
(2012) 10 DEL CK 0390

In the Delhi High Court

Case No : Writ Petition (C) No. 5666 of 2012

Patel Energy Limited

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Citation : (2012) 10 DEL CK 0390

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : P.S. Narasimha, with Mr. K. Parameshwar and Mr. Kapil Rustagi, for the Appellant; Rajeeve Mehra, ASG with Mr. Sumeet Pushkarna, for Respondent no. 1/UOI, Gp. Capt. Karan Singh Bhati and Mr. Karunendra Singh, for the Respondent

Judgement

Rajiv Shakdher, J.

CM No. 12083/2012 (O. 6 R. 17 of CPC)

1. This is an application, seeking amendment of the writ petition bearing no. 5666/2012 and the interlocutory application being: CM 11610/2012. The application, appears to have been filed, due to the petitioner/applicant obtaining knowledge of certain facts during the course of proceedings in this Court, held on 10.09.2012. The amendment is, thus sought, essentially on the ground that the respondent no. 2 had apparently issued a letter dated 03.09.2012, followed by another letter dated 10.09.2012, which sought to cancel/withdraw the Letter of Assurance (hereinafter referred to as LOA). It is the averment of the petitioner/applicant that the letters dated 3.9.2012 and 10.9.2012 are consequential to the communication dated 30.07.2012 issued by respondent no. 1, which is impugned in the writ petition.

2. It is in this background that the petitioner/applicant seeks to incorporate nearly twenty (20) new grounds in the writ petition which extend from CC to VV. The petitioner/applicant seeks to incorporate these grounds after ground BB;

which finds mention in the present writ petition. This apart, the petitioner/applicant seeks to incorporate two new paragraphs, in place of existing paragraphs 40 and 41. Paragraph 40 pertains essentially to the averments relating cause of action, while paragraph 41 seeks to make necessary averments pertaining to territorial jurisdiction of this Court.

3. Apart from the above, amendment is also sought by way of insertion of additional prayers (F) and (G) in the writ petition. Both these prayers seek issuance of direction for quashing letters dated 3.9.2012 and 10.9.2012. In addition, a prayer is made in the captioned application for insertion of an additional prayer in the interlocutory application (IA), which is, CM 11610/2012. The additional prayer is set out in clause (e). By way of prayer clause (e), stay is sought of the order dated 10.9.2012.

4. Before, I proceed to dispose of this application, I may only indicate that the captioned application came to be listed on 18.09.2012, however, even though arguments were advanced on the said application by the learned senior counsel for the petitioner, in the order of 18.09.2012, inadvertently, the said application is not referred to. This apart, arguments were also heard in CM 11610/2012 and the matter was listed for further directions on 19.09.2012 for counsel for respondent no. 2 to obtain instructions in the matter. On 19.09.2012, orders were reserved in CM No. 11610/2012. Once again, inadvertently there was no reference to the captioned application for amendment. In view of the fact that the amendment application is relevant for disposal of CM 11610/2012, as an additional prayer for stay of operation of letter dated 10.9.2012 is sought, it is felt necessary by me to dispose of the captioned application as well.

5. Since the prayer, for amendment made in the captioned application (both qua the writ petition and the CM 11610/2012) has been made, at the initial stage, which, in my view, is necessary for determining the issues, as well as relief sought both in the writ and the interlocutory application, it is not necessary to call for a reply to the respondents. Having perused the captioned application, and for the reasons noticed hereinabove, which propelled the petitioner to move the captioned application for amendment, the same is allowed. The amendments sought shall stand incorporated both in the writ petition and CM 11610/2012. The petitioner shall place the amended writ petition on record, within two weeks from today. As far the CM No. 11610/2012 is concerned, the amendment will be deemed to have been incorporated.

