(2023) 11 CHH CK 0060

In the Chhattisgarh High Court

Case No : Writ Petition (C) No. 679 Of 2013

Navbharat Fuse Company Limited APPELLANT

Vs

South Eastern Coal Field Ltd. RESPONDENT

Date of Decision : 23-11-2023

Acts Referred:

Code of Civil Procedure, 1908 — Section 34
Indian Penal Code, 1860 — Section 34
Negotiable Instruments Act, 1881 — Section 138(b), 138(c)
Air Pollution (Prevention of Control) Act, 1981 — Section 31A, 37, 40

Citation : (2023) 11 CHH CK 0060

Hon'ble Judges : Ramesh Sinha, CJ;Naresh Kumar Chandravanshi, J

Bench : Division Bench

Advocate : Aagney Sail, Dr. Sudeep Agrawal, Animesh Tiwari

Final Decision : Allowed

Judgement

1. The petitioner, in this petition seeks for the following reliefs:

"10.1. The Hon'ble Court may kindly be pleased to call for the entire record pertaining to the case of the petitioner.

10.2. The Hon'ble Court may kindly be pleased to quash the impugned order dated 23/04/2013 passed by respondent No.4.

103. The Hon'ble Court may kindly pleased to direct the respondent company to extend the period of Fuel Supply Agreement and supply Coal as per the terms and conditions of the Agreement dated 10/10/2009.

10.4. The Hon'ble Court may kindly be pleased to direct the respondent Company to refund the Security deposit/ Bank Guarantee forfeited by them alongwith interest.

10.5. The Hon'ble Court may kindly be pleased to direct the respondent No.5 to decide the matter relating to renewal of the consent for the 1st and 2nd Kiln of

Sponge Iron.

10.6. Any other relief, which this Hon'ble Court may deems fit and proper may also be awarded to the petitioner including the cost of the petition."

2. The facts, in brief, as projected by the petitioner is that the petitioner is a registered Company having one of its Sponge Iron unit Located at Village Raikot, District-Bastar with having all the requisite permissions and certificates for operating the same. The petitioner-Company required 36,000 tonnes per annum of 'F grade' coal for its Sponge Iron Unit as such applied and requested for the same from the respondents No. 1 to 4-South Eastern Coalfields Ltd. (for short, the SECL) which was allowed to the petitioner through Letter of Assurance (for short, LoA) dated 11.07.2008. The LoA was issued in accordance with the guidelines of the Ministry of Coal assuring the petitioner regarding the supply of coal as per the conditions mentioned. The petitioner, on having fulfilled the conditions and having achieved the milestones as set-out in the LoA, the respondent-SECL entered into an agreement with the petitioner for supply of Coal to Sponge Iron Plant: 30000 tonnes per annum for 2nd Kiln (earlier wrongly mentioned as 1" Kiln), situated at Village Raikot, District-Bastar as per the terms and conditions of the agreement.

3. As per the conditions of the Fuel Supply Agreement (for short, the FSA) the petitioner was having the lawful authority for the plant and complying with the requisite condition of contract, the petitioner also submitted the Bank Guarantee (for short, BG) as prescribed in the agreement. Though the FSA was executed between the petitioner and respondent-SECL but neither the Memorandum of Understanding (for short, the MoU) was executed nor the coal supply was made on the part of the respondent-SECL. Meanwhile, the consent to operate Sponge Iron Plant granted by respondent No.5 also expired and the petitioner applied for renewal of the same which was awarded to the petitioner on 08.06.2010 accordingly the petitioner submitted the same before the respondent authority and requested for commencement of coal supply for 2nd Sponge Iron Plant. The respondent-SECL failed to consider the request of the petitioner and again the period of consent to operate Sponge Iron Plant issued by

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the respondent No.5 expired by efflux of time and the petitioner applied for the renewal of the same.

4. Being the procedural delay on the part of respondent No.5, the renewed consent could not be obtained by the petitioner within time and as such a notice was received by the petitioner from the Coal Feeder dated 09.07.2011 for submitting the Pollution Clearance Certificate before the respondent-SECL. The petitioner, soon after receiving the renewed pollution clearance certificate for the period of 30.11.2010 to 29.11.2011 issued on 23.09.2011 again submitted the same before the respondent-SECL and requested for executing MoU and for starting coal supply. The petitioner, for supply of coal under the FSA, also

submitted its unconditional acceptance, accordingly a MoU was signed between the parties declaring the effective date, target start period, first delivery date etc. It was further specifically mentioned that the agreement is a case of coal block allotment/tapering linkage therefore the same is subject to the guidelines/ procedure applicable for the same.

5. At the same time, two addendums were also signed between the parties in relation to the Coal Supply Agreement dated 10.10.2009 whereby under the Addendum # 1, it was declared that the Kiln number as mentioned in the Coal Supply Agreement dated 10.10.2009 shall be read as 2nd Kiln instead of 1st Kiln. Further as per Addendum # 2, it was mentioned that as the plant of the petitioner is covered under the End Use Plant (EUP) of Madanpur (North) Coal Block, to which the date of allotment was 13.01.2006 and the normative date of production is 13.07.2009. Further vide the Addendum # 2, certain clauses of the Coal Supply Agreement relating to period of agreement, quantity of tapering basis, add-on price were further modified. Accordingly the supply of coal was started by the respondent-SECL as per the FSA between the parties and meanwhile as the period of consent granted by the respondent No.5 was going to expire, the petitioner made application before the respondent No.5 for renewal of the same vide its application dated 29.11.2011.

