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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No.4795 of 2022

MB Power (Madhya Pradesh) Limited Registered Office at Laharpur, Jaithari, Anuppur, Madhya Pradesh – 484330 India,

Through: Sandeep Dubey, Manager (Fuel Management), S/o K.K. Dubey, A/o. 40 years, R/o Manager (Fuel Management), M.B. Power (Madhya Pradesh) Ltd, Laharpur, Jaithari, Anuppur, District Anuppur, Madhya Pradesh- 484330.

---- Petitioner

Versus

1. South Eastern Coalfields Limited through Chief General Manager/General Manager (S&M), HQ, Seepat Road, Bilaspur, Chhattisgarh495006.
2. Ministry of Coal, through – Secretary, No..11, Akbar Road, New Delhi- 110011.
3. Coal India Limited, through – CMD, Coal Bhawan Premise NO.04, Plot No.AF-III, Action Area-1A, New Town, Rajarjat, Kolkata- 600156.

---- Respondents

(Cause Title is taken from Case Information System)

For Petitioner	:	Mr. Sourabh Dangi, Mr. Vaibhav Mishra, & Mr. Sajal Gupta, Advocates
For Respondent No.1 :		Mr. Vivek Ranjan Tripathi, Senior Advocate, along with Mr. H.S. Ahluwalia & Mr. Atul Kesharwani, Advocates
For Respondents No.2: & 3		Mr. Ramakant Mishra, Deputy Solicitor General along with Mr. Tushar Dhar Diwan, Central Government Counsel
Date of Hearing	:	29.02.2024
Date of Order	:	01.04.2024

Hon'ble Shri Justice Rakesh Mohan Pandey

CAV ORDER

1. The petitioner has preferred this petition under Article 226 of the



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Constitution of India seeking the following relief(s):-

I. That this Hon'ble Court may kindly be pleased to pass a writ of mandamus restraining the Respondent No.1 from arbitrarily and unreasonably reading into the Petitioner's FSA dated 26.03.2013 a nonexistent clause 2.8.2.3, which forms part of FSAs of some other companies,

II. That consequently this Hon'ble Court may kindly be pleased to pass a writ of mandamus restraining the Respondent No.1 from arbitrarily and unreasonably applying extensions and/or Cut-Off Dates, including the Cut-Off dated of 31.03.2022 pertaining to the said clause 2.8.2.3 to the Petitioner's FSA dated 26.03.2013 particularly when the Petitioner's FSA does not contain the said clause 2.8.2.3,

III. That further consequently this Hon'ble Court may kindly be pleased to pass a writ of mandamus to the Respondent No.1 to supply coal in accordance with the existing terms of the Petitioner's FSA dated 26.03.2013 for the entire duration of the FSA, including all of the quantity required for generation of power agreed to be supplied towards the 150 MW Medium Term PPA dated 18.05.2022 with Haryana Discom (from the date of Petitioner's request dated 24 May 2022) and in respect of any and all other Long-Term and/or Medium Term PPAs that may be executed by the Petitioner for the remaining contract period (i.e., until 26.04.2036) under the Petitioner's FSA 26.03.2013.

IV. Any other relief, which this Hon'ble Court deems, fit in the facts and circumstances may also be granted in favour of the petitioner.”

2. Briefly stated facts of the present case are as follows:-

A. The petitioner company is engaged in the business of power generation having an operational 1200 MW coal-based thermal power project in District Anuppur, Madhya Pradesh. Earlier, it was practice to issue a linkage letter for a stable supply of coal



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on the basis of interest shown by the companies setting up thermal power projects. Thereafter, once an allottee of linkage shows that it had made progress with respect to its project interest, which would include acquiring more than 50% of land and achieving financial closure to fund the project, LoA would be granted.

B. The petitioner signed LoA on 06.06.2009 with SECL, thereafter Fuel Supply Agreement (in short 'FSA') was entered into between the parties on 26.03.2013. According to clause 2.2 of the agreement, the FSA shall be valid for a period of 20 years or the effective date of the life of the power plant, whichever is earlier. Clause 2.8 specifies two condition precedents according to which the agreement is subject to the satisfaction of the condition precedents provided under Clauses 2.8.1 and 2.8.2.