6. The application is, accordingly, disposed of.

CM No. 11610/2012 (Stay)

7. This order will dispose of the captioned application in which post the amendment ordered above, the following prayers stand included:

- (a) Issue an order staying the operation of letter dated 30.07.2012;
- (b) Issue an order restraining the first and second respondent from withdrawing

or cancelling the Letter of Acceptance dated 12.7.2010;

(c) Issue an order restraining the second Respondent from invoking and encashing the bank guarantee specified in letter dated 6.9.2012;

(d) (sic d). Grant any other or further relief as may be deemed fit and proper in the facts and circumstances of the case in favour of the petitioner and against the respondents.

(e) Issue an order staying the operation of letter dated 10.09.2012 as being illegal, arbitrary and unreasonable;

BACKGROUND FACTS

8. These prayers have been made in the background of the following broad facts:

9. The petitioner is a company by the name of Patel Energy Limited (hereinafter referred to as the PEL). The PEL claims to be a group company of Patel Engineering Limited. The said company, i.e., Patel Engineering Limited, as per averments made in the writ petition, was originally incorporated as a limited company by the name of PEC Realtors Limited. The date of incorporation of PEC Realtors Limited is not set out. Though, if one were to go by the name, it is suggestive of the fact that it was in real estate business, prior to its change of name, which evidently was brought about on 18.11.2004. The object being to carry on, inter alia, businesses of designing, erecting, constructing and administrating IPPs for generation and distribution of power of all kind. The PEL has its registered office located in Mumbai.

10. It is the case of PEL, that since it was desirous of setting up a power plant of a capacity of 500 MW at Bhavnagar, Gujarat, it applied to the Ministry of Coal in the Central Government, in 2007, to provide coal linkage for a power plant with a capacity of 1200 MW. This request was evidently revised for a power plant of a capacity of 1000 MW.

11. The PEL, claims that it had for the aforesaid purpose entered into a Memorandum of Understanding (MOU), on 30.04.2007, with the State Government of Gujarat through Gujarat Power Corporation Limited (in short GPCL). The aforesaid MOU, evidently, was amended after the GPCL gave its approval for changing the location of the proposed power plant from Bhavnagar to Pipavav in Amreli District, in the State of Gujarat. The approval in this regard; PEL claims to have obtained vide letter dated 16.02.2009, issued by the GPCL. A perusal of the said letter would show that GPCL accorded its "in principle" approval, for shifting the power plant site from Ghogha to Pipavav. The shifting of plant site was subject to provisions of the new power generation policy announced by the State Government on 02.01.2009.

12. The Standing Linkage Committee (Long Term) For Power [hereinafter in short referred to as SLC (LT)] constituted under the Ministry of Coal, in its meeting held on 29.01.2010, authorized the issuance of a Letter of Assurance (in short

LOA) by Coal India Limited, which is the holding company of respondent no. 2, i.e., Southern Eastern Coalfields Limited (in short SECL) for a capacity of 1x500 MW power plant in accordance with the provisions of the new coal distribution policy subject to several milestones approved by SLC(LT) in their meeting of 12.11.2008, as also conditions applicable in respect of the projects recommended in that meeting. Importantly, SLC(LT) in the aforementioned minutes, inter alia, observed as follows:

....Committee was informed that this project was recommended earlier by MoP and also included in their letter of 28/1/2010. However, the construction is yet to start. To a specific query by the Committee whether the entire capacity is likely to come up during 11th Plan, CEA informed that out of two units only one unit is likely to come during 11th Plan and accordingly LoA for one unit may be considered. As per the original application submitted by the developer the unit size was proposed to be 2x600 MW whereas according to the CEA/MoP, the unit size has been revised to 2x500 MV....

13. In pursuance to the decisions taken at the SLC(LT) meeting of 29.01.2010, a communication was issued from SECL dated 30.04.2010, whereby it informed the petitioner that if a LOA for supply of coal to its power plants had to be executed, it would be required to furnish a Commitment Guarantee (hereinafter referred to as CG) either in cash or by way of bank guarantee. The petitioner was, therefore, required to give a CG equivalent to 10% of the notified base price of its annual coal requirement, considering the highest grade of coal applied for, which was indicated against the units as per the list enclosed with the said communication. The petitioner was thus tentatively assured of being made available coal equivalent to 20,80,800 tonnes per annum of grade "F", for its power plant, of the capacity 1x500 MW. Consequently, the petitioner was required to give a CG equivalent to Rs. 13,10,90,400/- calculated on the basis of 10% of the notified base price of annual coal requirement. Notably, in the said communication, certain special milestones were noted, which for the sake of convenience, are extracted hereinbelow:

