4, to attain the milestones within the period of 24 months

including any Force Majeur Act occurring during the validity period. According to him, the object of furnishing EMD is to see that only serious and committed consumers approach for LOA and on failure to discharge the commitments, the CG needs to be invoked.

11. The contention of Shri M.G. Bhangde, the learned Senior Counsel appearing for Respondent No. 1 Company is that there is complete fulfillment of all the commitments and all the four milestones have been attained within the stipulated period. According to him, at any rate, there is substantial compliance and if some of the commitments remained to be partially unattended before expiry of 24 months period, it was the effect of Force Majeur Act, which needs to be condoned. According to the Respondent, the cancellation was illegal and consequentially, the Appellants had no authority to encash the CG on the basis of illegal cancellation. It is urged that Clause 1.4 of LOA regarding Force Majeur, permits the Appellants to amend or repeal the conditions of LOA. According to him, the normative requirements are not fulfilled during the stipulated period and this has actually been condoned by the Appellants in cases of M/s. Jaykay Cem Ltd., to whom the LOA was issued on 28th /30th June, 2008 and M/s. Gopani Iron and Power (I) Pvt. Ltd., to whom the LOA was issued on 3rd /5th June, 2008. These companies had not completed the milestones within the stipulated period but still the action against them has not been taken.

12. So far as the question of no fulfillment of four milestones is concerned, the milestone No. 5 is regarding obtaining environment clearance. The approved terms of reference were required to be submitted within a period of six months from the SEAC (State Expert Appraisal Committee) and the final clearance was required to be submitted from the SEIAA (State Environment Impact Assessment Authority) within a period of twelve months. It is not in dispute that the Respondent No. 1 company applied for obtaining environment clearance for the first time on 14.4.2009. On 16.11.2009 the SEAC recommended for grant of environment clearance. On 14.12.2009, the Respondent No. 1 company informed the Appellant No. 2, that as soon as a clearance is issued, the same shall be submitted immediately. On 9.7.2010, the SEIAA returned back the recommendations of the SEAC to find out whether public hearing was conducted. This fact was informed by the Government of Maharashtra to the Respondent No. 1 company on 8.9.2010. On 10.8.2010, the Respondent No. 1 company informed the Appellant Nos. 2 that the environment clearance is left and immediately upon receipt of it, it shall be submitted. Undisputedly, the clearance was not submitted before the last date i.e. 18.8.2010, but it was produced on 29.9.2010.

13. The contention of Shri M.G. Bhangde, the learned Senior Counsel appearing for the Respondent Nos. 1 and 2, is that it is a case of deemed clearance under Rule 8(iii) of the Environment (Protection) Rules, 1986. He submits that on 16.11.2009, the recommendations were accepted for grant of environment clearance and the period of 105 days as stipulated under Rule 8(iii) expired on 23.3.2010. Hence, the environment clearance sought for, is deemed to have

been granted before expiry of 24 months on 18.8.2010. Shri S.C. Mehadia, the learned Counsel appearing for the Appellants, submits that the period of 105 days, is required to be counted from the date of receipt of final Environment Impact Assessment Report and that was not submitted hence, the question of deemed grant, does not arise.

14. Prima facie, what is required, is the production of final clearance from the competent authority i.e. SEIAA and it has not been produced. The delay is caused probably because of delay in making application. The LOA was issued on 19.8.2008 and application for grant of clearance was made on 14.4.2009. It is not in dispute that for non completion of this milestone within six months or twelve months, Additional Commitment Guarantee was also furnished in terms of Clause 3.3 of LOA by the Respondent No. 1 company. The provision of deemed grant, only permits or enables the Respondent No. 1 company to proceed in the matter as if the clearance is granted. Prima facie, it is not the deemed clearance which is contemplated under the milestone. The fact remains that the environment clearance has been granted and it is produced from the competent authority on 29.9.2010 i.e. after the expiry of the last date of 18.8.2010.