6. The petitioner started lifting of coal as per delivery order in accordance with the agreement but again, the period of Environment Clearance expired and as per the terms and conditions the respondent-SECL allowed the petitioner to lift coal upto three months and after that no delivery order was issued in favour of the petitioner for the reason that the petitioner could not produce the Pollution Clearance Certificate which was beyond the control of petitioner. The petitioner as such requested the respondent-SECL and given undertaking that the Pollution Clearance certificate will be procured as early as possible and meanwhile to continue with the delivery of coal as per the agreement.

7. Even though the petitioner submitted an undertaking but the respondent-SECL did not allow the petitioner to lift coal as per the agreement as a result the petitioner failed to lift the coal in accordance with the prescribed limit under FSA which was beyond the control of the petitioner for want of Pollution Clearance Certificate as the same was not issued to the petitioner by respondent No.5 and whereas its application was kept pending and further as a result of which the respondent-SECL did not allow the petitioner to lift coal. Though the petitioner was stopped from lifting coal by the respondent-SECL, the petitioner continuously persuaded the respondent No.5 to renew the consent but despite several requests the respondent No.5 failed to renew the consent of the petitioner and further kept the application pending. Being the above position where the petitioner failed to lift the coal because of the non-renewal of consent by respondent No.5 and respondent-SECL itself stopped the petitioner from lifting coal which was beyond the control of petitioner, the respondent-SECL without considering the said fact issued a notice to the petitioner dated

22.03.2013 regarding the termination of the FSA only for the reason that the petitioner lifted the coal below 30% as per the Annual Contract Quantity for the year 2011-2012 without considering the fact that the supply was stopped by the respondent-SECL themselves on account of non-submission of the renewed Pollution Clearance Certificate which was beyond the control of the petitioner as the application of the petitioner was pending before the respondent No.5. After receiving the notice, the petitioner contacted with the authorities and deliberated the matter and before any decision could have been taken or before any reply could have been filed by the petitioner, the respondent No.4 passed the impugned order of termination of contract and consequential forfeiture of BG, and not only the BG relating to 2nd Kiln but also in the garb of the impugned order, encashed other BGs which were submitted to the respondent-SECL prior to this agreement with respect to another agreement relating to 1st Kiln. The petitioner categorically submitted his detailed reply but the same was of no avail.

8. The action of the respondent-SECL is illegal, arbitrary and discriminatory as for no fault on the part of petitioner the impugned order has been passed. The respondent-SECL failed to consider that as per agreement the same can be terminated only in terms of Clause 15 of the agreement. The respondent No. 4 passed the impugned order in violation of clause 15.1.4 of the FSA which specifically prescribes that for terminating the agreement on the ground of level of lifting below 30%, the same shall be done after giving written notice which is to be mandatorily issued within sixty days of the end of the relevant year, whereas in the instant case. the notice for the first time was issued by the respondent-SECL after more than ten months.

9. According to the petitioner, its case falls under clause 16 of the FSA which is the Force Majeure clause which was beyond the control of the petitioner. The respondent No.4 has passed the impugned order without considering the fact that delay in renewal of Environmental Clearance Certificate was not attributable to the petitioner as the application was already made within time however the same was not renewed by the respondent No.5. If any action in relation to termination of agreement was to be taken by the respondent-SECL, the same should have been taken in accordance with Clause 15.1.1 of the agreement but the respondent-SECL could not adopt the same and arbitrarily terminated the agreement. As per the Addendum # 2 dated 04.11.2011 the agreement stood terminated on 12.07.2012 by efflux of time and the respondent-SECL is not having any right or authority to terminate a non-est agreement and thereby forfeiting the Security Deposit (for short, the SD). Neither as per the terms of contract nor as per law the respondent-SECL can forfeit the SD of the agreement which has been terminated on expiry of its term without there being any fault on the part of the petitioner. The respondent-SECL had forfeited all the SDs made by the petitioner with respect to the two agreements in relation to Kiln-1 and Kiln-2 whereas vide the impugned order, only the agreement in relation to Kiln-2 has been terminated. The application of the petitioner with regard to the Environment Clearance Certificate is still pending before the respondent No. 5.

Hence, this petition for the reliefs as prayed above.

10. Mr. Aagney Sail, learned counsel for the petitioner submits that the FSA stood terminated on 12.07.2012 i.e. eight months before the impugned order dated 23.04.2013 was passed and as such, the respondent-SECL had no vested right or authority to pass the impugned order and forfeit SD by encashing BGs on 23.04.2013. The impugned order is not maintainable being in direct violation of clause 15.1.4 of the agreement. The respondent-SECL did not terminate the FSA by issuing notice within 60 days of the end of the relevant year i.e. between 01.04.2012 to 30.05.2012 as provided in clause 15.1.4 of the FSA. The respondent-SECL wrongly contends that relevant year should be the next financial year as booking can be made even on the last day of the financial year (which remains valid for 45 days). This interpretation / contention is not supported by the FSA. Further, the respondent-SECL has erroneously forfeited the BGs (Rs. 23,00,400/-) for the 1st Kiln for which there was a separate FSA and which were not at all related to the termination of the concerned FSA in the present case. Though the respondent-SECL has stated that they are ready to refund the BGs for the 1st Kiln in their return and additional return, however, till date they have not done so. The petitioner-Company is entitled under Section 34 of the Code of Civil Procedure, 1908 to interest on the total amount of Rs. 44,60,400/- of the four BGs the details of which have been given at page 96 of the writ petition, forfeited by SECL since the date of filing of present Writ Petition. The Interest rate is determined as per clause 12 read with clause 1(t) of the FSA as the Prime Lending Rate of State Bank of India.