- (i) Financial closure - within 3 months from the date of issue of LOA.
- (ii) Environmental clearance - within 6 months from the date of issue of LOA.
- (iii) 90% of the acquisition of land required for the entire project and start of construction - within 12 months from the date of issue of LOA.
- (iv) Date of synchronization before September, 2011.
- (v) Date of COD before 31st December 2011.

13.1 The communication ended with it being stated that, in case, the petitioner was unable to meet milestone No. 1, which pertained to financial closure within the time stipulated therein, the LOA shall stand withdrawn and, the LOA holder, which in this case was the petitioner, would have to apply for afresh with Ministry of Coal for seeking a LOA in the prescribed proforma alongwith the requisite fee.

However, if the said milestone was met, the LOA holder will have to meet the remaining special milestones as were decided in the SLC(LT) meeting of 12.11.2008.

14. Based on the aforesaid understanding a LOA was executed between PEL and SECL on 12.07.2010. The LOA was valid for the period of 24 months from the date of issue and, it was to stand annulled, upon expiry of the said period unless it was extended, and that too, for a period of three months in accordance with clause 3.5 of the LOA. It may be pertinent to note, that clause 3.5, required SECL to return the CG in the event of occurrence of a force majeure event. Pertinently clause 2.1 of the LOA, which required PEL to undertake completion of all activities as defined in annexure 1 of the LOA within the period of 21 months, and each activity within the period mentioned against it, unless its completion was affected by force majeure events; which were specifically excluded and adverted as, inability or failure to obtain finances for the plant, failure to comply with existing rules and regulations with respect to statutory clearances applicable to the plant or, any such event, which resulted from negligence, omission or default of PEL.

15. The net effect of the stipulation of the validity period in clause 4 and 2.1 of the LOA, was that the LOA would ordinarily, come to an end on 12.07.2012. I may also refer to two more clauses of the LOA, which are clauses 3.4.1 and 3.4.2. Since, specific reliance has been placed by PEL, on these clauses, the same are extracted hereinbelow:

....3.4.1 Cancellation or withdrawal of LOA

In the event that any of the activities/milestones is delayed upon the period specified against each such activity/milestones in Annexure 1 and the Assured fails to furnish the additional CG to the assurer in accordance with clauses 3.3 hereof but fails to fulfill all the activities/milestones within the total period of twenty-four (24) months, as specified in Annexure 1, the Assurer shall have the right to cancel or withdraw this LOA after duly notifying the Assured in writing at least seven (7) days in advance. For the avoidance of doubt, all the milestones, as specified in Annexure 1, shall need to be fully completed and any partial completion with regard to any activity/milestones at the end of validity of the LOA shall entitle the Assurer to cancel or withdraw this LOA. Upon such cancellation/withdrawal of this LOA, the Assurer shall encash the CG including any additional CG submitted by the Assured. It is clarified for removal of doubt that this Clause shall survive the cancellation/withdrawal of this LOA.

3.4.2 Failure to sign the FSA

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 from the expiry of validity of the LOA or the satisfactory achievement of all the milestones, as shown in Annexurer 1, whichever is earlier. It is also clarified to the Assured that the percentage of annual contracted quantity fixed with respect to Take of Pay obligations in the

FSA may be reviewed by the Seller in light of its coal availability and coal commitments, and amended, on year-to-year basis during the term of the FSA....

16. It may also be noted that the special milestones which are referred to in the minutes dated 12.11.2008 of the SLC(LT) was also referred to in clause 7 of the LOA. That apart, annexure 1 to the LOA required the fulfillment of the following activities/milestones by the PEL in the timelines given against it.