15. The milestone No. 6 is regarding forest clearance, if it is applicable. The recommendations for clearance were required to be obtained within a period of twelve months from the State Government and the final clearance was required to be obtained within a period of twenty four months from the Central Government. The case of the Appellants is that the forest clearance was required to be obtained in respect of Survey Nos. 18, 19, 26, 29, 46, 47, 49 and 50, for the Integrated Project of Sugar, consisting of Ethanol and Captive Power Plants. The Respondent No. 1 company, however, submitted the forest clearance on 4.9.2009, only in respect of four survey numbers i.e. Survey Nos. 18, 19, 26 and 29. For failure to submit the forest clearance in respect of remaining survey numbers, the Respondent No. 1 company was asked to furnish the Additional Commitment Guarantee by the Appellant No. 2 as per the order dated 5.7.2009, in terms of Clause 3.4.1 of LOA. Though on 14.12.2009, the request was made for waiver of the Additional Commitment Guarantee, it was informed by the Respondent No. 1 company, that it shall be submitted. It is not in dispute that the forest clearance in respect of remaining Survey Nos. 46, 47, 49 and 50, has not been submitted.

16. The contention of Shri M.G. Bhangde, the learned Senior Counsel appearing for the Respondent Nos. 1 and 2, is that the Integrated Project of Sugar, is being installed or commissioned only in 60 acres of land covered by Survey Nos. 18, 19, 26 and 28 in respect of which the forest clearance has been submitted within a stipulated period. It is his further submission that the entire land including Survey Nos. 46, 47, 49 and 50, is an agricultural land converted for nonagricultural use and none of its part is falling in the forest area and hence, the forest clearance was not required. As against this, the contention of Shri S.C. Mehadia, the learned Counsel appearing for the Appellants, is that there is

nothing on record to show that the Integrated Sugar Project is being commissioned only on Survey Nos. 18, 19, 26 and 28. It is his submission that the stand of the Respondent No. 1 that no forest clearance is required, is without any basis and contrary to the terms of LOA. At any rate, according to him, the Respondent No. 1 has submitted the Additional Commitment Guarantee in terms of Clause 3.4.1, which indicates the acceptance of requirement regarding obtaining of forest clearance. From the rival submissions it appears that prima facie the milestone No. 6 regarding forest clearance has not been complied with.

17. The milestone No. 8 is in respect of funding of investment as identified in the DPR (Detail Project Report). The requirement was of passing of the Board Resolution on the amount of equity investment in the CPP and/or sanction letters from the Bank/Financial Institution. The competent authority prescribed is that of Company Secretary acting under the Company Seal and/or of the Bank/Financial Institution. In response to the same, the Respondent No. 1 had submitted the copy of the Board Resolution dated 15.2.2007 wherein it was resolved that the company will apply to various agencies and Financial Institutions for the said project. The detailed cost of DPR was of Rs. 136.99 Crores, in which the equity participation was of 25% i.e. Rs. 34.25 Crores and balance was to be by loan from the Financial Institutions.

18. It is the case of the Appellants that the Respondent No. 1 company has not furnished Resolution of the Board, regarding equity investment nor any document is produced on record showing any final approval or arrangement with any Bank or Financial Institutions. It is not in dispute that there is nothing on record produced by the Respondent No. 1 to show that any arrangement is made for finance either with any Bank or Financial Institutions. Relying upon the provision of Rule 3 of the Electricity Rules, 2005, regarding requirements of Captive Generation Plant, the submission is made by the Appellants that in order to qualify as Captive Generation Plant, there has to be not less than 26% of the ownership held by the captive users. It is the case of the Appellants, that there is nothing on record to show, that not less than 26% of the ownership in the Captive Power Plant, is held by the Respondent No. 1 company.