11. Mr. Sail further submits that the FSA stood terminated (by afflux of time) on 12.07.2012 i.e. eight months before the impugned order dated 23.04.2013 was passed. The MoU dated 04.11.2011 is the effective date of the FSA as provided in clause 6(iv) of the said MoU. Further, effective date is defined in para 1(m) of the FSA. The Addendum # 2 dated 04.11.2011 changed the period of agreement (as per Ministry of Coal policy dated 26.02.2010- ANNEXURE-P3 page 22-24) from five (5) years from 'effective date' (Refer clause 2.2 of FSA) to three (3) years from 13.07.2009 (which was the 'Normative date of production' of the Madanpur (North) Coal Block allotted to Petitioner). Hence, period of agreement commenced from 'effective date' i.e. 04.11.2011 and stood terminated on 12.07.2012. Addendum # 2 states the 'non obstante clause' while modifying the FSA. Power and procedure to amend the FSA is provided in Clauses 18.1 & 18.3. Addendum # 2 states that, "Now, therefore, notwithstanding anything contained in the Coal Supply Agreement dated 10.10.2009 and MOU dated 04.11.2011, it is agreed, to modify, mutatis-mutandis, relevant provisions/Clauses thereof as "(A) Period of Agreement – The Agreement, shall stand terminated on 12.07.2012....". The respondent-SECL has admitted that FSA stood terminated on 12.07.2012 in their reply dated 19.02.2014 and also in their additional reply.

12. Mr. Sail also submits that the consequences of termination of FSA on 12.07.2012 would be that the SD stood discharged on 12.10.2012. The SD

totaling to Rs. 21,60,000/- made by the petitioner in compliance of clause 3.2 of FSA stood discharged on 12.10.2012 (within three months of termination as per clause 3.3 of FSA). Hence, act of SECL in forfeiting the SD by invoking clause 3.6 of FSA is completely without any basis as no lien of SECL existed after 12.10.2012 i.e. three months after date of termination of FSA. Since, initially the validity of the FSA was five years so the SD submitted by way of BG by petitioner was for a period of five years and three months i.e. from Nov. 2009 to March, 2015. The BG period was not reduced after signing Addendum # 2 as the petitioner, in good faith, was hopeful of extending the FSA as provided in clause 2.7 and never dreamt that SECL will misuse the BG in violation of the FSA after its termination. The BGs were irrevocable and did not envisage reduction of its validity period. Even the respondent-SECL had no authority vested to terminate the FSA on 23.04.2013. The FSA stood terminated on 12.07.2012 and no supply of coal took place thereafter. There was no amendment / modification entered into by the petitioner and SECL to extend the FSA. Hence, as on 23.04.2013 i.e. on the date of passing of termination order. there was no authority with SECL to terminate the FSA by invoking clause 15.1.4 as no agreement existed between petitioner and respondent-SECL on that date.

13. With regard to the interpretation of the words ‘notice to be issued within 60 days of the end of the relevant year’ appearing in clause 15.1.4 of the FSA, Mr. Sail submits that the word ‘within’ which can be used as an adverb, preposition, noun and adjective, when used as a preposition (in the present sentence) is defined in the Merriam Webster Dictionary as: "Within: used as a function word to indicate situation or circumstance in the limits or compass of: such as - before the end of. For e.g. within 15 days of receipt of information. (S.138(b) NI Act)" 643. From a grammatical standpoint, the words 'within 60 days of.. (an event/ date)' means that within, any duration of days less than or equal to 60 days, measured from some starting point of reference (i.e. an event/date). For example, Section 138(b) and (c) of the Negotiable Instruments Act, 1883. In the present case the starting point of reference for the sixty days is the 'end of the relevant year. The term 'relevant year has not been defined in the FSA, but, 'year' is defined in clause 1(w) to mean the financial year commencing from April 1st and ending on the following March 31st. Hence, 'end of relevant year' means March 31" as the date (31") and the month (March) of the relevant year. As a result, if the relevant year is 2012 (which is in the present case) then the said words of the clause 15.1.4 of the FSA would mean that notice under this clause is to be issued within 60 days of 31.03.2012 I.e. notice can be issued on any day between. 01.04.2012 and 30.05.2012 (Refer para 9.5 of Writ Petition at Page 10 and Annexure P15 at Page 95-96). The word 'of cannot be interpreted as having the meaning before, as such interpretation will frustrate the clause completely i.e. if notice of termination is to be issued 60 days prior to end of financial year then how will the calculations be made for the financial year ending on March 31st. The respondent-SECL has admitted to the 'relevant year' ending on 31.03.2012 in the context of this term appearing in clause 15.1.4 of the FSA in

their additional reply dated 12.09.2014 at paragraph No. 7 (Page 142) and in their reply dated 19.02.2014 at paragraph no. 21(iv) (Page 128).