17. It appears that post signing of the LOA, for the first time, PEL intimated to respondent no. 1 (which is the Ministry of Power) vide its communication dated 21.08.2010 that it had to shift the location of its power plant from Bhavnagar district to Pipavav in Amreli District for technical reasons, in respect of which, as noticed above, approval had been granted by GPCL on 16.02.2009. There is a time lag of nearly eighteen (18) months. By this communication, the PEL also informed the Ministry of Power that, it was now hoping to set up a plant of 2x660 MW and, therefore, it may consider arranging a long term coal linkage for the balance capacity of 820 MW (having already obtained a LOA for 1x500 MW) from either SECL or Western Coalfields Limited, which is another subsidiary of Coal India Limited. This request, was evidently reiterated on 09.05.2011.

18. Importantly, SECL vide communication dated 10.05.2011 informed the petitioner that the documents that had been submitted by PEL, towards achievement of milestones as per the LOA executed with it, reflected the following deficiencies:

....1. Milestone SI. No. 2: Board Resolution dated 13.08.2010 for 2x660 MSW by Patel Engineering Ltd. Submitted.

2. Milestone SI. No. 3: DPR for Dec 2010 submitted for 2x600 MW mentions location of the Plant as Amreli District, but LOA is for 1x500 MW for the plant in the Bhavnagar District.

3. Milestone SI. No. 4: Land notification/application not submitted. Few land documents submitted. Translated version required.

4. Milestone SI. No. 5: Final environment Clearance not submitted.

5. Milestone SI. No. 6: Recommendation for Forest Clearance/Forest Clearance not submitted.

6. Milestone SI. No. 7: In principle water allocation/clearance from State Authority/CGWA not submitted.

7. Milestone SI. No. 8: Board Resolution dated 13.08.2010 for 2x660 MW does not mention project cost and is by Patel Engineering Ltd.

8. Milestone SI. No. 9: Only in principle sanction letter dated 01.10.2010 submitted.

9. Milestone SI. No. 10: Certificate of start of construction not submitted...

18.1 The said communication ended by saying that the information which was submitted by PEL was received without prejudice to the rights of the SECL, as contained in the LOA.

19. The petitioner claims that it had obtained "in principle" approval from Axis Bank for a long term debt to the extent of Rs. 5330 crores which, according to it was equivalent to 75% of the project cost; the total cost of the project being 7100 crores. Importantly, there is no reference to final sanction letter. Axis Bank made it clear, vide its letter dated 19.05.2011, that the final sanction letter would be issued after due diligence and receipt of internal approvals. Furthermore, a careful perusal of the letter would show that it was premised on the petitioner having obtained a long term coal linkage from the Ministry of Coal through the aegis of SECL.

20. The PEL, evidently, vide its letter dated 19.5.2011, responded to the milestone deficiency pointed out in the SECL communication dated 10.05.2011. What was categorically stated in this letter of PEL, amongst other aspects, was that it was difficult to achieve some of the milestones, such as financial closure for the project without other approval pertaining to environment fuel linkage etc. In some sense, there was an admission that even the financial commitment by banks and financial institutions, as stipulated in the LOA was not in place, save and except of the Axis bank, to which I have made a reference above.

20.1 The PEL thus again shot of another letter dated 21.05.2011, more or less reiterating the same aspect. In respect of the other deficiencies pointed out in the SECL letter regarding the Board of Directors Resolution of PEL not being in place, explanation was rendered that its parent company, i.e., Patel Engineering Ltd., had taken a decision relating to investment and commitment of equity qua the project and hence, a Board of Directors resolution of Patel Engineering Ltd. was supplied. The PEL however proceeded to enclose a fresh Board of Directors resolution of 13.08.2010. As regards other aspects, it took the stand that much of it was dependent on the request for change of location and change of configuration of its power plant by Ministry of Coal. It also requested that no further CG should be sought with regard to achievement of milestone 3, which related to achievement of technical and feasibility studies. PEL took the stand that they had already submitted a DPR before the due date. Nevertheless in respect of milestones 4, 5 & 7 it furnished an additional CG by way of a bank guarantee in respect of sum of Rs. 3,93,27,120/-.