19. The contention of Shri M.G. Bhangde, the learned Senior Counsel appearing for the Respondent Nos. 1 and 2, is that the Respondent No. 1 company has already submitted Resolution dated 15.2.2007 stating that the company can apply to various agencies and financial institutions, it is not at all necessary for the Board to pass any fresh Resolution in respect of such dealings. He has further submitted that a Board Resolution of M/s. Aarya Powertech Private Limited, duly certified by the Company Secretary with seal dated 18.2.2010 about investment of Rs. 145.00 Crores in CPP as equity in Respondent No. 1 company, was submitted in the office of Appellant Nos. 2 company on 10.8.2010. The contention of Shri S.C. Mehadia, the learned Counsel appearing for the Appellants, is that M/s. Aarya Powertech Private Limited, is neither a Bank nor

Financial Institution, but it is a company which is the sister concern of the Respondent No. 1 company and one Shri Manish Amarchandbhani Mehta, who has been authorized to sign on behalf of M/s. Aarya Powertech Private Limited, is the real brother of Plaintiff No. 2 Nilesh and capacity of company is unknown.

20. The milestone No. 9 regarding notice to proceed for the main plant and equipment, the requirement was of giving of notice to proceed/work order/contract within a period of 24 months in respect of installation and commission of Captive Power Plant. The contention of the Appellants is that in spite of lapse of period of 24 months, nothing is placed on record to show that any orders for Plant and Machinery of the Sugar or Ethanol Plants have been placed on record. The contention of Shri M.G. Bhangde, the learned Senior Counsel appearing for the Respondent Nos. 1 and 2, is that letter of intent to EPC contractor was issued on 18.2.2010.

21. The finding recorded that the Respondent No. 1 company has prima facie shown, that it has completed almost all the milestones, as are prescribed by LOA and the Plaintiffs are at no fault, cannot be sustained. In respect of environment clearance, undisputedly, the clearance was not submitted before the last date i.e. 18.8.2010, but it was submitted on 29.9.2010. The contention regarding deemed grant of clearance, is not acceptable as a compliance of milestones. The Respondent No. 1 company has furnished the Additional Commitment Guarantees for compliance of the same within the extended period, and ultimately the clearance was produced on 29.9.2010 i.e. after the expiry of the last date i.e. 18.8.2010. So far as the forest clearance is concerned, though the clearance was submitted in respect of Survey Nos. 18, 19, 26 and 28 on 4.9.2009, the Additional Commitment Guarantees was submitted to comply with the requirement of forest clearance in respect of remaining Survey Nos. 46, 47, 49 and 50, on or before the expiry of 24 months and the same was not submitted till expiry on 18.8.2010. In respect of funding of investment, there is total noncompliance as no arrangement with any Bank or Financial Institution have been made and the arrangement with M/s. Aarya Powertech Private Limited, does not inspire the confidence. Though it is urged that the Project for Ethanol has been dropped, there is absolutely no progress shown in respect of milestone regarding notice to proceed for the end use plant, except to produce letter of intent dated 18.2.2010 to EPC contractor. The ground realities are best known to the parties, who have to judge the progress even by spot inspection. Delay in attaining milestones as per time schedule and the explanation furnished shows lack of seriousness in erecting Power Plant. In such a situation, the Appellants cannot be compelled to incur a risk in going ahead with entering into Fuel Supply Agreement.

22. Prima facie, milestones have not been attained within a period of 24 months, as prescribed in LOA and upon such no fulfillment, LOA, stands automatically annulled in terms of Clause 4. It is the Appellant No. 2 who has to judge the compliance of the requirements and whether substantial compliance meets the

requirement or not. The Court cannot substitute its own opinion in respect of it. The action of the Appellants, is in terms of Clause 3.4.1 of LOA. The Respondent No. 1 has accepted the terms and conditions with full knowledge of its consequences and cannot, therefore, rely upon the instances in respect of the other companies. There is no prima facie case made out. The Trial Court, therefore, committed an error in granting an order of injunction.

23. Shri S.C. Mehadia, the learned Counsel appearing for the Appellants, has relied upon the principles, laid down by the Honourable Apex Court, in its decision reported in Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , in the matter of grant of injunction, restraining the encashment of Bank Guarantees or a Letters of Credit. Para 14 of the said judgment being relevant, is reproduced below

14. From the discussions made herein above relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit: (

i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

The Apex Court has held that there are two exceptions when the Courts can grant an order of injunction in favour of an aggrieved party in the matter of encashment of Bank Guarantee or a Letter of Credit and those are at Sr. Nos. (v) and (vi) above. Shri S.C. Mehadia, the learned Counsel, submits that the Bank

Guarantee furnished in question, is an unconditional one and the existence of any dispute between the parties to the contract, is not a ground for issuing an order of injunction to restrain the enforcement of a Bank Guarantees or Letters of Credit. According to him, the Trial Court should not have even gone into the dispute in respect of compliance of the conditions. He further submits that there is no case made out, falling in any of two exceptions, laid down by the Apex Court.