14. Mr. Sail next submits that the respondent-SECL has wrongly contended that booking can be made even on the last day of the financial year (valid for 45 days) hence, the expression 'relevant year' should be the next financial year. SECL had taken the main ground before Supreme Court of India in their SLP, their written submissions and submitted during the hearing on 18.07.2023 that booking of coal can be made even on the last day of the financial year i.e. on 31.03.2012 which will be valid for 45 days (Clause 7.2.4 of FSA). Therefore, an order placed on the last day of the financial year, whose lifting may be done within a period of 45 days after the conclusion of the financial year and the same shall still be considered as the invoice for the preceding financial year. Thus, underlifting of coal can only be detected in the next financial year (by 15 May) and, therefore, the expression 'relevant year' must be construed as the next financial year and not the contractual year when the lifting of the coal takes place. This interpretation of respondent-SECL that booking can be made on the last day of the financial year is not supported by the FSA based on the following:

(1) Booking can only be done within the monthly time schedule specified by SECL (seller) and on advance payment of the order (Clause 7.2.1 & 7.2.2 of FSA). The seller issues notice before commencement of the month providing time schedule for booking (Clause 7.1.1. Hence, booking cannot be made on any day of the month as per the choice of the buyer but only within the monthly time schedule specified by seller. The FSA does not envisage a situation wherein order can be placed by buyer outside the monthly time schedule specified.

(ii) Order can only be placed by purchaser on making advance payment of the value of the respective order within such time as notified by the Seller (Clause 7.2.2 FSA).

(i) Seller (SECL) shall ensure that sale order / delivery order in favour of purchaser is prepared promptly upon realization of advance payment and the same reaches the concerned colliery /weigh bridge within five (5) working days of the last day of the period notified by the Seller for booking (Clause 7.2.3 of FSA).

15. Mr. Sail lastly submits that in a calendar month, a buyer cannot place order for more than 1500 tonnes of coal. The ACQ of coal was 36,000 tonnes as per clause 4.1 of FSA which for part of a year will be prorated accordingly. This ACQ was reduced by 50% to 18,000 tonnes as per clause 6(vii)(a to c) of the MoU dated 04.11.2011. The ACQ shall be delivered in equal monthly quantities during the year which shall be calculated as ACQ/12 i.e 18,000tonnes / 12months = 1,500 tonnes per month which is the Scheduled Quantity (SQ) (Clause 4.2 of FSA). Purchaser can make bookings and on advance payment can place orders for the Scheduled Quantity (Clause 7.2.1 & 7.2.2). Hence, in a calendar month only 1,500 tonnes of coal can be purchased. He placed reliance on the judgment

rendered by the Hon’ble Supreme Court in Adani Power (Mundra) Limited v. Gujarat Electricity Regulatory Commission & Others, reported in (2019) 19 SCC 9, wherein it has been observed as under :

“24. It could thus be seen that it is more than well settled that the clauses in the agreement ought to be given the plain, literal and grammatical meaning of the expression used in the same. No doubt, that the courts will also try to gather as to what intention the parties wanted to give them. As has been held by Ranjan Gogoi, J. (as His Lordship then was) the principle of business efficacy could be invoked only if by a plain literal interpretation of the term in the agreement or the contract, it is not possible to achieve the result or the consequence intended by the parties acting as prudent businessmen. This test requires that a term can only be implied, if it is necessary to give business efficacy to the contract, to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business sense without the term, the courts will not imply the same. It is amply clear that courts can imply a clause only if it is found that the plain and literal meaning given to the expression used in the terms is not in a position to make out the intention of the parties. Reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract. As held in the case of Nabha Power Ltd. (NPL) v. Punjab SPCL {(2018) 11 SCC 508}, for invoking the business efficacy test and carving out an implied condition, not expressly found in the language of the contract, the following five conditions will have to be satisfied:

(1) Reasonable and equitable;

(2) Necessary to give business efficacy to the contract;

(3) It goes without saying i.e. the Officious Bystander Test;

(4) Capable of clear expression; and

(5) Must not contradict any express term of the contract.”

16. Per contra, Dr. Sudeep Agrawal, learned counsel appearing for the respondents No. 1 to 4-Company, submits that the petitioner was required to maintain the level of lifting not below 30% in any given year and in event of the level of lifting falling below 30%. Schedule 1 at page 48 of the writ petition reveals that the ACQ in metric tonnes was fixed at 36,000 metric tonnes per year. Hence, in event of the level of lifting falling below 30% of the ACQ (36,000 metric tonnes per annum) there was automatic implementation of the provisions

of clause 15.1.4 of the agreement. In other words, the petitioner was required to maintain a minimum level of lifting every year so as to make the sale of coal feasible and the non-lifting in a particular year below 30% of the level of lifting attracted penal provision of termination of agreement under the relevant clause 15.1.4, hence according to the relevant provisions, the petitioner was issued a notice on 22.03.2013 appraising him about the short-comings to the effect that the petitioner had not lifted the minimum quantity of coal with respect to the ACQ for the year 2011-12 and the petitioner was also informed that the situation so created by it was detrimental to the distribution claim and the interest of the respondent-Company. Hence, the petitioner was specifically informed that the respondents intend to terminate the FSA with consequential forfeiture of the SD. After the expiry of 30 days vide order dated 23.04.2013 (Annexure P/1), the respondent-Company terminated the FSA and has forfeited the SD and as such, there is no illegality or arbitrariness in the action of the answering respondents as the respondents are well within the right to terminate the FSA in accordance with the agreement signed between the parties specially so when the action of the petitioner in not lifting the minimum specified quantity is detrimental to the financial interest and the distribution plan of the SECL.