21. Undeterred, PEL by yet another communication dated 7.06.2011 addressed to the Ministry of Coal for according approval for change of the location of the power plant and providing long term coal linkage for balance capacity equivalent to 820MW.

22. The aforesaid communication was followed by a letter dated 14.6.2011 issued to SECL, in which after detailing out the steps taken by it for achieving the milestones put in place in the LOA, it made a request that "no deterrent action"

should be taken to cancel the LOA. The PEL followed this up with yet another communication dated 16.6.2011 issued to the Ministry of Coal, which was on the same line as, the letter dated 7.6.2011.

23. In view of the petitioner having failed to achieve milestones, as stipulated in the LOA, SECL issued a communication dated 8.8.2011 to PEL, wherein, additional CG equivalent to Rs. 2,62,18,080/- was sought. In this communication a reference was made to an earlier communication dated 13/14.05.2011 issued by it, wherein an additional CG of 10,48,72,320/- was sought. Since there was a deficit in the amount furnished via the said CG, this additional CG, to which I have made a reference above, was sought.

24. To show its bonafides, PEL wrote to the Minister for Power on 11.08.2011 to indicate that it will acquire lands to the extent of 200 acres via sale deeds and another 500 acres through execution of lease deeds. A reference was also made to the fact that, it had incurred a sum of Rs. 39 crores (approximately) in the following manner:

25. On account of the various requests issued by PEL, it appears that on 29.8.2011, Ministry of Coal forwarded its representations to the Central Electricity Authority, with a direction that the present status of the project should be made known to it.

26. In the meanwhile, as demanded by the SECL, a CG to the extent of Rs. 2,62,18,080/- was furnished by way of a bank guarantee. This incidentally was the third bank guarantee issued by PEL. The said bank guarantee was sent under the cover of letter dated 23.9.2011. In this letter, a reference was also made to various milestones which were either achieved or in the process of being achieved. In regard to milestones no. 8, relating to financial closure, PEL referred to its "in principle letter" and, indicated furthermore that, it was pursuing the execution of a loan agreement with Axis bank.

27. PEL claims that the Appraisal Committee on Environment Impact assessment of Thermal Power and Coal Mine Projects, at its meeting on 7.2.2012, did not grant approval as, its request for change of location was pending consideration. This apparently prompted petitioner to approach CEA vide its communication dated 18.02.2012. On the said date a communication was also issued to the Ministry of Power and Ministry of Coal for change of location.

28. Vide communication dated 2.5.2012, the Ministry of Power recommended a change of location of the power plant, which PEL proposed to relocate from Bhavnagar to Pipavav area. By a communication of 21.5.2012 PEL reiterated its request for change of its location based on various factors including the recommendation by Ministry of Power for change of location. The Ministry of Coal on 28.5.2012 informed the PEL apparently with respect to a letter dated 9.5.2011 that it would have to fulfill certain enclosed guidelines for change of location before its request in regard to the same could be examined. The aspect of change of location of power plant was once again articulated by PEL in its

letters dated 18.6.2012 and 18.7.2012 to the Ministry of Coal and 4.07.2012 and 18.7.2012 to SECL. In the letter to SECL, a request was made that no action should be taken for withdrawal of the LOA and consequent encashment of the CG. However, on 30.07.2012, the Ministry of Coal, Government of India, informed PEL that its request for change of location was considered and that it had been rejected on the ground that it had failed to achieve the milestones provided in the LOA. It specifically adverted to the fact that some of the milestones, which had not been achieved, did not fall within the ambit of force majeure, as per the conditions stipulated in the LOA. The said communication also alluded to the fact that there was no provision in the LOA for extension of the validity of the LOA. Immediately thereafter the petitioner shot of a letter dated 31.7.2012, to review the decision taken by it, in its communication dated 30.07.2011.

29. On 06.09.2012 SECL sought invocation of the three bank guarantees furnished by PEL. A copy of the letter by SECL to Axis bank Ltd., which was the bank which had furnished the three bank guarantees was also sent to PEL.