24. Shri M.G. Bhangde, the learned Senior Counsel appearing for the Respondent Nos. 1 and 2, has urged that this case is essentially concerned with the cancellation/withdrawal of LOA and the relief claimed, is for declaration, that such cancellation/withdrawal, is illegal. Relying upon Clause 3.4.1 in LOA, he has urged that the Commitment Guarantees or Additional Commitment Guarantees furnished, can be invoked only upon the finding is recorded, that the cancellation is legal and proper. Shri M.G. Bhangde, the learned Senior Counsel, disputes the contention of Shri S.C. Mehadia, that the Commitment Guarantees furnished, are unconditional. He submits that there is no such pleading in the written statement and the Respondent No. 1 had no opportunity and hence, this Court should not take the same in consideration. In respect of the judgment of the Apex Court, cited by Shri S.C. Mehadia, it is urged that it was a case where a declaration, that cancellation/withdrawal was illegal and improper was not claimed. According to him, the present case is different than the one decided by the Apex Court. He submits that the case of the Respondent No. 1, is squarely covered by an exception, that invocation of Commitment Guarantees would result in irretrievable harm or injustice to the Respondent No. 1 company.

25. Once it is held that the Respondent No. 1 company has failed to make out a prima facie case, the balance of convenience will not tilt in favour of the Respondent No. 1 company. The learned Judge of the Trial Court has failed to apply his mind to the well settled principles for grant of injunction, laid down by the Apex Court in the aforesaid judgment, in the matter of invocation of Bank Guarantee. When the Plaintiff is coming before the Court, seeking injunction restraining the Defendants from invoking Bank Guarantee, it is for him to establish that the Commitment Guarantees furnished, are conditional one. In view of this, the failure on the part of the Appellants to plead that the Commitment Guarantees, were unconditional would not make any difference. The perusal of the Clauses in the Commitment Guarantees prima facie indicates, that the same are unconditional. What is an irretrievable injury caused to the Respondent No. 1 company, has not been demonstrated. No doubt, the Respondent No. 1 company has invested huge amount, but then it was knowing fully well the maximum period, within which the Milestones were required to be attained. There is neither any prima facie case made out nor that of an irretrievable injury. If it is ultimately found that invocation of Commitment Guarantees was wrong, the Respondent No. 1 company shall be entitled to get back the amount of Commitment Guarantees with interest at prevailing Bank rate. There was no assurance, that Fuel Supply Agreement (FSA) shall be

entertained into even if the Milestones are not completed, within a stipulated period. The Trial Court has, therefore, committed an error in granting an order of injunction.

26. In view of above, the appeal is allowed. The order dated 22.11.2010, passed below Exh.5 in Special Civil Suit No. 824 of 2010, by the learned Third Joint Civil Judge, Senior Division, Nagpur, is hereby quashed and set aside. The application for grant of injunction at Exh.5, is dismissed with the condition that if the Respondent No. 1 succeeds in the suit, it shall be entitled to recover the amount of Commitment Guarantees at the prevailing Bank rate of interest from the date of its invocation, till its realization. It is made clear, that none of the observations made by this Court, which are based upon prima facie assessment of the case, shall come in the way of parties in final decision of the suit. There shall be no order as to costs.

27. The learned Counsel appearing for the Respondent Nos. 1 and 2 submits that the effect and operation of this judgment be stayed for a further period of four weeks so as to enable the Respondent Nos. 1 and 2 to adopt all such remedies as are available to them in law.

28. The request is opposed by the learned Counsel for the Appellants. Keeping in view the fact that the interim order passed by this Court is operating till today, there shall be a stay to the effect and operation of this judgment for a further period of two weeks; after expiry of which, the stay shall stand automatically vacated.