17. Dr. Agrawal further submits that the ground of Force Majeure raised by the petitioner is an attempt to demonstrate before the Hon'ble Court that the reason that non-lifting of coal was not on account of his flaws but on account of certain lefts on part of the State official. The petitioner-Company was obliged to obtain Pollution Clearance Certificate from the respondent No. 5 as it was specially mentioned in the agreement that all the mandatory clearance were required to be fulfilled by the petitioner. Hence, the fact that the petitioner failed to obtain Pollution Clearance Certificate and on that count he could not commence his production cannot be attributed to Force Majeure. On the other hand, it is evident and apparent that on account of justifiable reasons, the respondent No. 5 did not issue the Pollution Clearance Certificate to the petitioner as it was required on part of the petitioner to satisfy the requirements of the respondent No. 5 so as to enable them to issue Pollution Clearance Certificate in accordance with the prevalent norms. The instant petition is utterly vague and baseless and deserves to be dismissed.

18. So far as the averments/allegation of the petitioner that the respondent No. 1 did not sign MoU for coal supply even after the FSA was signed on 10.10.2009, is baseless and has been made with a deliberate effort to confuse the entire issue. The averments made herein are in nowhere related to the instant case nor have any bearing with the relief sought for by the petitioner. On the contrary, it is specifically submitted that the FSA provides for certain conditions precedent which was required to be fulfilled/achieved by the parties. After the achievement of the condition precedent, issuance and acceptance of notices of satisfaction of these conditions precedent by the respective parties, and declarations made by the purchase that the same have been achieved/fulfilled by it, the MoU was executed for the supply of coal on 04.11.2011, vide Annexure P/9. This MoU was

duly signed by the petitioner and hence is binding on it. The petitioner has raised vague allegations that the MoU was signed much later. Obtaining of Pollution Clearance Certificate by the petitioner was a matter solely between the petitioner and the respondent No. 5 as it is a statutory requirement for industry/plant which needs to be accomplished/fulfilled.

19. Dr. Agrawal next submits that on the basis of the information received from the Ministry of Coal dated 19.04.2011 forwarded by the CIL vide letter dated 17.05.2011, it was found that the Kiln reference under this agreement should be 2nd Kiln and hence it was declared that henceforth the Kiln Number be read as 2nd Kiln in the FSA dated 10.10.2009 instead of the 1st Kiln. It is further submitted that in this Addendum the correction of the Kiln Number has no effect whatsoever as it does not change the nomenclature of the FSA or conditions therein. Dr. Agrawal refers to proviso 4 of Schedule-I of ACQ and submits that as per this Schedule, it was expressly agreed between the parties that the ACQ/ validity period of this agreement will stand revise at any point of time in accordance with the directions of the Ministry of Coal/Coal India Limited/Coal Controller, arising out of the allotment of production from the Coal Blocks. In other words, the agreement clearly postulates that the ACQ/validity period of the agreement could be revised at any point of time in accordance with the policies of the Central Government/Coal India Limited and the petitioner had duly signed and expressed his consent. The answering respondents further submit that after signing the agreement the petitioner cannot raise the dispute that the Addendum # 2 was added and the same was adverse to its interest. The Ministry of Coal came up with a policy commonly known as the Tapering Policy on 26.02.2010 (Annexure P/3). This Tapering Policy which came subsequent to the signing of the FSA and on the basis of the contents of Proviso 4 of Schedule-I, the Addendum # 2 was executed between the parties and the period of agreement was altered and it was stated that the agreement shall be terminated on 12.07.2012.

20. After the FSA was made effective by execution of MoU on 4/11/2011, the supply of coal was commenced to the petitioner's unit. It is the practice adopted with the answering respondents to allow supply of coal to only those units which possessed valid consent to operate from environment department and in absence of the same the coal was being supplied only for the fixed period being treated as a grace period so as to enable the units/consumer/purchase to acquire/obtain the required clearance certificate from the Environment department to ensure smooth/ uninterrupted supply of the coal. This is a procedure adopted so as to ensure that the policy of the Government of India and the Environment Board etc. are not violated. It is further submitted that in the instant case the environment clearance period expired on 29.11.2011 and therefore the respondent No. 1 allowed the petitioner to lift coal up to grace period of 3 months. It is further submitted that even after the grant of grace period of 3 months and even subsequent thereto the petitioner failed to obtain the necessary environment clearance from the respondent No. 5 and therefore the

respondents will left with no other option but to discontinue the supply of coal. The FSA clearly lays down that the petitioner company was to ensure that a minimum of 30% of the ACQ was maintained. The agreement further lays down that in event the lifting of coal falls below 30% in a particular year, the respondents/suppliers were entitled to terminate the FSA by issuance of notice of 30 days to the opposite party. Pursuant to the said provision laid down under clause 15.1.4, the respondent-Company has issued a notice to the petitioner addressing him in detail about the short-comings of his part and the intention on part of the respondents to terminate the FSA with consequential forfeiture of the SD. The respondent No. 1, subsequent to the issuance of notice of termination dated 22.03.2013 (Annexure P/14) issued the final termination letter dated 23.04.2013 (Annexure P/1). As per the contents and provisions of the notice, the SD amount in form of BG was forfeited accordingly. It is submitted that an amount of 21,60,000/-, which was a BG towards the instant FSA was duly forfeited by the answering respondents. However, it is respectfully submitted that in case the respondents have forfeited the BG relating to 1st Kiln, they are ready to reconcile the dispute by refunding the said amount erroneously forfeited. Respondents in this regard, have also duly communicated with the SECL, Kolkata. This would reflect that the respondents have no intention to keep with them the forfeited amount with respect to the Kiln Number 1 and it has been their endeavor to refund any excess amount as claimed by the petitioner. The answering respondents submit that they have acted strictly in accordance with law and the petitioner has failed to carve out any case and no warranting any interference.