30. It is in this background that the petitioner approached this Court on 10.09.2012 seeking a stay on the invocation and/or the encashment of the bank guarantees, in addition to a stay on the impugned letter dated 30.07.2012.

SUBMISSION OF COUNSELS

31. In the aforesaid background following arguments were advanced on behalf of PEL by Mr. Narasimha, learned senior counsel, assisted by Mr. K. Parameshwar and Mr. Kapil Rustagi, Advocates. Mr. Narasimha briefly submitted as follows:

(i) The impugned letter dated 30.07.2012, whereby the request of PEL for change of location of its power plant was rejected, was illegal and unfair having regard to the fact that the PEL had been seeking a change in location of its power plant since 21.8.2010. It was submitted that it took respondent no. 1 nearly two years to reject PEL's request; thereby undermining its request to achieve the milestones stipulated in the LOA.

(ii) The invocation of the three bank guarantees was connected to and/or related to the communication dated 30.07.2012, and therefore, ought not to be allowed to be encashed as that would set back PEL financially, in respect of investment undertaken qua the project.

(iii) The invocation of the bank guarantees in issue, was against the provisions of the clause 3.4.1 of the LOA, which required issuance of a prior notice in writing of at least seven (7) days before SECL could proceed to cancel or withdraw the LOA. The letter dated 03.09.2012 of SECL, which sought to cancel the LOA, followed by encashment of the bank guarantees in issue, did not adhere to the seven (7) days time frame stipulated in clause 3.4.1 of the LOA. Resultantly, the invocation letter of 06.09.2012 was clearly impregnated with an inherent defect. In other words, the invocation was not in accordance with the terms of contract.

(iv) The invocation was both fraudulent and inequitable, in as much as, the defect in the invocation letter of 6.9.2012 was sought to be cured by issuing two letters of even date, i.e., 10.09.2010. The first letter dated 10.09.2010 was issued from the Bilaspur office of SECL, while the second letter also dated 10.09.2010 was issued from the Kolkata office of SECL. The defect in the first letter was sought to be cured by a letter dated 11.9.2012; which evidently was issued once again from the Bilaspur Office of SECL. It was submitted that these letters were issued post the hearing held on 10.9.2012, with a predetermined agenda, which was, demonstrable from a fax which had been received in the office of the petitioner on 9.9.2012. The contention was that the letter which bore the date 10.9.2010 and made a reference to SECL's earlier communication with PEL on 3.9.2012 had been faxed on 9.9.2012 and, therefore, was premeditated and this defect was sought to be cured after the hearing of 10.9.2012 by issuance of a letter dated 10.9.2012 from SECL Kolkata office and a second letter of 11.9.2012 from SECL Bilaspur office, seeking to correct the error, in its earlier letter dated 10.9.2012.

(v) The invocation was inequitable in the circumstances that huge amount of money, time and effort had been spent by PEL in attempting to set up a power plant. The non-achievement, if any, with regard to the milestones stipulated in the LOA, was attributable to respondent no. 1, i.e., the Ministry of Coal and not the PEL.

32. In response Mr. Bhati, Advocate, who appeared for SECL submitted that apart from objections to the territorial jurisdiction of this Court in entertaining the writ petition there was no case made out by PEL for grant of stay vis-?-vis the bank guarantees in issue. It was submitted that the LOA by the efflux of time had come to an end on 12.7.2012. Since, PEL had failed to achieve the milestones stipulated in the LOA, SECL was well within its right to invoke the bank guarantees in issue. As to whether respondent no. 1's decision to reject PEL's request for change of location of power plant is sustainable, is a matter which the court would examine in the course of adjudication of the writ petition, but that decision would not have, at present, any bearing on the invocation of the bank guarantees in issue, as these are independent contracts, executed between the beneficiary, i.e., the SECL and the bank (in this case the Axis Bank Ltd.). There being no fraud in the invocation of the bank guarantees in issue, which is established and known to the bank, no stay ought to be granted on the invocation of the bank guarantees. Furthermore, it was submitted that there was no case of special equity made out in the present case, as right from the very beginning, the petitioner has been in breach of various milestones stipulated in the LOA. In any event, it was contended, the bank guarantees in issue, were independent of the underlying contract.

33. Mr. Rajeeve Mehra, learned ASG who appeared for respondent no. 1, supported the decision taken by respondent no. 1 to reject the PEL's request for change of location of its power plant. Mr. Rajeeve Mehra relied upon the

correspondence to demonstrate that the change of location was sought after a lag of nearly eighteen (18) months, since its purported approval by the State of Gujarat. Mr. Mehra submitted that the change of location required fulfillment of guidelines dated 09.05.2011 to which reference has been made in respondent no. 1's letter dated 28.05.2012. Mr. Mehra also took an objection qua the territorial jurisdiction of this Court to entertain the petition. This objection, of course, at this stage was raised orally, since replies had not been filed.

REASONS

34. Having heard the Learned Counsels for the parties, and perused the record, in my view, the following has emerged:

(i) The PEL had initiated a process for setting up a power plant sometime in 2007. For this purpose a MOU was executed with the State of Gujarat through GPCL on 30.04.2007.

(ii) The SLC(LT) appears to have authorized issuance of a LOA by Coal India Limited for a capacity of 1x500 MW subject to PEL achieving milestones, which were approved, as far back as, in November, 2008.

(iii) The PEL sought and obtained a change of the location of its power plant from Bhavnagar to Pipavav as far back as on 16.02.2009 from the State of Gujarat.

(iv) The SLC(LT) recommended coal linkage for its 1x500 MW power plant on 29.1.2010. There is no averment in the petition as to whether SLC(LT) was informed at this stage, about the approval qua the change of location of its power plant.

(v) In any event, admittedly, PEL informed respondent no. 1, Ministry of Coal, with regard to its desire to change the location on account of "technical reasons" for the first time on 21.08.2010. It is in this letter, that it referred to the fact that the State of Gujarat had accorded its approval vide communication dated 16.02.2009 and consequently, had resulted in its MOU dated 30.04.2007 being amended accordingly.

(vi) This request lay dormant and was revived by PEL by a communication dated 9.5.2011, addressed once again to respondent no. 1. Importantly, in both these communications dated 21.8.2010 and 9.5.2011 there is not only a reference to the request for change of location of the power plant but also with regard to request for approval for a change in plant configuration from 1x500 MW to 2x660 MW.

(vii) SECL vide communication dated 10.5.2011 forewarned PEL with regard to the failure on its part to achieve milestones stipulated in the LOA. From then on, PEL sought to explain why it had failed to achieve the milestone stipulated in the LOA. In respect of the correspondence on that issue, I have already made a reference above, which I do not intend to advert to once again. Suffice it to say, admittedly, apart from the fact that change of location for the power plant, there

were several other milestones which were not related to change of location but nevertheless were vital towards discharge of obligations undertaken by PEL, under the LOA. For example: crucially, the obligation to bring about finance. This obligation required PEL to bring on board the banks and financial institutions which would back the execution of the power plant project. Even according to PEL the estimated cost of the project was Rs. 7100 crores, against which PEL had in place in principle approval of the Axis Bank of Rs. 5300 crores. This in principle approval was also subject to a final sanction, due diligence, and internal approval of the said bank.

(viii) Mr. Narasimha learned senior counsel for the petitioner did not refer to any document to demonstrate that it had achieved the necessary financial closure within the timeline of three (3) months stipulated in the LOA. In fact this milestone of financial closure was a "special milestone", which was adverted to both in the LOA and the letter of 30.04.2007, issued by SECL which, preceded the execution of the LOA

(ix) The LOA came to an end by efflux of time on 12.7.2012. Therefore, there was no necessity to cancel or withdraw the LOA. However, in terms of clause 3.4.2, SECL was well within its right to encash the CGs which were in the form of bank guarantees in the event of the failure on the part of PEL to achieve the milestones referred to in annexure 1 of the LOA

(x) The LOA could not have been extended beyond the period of twenty four (24) months, except in accordance with clause 3.5 and that too for a period of three (3) months.