21. Dr. Agrawal would also submit that the petitioner has raised the grounds regarding his case falling under the clause of Force Majeure without pleading the same in para 8 of the writ petition. However, it is respectfully submitted that the provisions of Force Majeure would not be applicable in the case of the petitioner. The ground of Force Majeure is an attempt to demonstrate before the Hon'ble Court that the reason that non-lifting of coal was not on account of his flaws but on account of certain lefts on part of the State official. The petitioner itself was obliged to obtain Pollution Clearance Certificate from the respondent No. 5 as it was specially mentioned in the agreement that all the mandatory clearance were required to be fulfilled by the petitioner. Hence, the fact that the petitioner failed to obtain Pollution Clearance Certificate and on that count he could not commence his production cannot be attributed to Force Majeure. On the other hand, it is evident and apparent that on account of justifiable reasons the respondent No. 5 did not issue the Pollution Clearance Certificate to the petitioner as it was required on part of the petitioner to satisfy the requirements of the respondent No. 5 so as to enable them to issue Pollution Clearance Certificate in accordance with the prevalent norms. The benefit under Force Majeure can only be obtained in cases of 'act of God'. However, in the instant case the Pollution Clearance Certificate was not granted to the petitioner on account of lapse attributed to the petitioner itself. Needless to say that the

petitioner cannot take benefit of Force Majeure class with respect to any lapse or shortcomings committed by it in not fulfilling the norms for granting of Pollution Clearance Certificate by the respondent No. 5.

22. Dr. Agrawal also submits that the provision of 'Termination of Agreement' (clause 15.1.4) prescribes for right to terminate agreement in case level of lifting of coal falls below 30% ACQ. In the instant case, after entering into the FSA, a MoU was executed on 04/11/2011 (Annexure P/9) for commencing the supply of coal having the effective date for entitlement of lifting on 04.11.2011. The ACQ for lifting for the year 2011-12 (from 04.11.2011 till 31.03.2012) was computed as 5765 Tonnes as prorate basis (with respect to 36000 TPA). However, the petitioner lifted only 1005 Tonnes during the period 31.03.2012 which is only 17.43% of ACQ (calculated on prorate Basis i.e. 5765 Tonnes). This non-lifting of assured quantity as per the agreement was detrimental to the distribution plan and interest of S.E.C.L. The mandatory provision of issuance of notice of not less than 30 days has been duly adhered to. The notice in terms of clause 15.1.4 was issued on 22.03.2013 before forfeiture of SD. The relevant year ended on 31.03.2012 and in the said period, the petitioner failed to lift the ACQ, the default, so committed, could not have been cured.

23. Lastly, Mr. Agrawal submits that in view of the above averments, the writ petition deserves to be dismissed at the threshold.

24. On 18.09.2023, the respondents-SECL has filed an application being IA No. 1 of 2023 for taking subsequent events on record. It has been stated that the relief as prayed at clause 10.3 of the writ petition has lost its efficacy for the reason that the FSA was signed between the petitioner and the respondent-SECL under the old policy and a new policy was introduced in the year 2016 i.e. auction coal linkages for the non-regulated sector and the Cabinet Committee on Economic Affairs, in its meeting held on 03.02.2016 decided that the allocation of coal linkages/LoAs for the non-regulated sector shall henceforth be done through auction based mechanism. Subsequently, the Ministry of Coal issued a letter to the Coal India Limited and SECL on 15.02.2016 and thereafter auction of coal linkages for non-regulated sector is done through competitive bidding process. Thus, on the basis of the aforesaid subsequent developments, now the petitioner is not entitled for getting coal supplies through previous linkage mechanism and instead if the petitioner wants coal supply for its plant, multiple avenues such as CIL e-Auction Scheme 2022, coal through State Nominated Agencies, Linkage e-Auction etc. are available to it.

25. Mr. Animesh Tiwari, learned counsel for the respondent No. 5 submits that from the perusal of the relief prayed by the petitioner it is clear that the main relief of the petitioner is against the respondent No. 4. As far as the answering respondent is concerned, the only relief which has been prayed against the answering respondent is to decide the matter relating to renewal of the consent for the first and second Kiln of sponge iron. According to Mr. Tiwari, the

petitioner-industry was not properly running the Air Pollution Equipments, ESP and Bag Filter was also not properly working and therefore the dust was producing and therefore the air pollution was caused and hence the letters were issued to the petitioner-industry on 05.12.2006, 19.02.2007, 14.03.2007, 07.04.2007 and 22.05.2007 and direction was issued to cure the aforesaid defects, however, no action was taken by the petitioner-industry and therefore the industry violated the terms and condition of the consent order granted by the Board. Thereafter, a notice was issued to the petitioner-industry through an Advocate and petitioner was directed to comply with the terms and condition of the consent/renewal order even though the petitioner did not comply the same and violated the certain provisions of Air Pollution (Prevention of Control) Act, 1981 (for short 'the Act, 1981). Therefore, a complaint case under Section 37, 40 of the Act, 1981 read with Section 34 of I.P.C. has been filed in the Court of Chief Judicial Magistrate, Jagdalpur which is pending for consideration. An inspection of the petitioner-industry was conducted on 22.12.2010 and it was found that the ESP and Bag Filter of the petitioner-industry are not working and therefore a notice under Section 31 A of the Act, 1981 was issued and petitioner-industry was directed to close the industry till such defects are cured. Thereafter, again on 21.01.2011, the inspection was made and it was found that the petitioner-industry is running, however, the ESP is closed and therefore again a notice under Section 31 A of the Act, 1981 was issued upon which the petitioner-industry informed that the industry is closed w.e.f. 31.01.2011. Therefore, again the inspection was conducted by the Officer of Board on 02.02.2011, 03.02.2011, 04.02.2011 and 08.02.2011 and it was found that the industry is closed. In the mean time, the industry vide it's letter dated 07.02.2011 informed that proper arrangement have been made for control of pollution upon which on 21.02.2011 inspection was made and it was found that the proper arrangements had been made for control of pollution and the relevant equipments were properly functioning and therefore vide letter dated 04.03.2011, the industry was permitted to start the production. The relief prayed by the petitioner against the answering respondent has become infructuous in view of the letter dated 02.07.2013, whereby the consent of the Board as first and second Kiln of Sponge Iron of the petitioner-industry has been renewed which is valid till 29.11.2013 on certain terms and condition.