(xi) Clause 2.1 of the LOA made time the essence of the contract. The only exception being: an eventuality which could be classified as force majeure. Clause 2.1, specifically excluded from the term force majeure, amongst others, the inability or failure to obtain finance for setting up the plant, or even the failure to comply with existing rules and regulations, with respect to statutory clearances applicable to the plant.

35. Except for a bald averment, there is nothing to show that the invocation is fraudulent or that a fraud has been employed, which is known to the bank. As regards special equities, in my view, failure to achieve the stipulated milestones, brings case out of the category of special equities. As indicated above, the petitioner's request for change of location, prima facie, seems suspect for the reason that SLC(LT) apparently was not told of the approval it had obtained for change of location from the Government of Gujarat, as far back as on 16.02.2009. A request with respondent no. 1 for change of location was also placed on record only on 21.08.2010. It, prima facie, seems that PEL was not positioned to set up the plant fully, when it executed the LOA with SECL. Though, PEL has claimed that it has invested Rs. 39 cores in setting up of the plant till today, a substantial amount, out of this, i.e., Rs. 10,00,000/- is for acquisition of land rights, while the balance amount is for furnishing the bank guarantees in

issue. Only a sum of Rs. 25,80,580/- has been spent towards plant and machinery, while a sum of Rs. 11.7 cores, of which no details are given, have been spent on preliminary and preoperative expenses against a total estimated cost of Rs. 7100 crores, which is 0.55% of the project cost.

36. Admittedly, the bank guarantees in issue are unconditional bank guarantee, which the bank is required to honour without demur. I may only note that quite curiously even though stay on invocation of bank guarantees was sought, the same were not filed with the writ petition in the first instance. The document came to be filed by way of an additional affidavit on 17.09.2012 i.e., prior to the second date of hearing, which was as indicated above, was held on 18.09.2012.

37. This being the position, in my view, no case of stay of invocation of bank guarantees in issue is made out. Mr. Narasimha's submission that invocation on 6.09.2012, was not in accordance of clause 3.4.1 of LOA, is fallacious for three reasons: First, this was not a case of cancellation or withdrawal of LOA; even though SECL in letter of 03.09.2012 sought to ride two boats at the same time. On the one hand in the letter dated 03.09.2012 SECL said that the validity of the LOA was for twenty four (24) months, on other words it came to an end by efflux of time; on the other, it was contended, quite erroneously that it was proceeding to cancel the LOA and encash the CGs. The LOA had quite clearly lost its efficacy by efflux of time on 12.7.2012. Secondly, since the PEL had breached the milestones stipulated in the LOA, SECL was well within its right to invoke and encash the bank guarantees in terms of clause 3.4.2. Lastly, in any event this defect was cured by issuance of the letter of invocation dated 10.9.2012. As a matter of fact, the letter dated 10.9.2012, which was erroneously issued from the Bilaspur office of SECL was corrected by SECL by issuance of a second communication dated 11.9.2012. In my view, for all these reasons, no case is made out for grant of ad interim relief qua invocation of the three bank guarantees in issue.

38. As regards prayers made qua stay of the operation of the impugned letter dated 30.07.2012, once again, no case is made out since the said communication is issued in response to PEL's request for considering change of location of the power plant. Whether or not the request of PEL was rightly rejected, is a matter which would require further examination after a return is filed by respondent no. 1. The PEL, in my view, has not been able to make out a prima facie case, based on the documents placed before me, for granting any ad-interim relief even with respect to the impugned letter dated 30.07.2012.

39. Finally, with regard to the prayer made for issuance of an order restraining the respondents from withdrawing or cancelling LOA dated 12.7.2010, in my view, is completely without basis as the present case is not one of withdrawal or cancellation of LOA but, is one where LOA expired by efflux of time.

40. For all these reasons, the captioned application is dismissed and the interim order dated 19.09.2012 stands vacated.

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41. List on 23.01.2013. The order passed today is suspended till 30.10.2012 to enable the petitioner to prefer an appeal.

Dasti under the signatures of the court master.