26. Return to the writ petition was filed by the respondents No. 1 to 4 on 19.02.2014 and in rebuttal, the petitioner has filed a rejoinder on 16.07.2014 stating that the respondents in their return at para 1 and 2 stated that since the petitioner failed to fulfill the requirement of maintaining minimum level of lifting which had attracted the penal provision of termination of agreement under Clause 15.1.4, regarding the same it is respectfully submitted that the petitioner has category submitted and raised ground that the petitioner failed to comply the same only because of Force Majeure as per clause 16 of the FSA further that it has been specifically pleaded that the act of the respondent authorities was arbitrary as the action and notice could have been issued within 60 (sixty) days

of the end of the relevant year i.e. 2011- 2012 but the respondents though admitting their action to be derived from the authority of clause 15.1.4 have not given any justification regarding the violation being made on their part of the said provision. The action of the respondents is predetermined so as to illegally extract the SD and as such exactly on the date when the 30 days period of notice expired the impugned order has been passed without considering the reply of the petitioner and controverting the submissions of the petitioner where the term of agreement already expired by efflux of time further even the SD of two separate agreements with respect to Kiln-1 and Kiln-2 had been forfeited. The Force Majeure clause 16 of the FSA itself mandates an excuse for the petitioner which could have been considered by the respondents as the respondent No.5 has not issued the Pollution Clearance Certificate within time even though the petitioner rectified the defects within reasonable time which is evident from the return filed by respondent No.5 who had issued the certificate subsequently. The petitioner had already applied for the renewal of consent before the respondent No.5 and even after rectification of the defects also the same was intimated but because of procedural lapse on the part of the respondent No.5 who had now only issued renewal for a term of two years which was beyond the control of petitioner as such the respondent should have considered the case of the petitioner as per clause 16 of the FSA. The respondents have stated that the action was in accordance with Clause 15.1.4 of the FSA without stating the exact compliance where they were required to issue notice within 60 days of the end of the relevant year (2011-2012) whereas the notice was issued on 23.03.2013 by that time the FSA itself got terminated by efflux of time on 12.07.2012. The petitioner had specifically informed the respondent authorities regarding the illegal forfeiture of BG relating to 1st Kiln but at no point of time any heed was given to it neither any communication is made regarding refund of the same.

27. In response to the rejoinder filed by the writ petitioner on 16.07.2014, the respondents No. 1 to 4 had filed additional return basically reiterating what has been stated in their return.

28. We have heard learned counsel for the parties, perused the pleadings and documents appended thereto.

29. This petition was filed on 07.05.2013 and the matter was listed for the first time before the Court on 10.06.2013. Thereafter, the matter was listed for as many as 14 times. Thereafter, on 14.09.2017, this Court finally disposed of this petition quashing the order dated 23.04.2013 (Annexure P/1) and directing the respondents No. 1 to 4 to refund the SDs/BGs forfeited in favour of respondent No. 1 on the basis of the said order.

30. The said order dated 14.09.2017 was challenged by the respondents No. 1 to 4 before the Supreme Court by filing Civil Appeal No. 2462 of 2018. The Supreme Court, vide order dated 18.07.2023 observed that the matter needs to be reconsidered by this Court after hearing both the sides and accordingly allowed the appeal setting aside the order dated 14.09.2017 passed by this

Court and the writ petition was restored to its original number.

31. Accordingly, the matter was listed before this Court on 08.08.2023, 18.08.2023, 13.09.2023 and lastly on 05.10.2023 when the matter was heard finally and reserved for judgment.

32. The operative portion of the order impugned herein dated 23.04.2013 (Annexure P/1) reads as under:

"Sub: Termination of Coal Supply Agreement & forfeiture of Security Deposit.

Dear Sir,

This has reference to notice for termination of Coal Supply Agreement (FSA), issued vide letter no. SECL/BSP/S&M/COMM/108/ NBFCL/597 dated 22.03.2013 (FSA Sl. No. N30 as per SECL list).

In pursuance to the same, the FSA dated 10.10.2009 signed between SECL (Seller) and Nav Bharat Fuse Co. Ltd. (Purchaser) for Sponge Iron Plant: 30,000 tpa - 1st Kiln at village Raikot, Dist. Bastar (CG) having Annual Contracted Quantity (ACQ) of 36,000 tpa stands terminated with consequential forfeiture of Security Deposit (SD) forthwith."

33. The operative portion of the notice of termination dated 22.03.2013 (Annexure P/14) reads as under:

"Sub:- Notice for termination of Coal Supply Agreement (FSA) (SI. No. N30).

Dear Sir,

Coal Supply Agreement (FSA) dated 10.10.2009 was signed between South Eastern Coalfields Limited (Seller) and Nav Bharat Fuse Co. Ltd. (Purchaser) for Sponge Iron Plant: 30,000 tpa-1st Kiln at Village Raikot, Dist. Bastar (CG) having annual Contract Quantity (ACA) of 36, 000 tpa.

As per records, it has been found that the purchaser booked only 1005 tonnes quantity of coal under the said Coal Supply Agreement for the year 2011-12.

As per FSA provisions, SECL (Seller) has the right to terminate the FSA if level of lifting in a year falls below 30% of ACQ. In present case, it has been found that the Purchaser has failed to minimum 30% ACQ of coal for the year 2011-12. This situation is detrimental to the distribution plan and interest of the SECL.

In view of above, this notice of 30 days is hereby served upon you to the effect that SECL intends to terminate aforesaid FSA with consequential forfeiture of Security Deposit (SD) on expiry of this notice period."

34. Clause 15 of the agreement provides for 'termination of the agreement' and clause 15.1.1 and 15.1.4 which is relevant for adjudication of the dispute is reproduced as under:

"15.1.1 In the event that either party is rendered wholly or partially unable to perform its obligations under this Agreement (Affected Party) because of a Force Majeure Act, as described in Clause 16 below, and such inability to perform lasts for not less than a total of ninety (90) days in any continuous period of one hundred eighty (180) days, and in the considered assessment of the other party (Non-Affected Party) there is no reasonable likelihood of the Force Majeure Act coming to an end in the near future, such party shall have the right to terminate this Agreement, by giving at least ninety (90) days prior written notice to the Affected party of the intention to so terminate this Agreement. In such event, the termination shall take effect on expiry of the notice period of ninety (90) days which ever is later, and the parties shall be absolved of all rights/obligations under this agreement, save those that had already accrued as on the effective date of termination."

xxx xxx xxx

15.1.4 In the event that the Level of Delivery (LD) falls below thirty percent (30%) or the Level of Lifting (LL) falls below thirty percent (30%), the purchaser or the seller as the case may be, shall have the right to terminate this Agreement, after providing the other party with prior written notice of not less than thirty (30) days. However, such notice is to be issued within sixty (60) days of the end of the relevant year."

35. Clause 16 of the FSA deals with Force Majeure and the case of the petitioner falls under clause 16.1 (h) which is as follows:

“16.1 "Force majeure Act" means any act, circumstance or event or a combination of acts, circumstances and events which wholly or partially prevents or delays the performance of obligations arising under this Agreement by any Party ("Affected Party") and if such act, circumstance or event is not reasonably within the control of and not caused by the fault or negligence of the affected party, and provided that such act, circumstance or event is in one or more of the following categories:

xxx xxx xxx

(h) Any delay or direction or order on the part of the Government of India or relevant State Government or denial or refusal to grant or renew, or any revocation, or modification of any required permit or mining lease or governmental approvals including those related to land acquisition or environment/forest clearance provided that such delay, modification, denial, refusal or revocation was not due to a cause attributable to the Affected party;

36. So far as the plea with regard to force majure clause is concerned, it has rightly been taken note of in the order passed by this Court on 14.09.2017 and we reiterate the same view. It was the duty and responsibility of the petitioner itself to submit all the relevant documents as was required/demanded by the respondent-SECL. Further, from the response filed by the respondent No. 5, it is evident that time and again the petitioner was granted opportunity to rectify the

defects pointed out which the petitioner failed to do so.

37. As per the addendum # 2, dated 04.11.2011, the period of agreement was to terminate on 12.07.2012. The said fact has been admitted by the respondent-SECL in its return and additional reply also. When the agreement was terminated on 12.07.2012, the respondent-SECL could not have terminated the FSA on 23.04.2013 (Annexure P/1) and as such, the act of the respondent-SECL in forfeiting the SD invoking clause 3.6 of the FSA is totally unjustified.

38. Further, as per clause 15.1.4 of the agreement, notice was required to be issued within 60 days of the end of the relevant year and in the instant case, for the financial year 2011-2012, the notice for termination should have been issued by 30.05.2012.

39. The notice for termination of of Coal Supply Agreement (FSA) was issued to the petitioner on 22.03.2013 (Annexure P/14) and the impugned order of termination was issued on 23.04.2013 (Annexure P/1). The said notice cannot be said to be within 60 days of the end of the relevant year and is not as per Clause 15.1.4 of Annexure P/4.

40. Another aspect of the matter is that as per the averments made by the petitioner which has not been controverted by the respondent-SECL, that the agreement stood terminated on 12.07.2012, and as such there was no occasion for the respondent-SECL to terminate the contract on 23.04.2013 (Annexure P/1) and the forfeiture of SD is without any jurisdiction.

41. Reliance has rightly been placed by the learned counsel for the petitioner on the judgment rendered by the Supreme Court in Adani Power (Mundra) Limited (supra) and it supports the case of the petitioner.

42. In view of the above facts and circumstances of the case and applying the ratio laid down by the Supreme Court in Adani Power (Mundra) Limited (supra), the order dated 23.04.2013 (Annexure P/1) passed by the respondent No. 4 is set aside. The petitioner would be entitled to all consequential benefits flowing from this order.

43. As the respondent-SECL in their return have admitted that in case they have forfeited the BG relating to 1st Kiln which has nothing to do with the FSA of the present case, hence, the respondent-SECL is directed to refund the BG relating to 1st Klin forthwith.

44. Resultantly, the writ petition stands allowed.