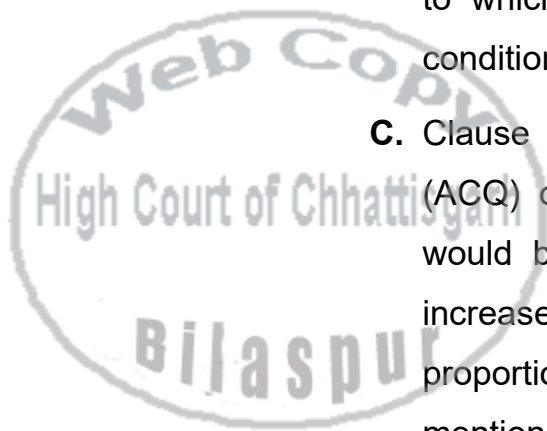
C. Clause 4.1.1 provides that the Annual Contracted Quantity (ACQ) of Coal to be supplied by the SECL to the petitioner would be 14,98,176 tonnes per annum and later on, it was increased to 55,48,000 tonnes per annum. The ACQ would be in proportion to the PPAs executed by the petitioner. It is also mentioned in the same clause that whenever there is any change in the percentage of PPA(s), a corresponding change in ACQ shall be effected through a side agreement.

D. Two more PPAs were issued by respondent No. 1 on 13.07.2015 and 17.04.2016 after due satisfaction of condition precedents.

E. The petitioner and SECL entered into the side agreement(s) (Addendum/s) and ACQ was also enhanced in proportion to the subsequent increase in the percentage of PPA(s).

F. The petitioner is getting coal under the FSA in respect of its 2 long-term PPA(s) in Madhya Pradesh and Uttar Pradesh and additional supply was also sanctioned from March 2019 to March 2022, in respect of 175 MW medium-term PPA with Haryana.

G. The petitioner participated in an online bid floated by the





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Haryana DISCOM on 21.04.2022. Haryana DISCOM enquired about the petitioner's linkage fuel status. The petitioner company ensured the Haryana DISCOM for a stable supply of coal on the basis of the Fuel Supply Agreement (FSA) and side agreements entered into between the petitioner and SECL. The Haryana DISCOM relying upon the documents submitted by the petitioner signed 150 MW PPA on 18.05.2022. The petitioner approached SECL on 24.05.2022 for the increase of coal supply to the tune of 7,41,711 tonnes per annum for 150 MW Haryana PPA in addition to the existing ACQ.

- H. The petitioner stated in its representation that the entire coal supply would not go beyond the allotted ACQ of 55,48,000 tonnes per annum. The petitioner again sent a reminder to the SECL on 20.08.2022, stating the fact that the petitioner company has already commenced supply under 150 MW Haryana PPA with effect from 19.07.2022. The Central Electricity Authority wrote a letter to the SECL and made a recommendation to consider the claim of the petitioner for enhancement of coal supply in respect of the Haryana PPA. The Central Electricity Authority observed that in the Standard Linkage Committee of Coal (for short, SLC), meeting dated 03.02.2022 time has been granted to comply with the third condition precedent till 31.03.2022; the third condition precedent does not find a place in the petitioner's FSA, therefore, SLC decision on the cut-off date would not apply in the case of the petitioner. The petitioner has signed a medium-term PPA with Haryana and the same is in accordance with para A(v) of the SHAKTI Scheme. On 17.10.2022, the Ministry of Power also wrote a letter to the Ministry of Coal, making a recommendation to consider the claim of the petitioner in light of the letter dated 26.08.2022 issued by the Central Electricity Authority. Thereafter, the Ministry of Power issued a memorandum in consultation with the Central Electricity Authority on 28.10.2022, wherein it is observed that 'the old regime of LoA-FSA would come to finality and fade away' and it is also stated in that memorandum that





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non-commissioned capacity LoA would be cancelled with the cut-off date of 31.03.2022 and for commissioned capacity with its invoice FSA, coal supply would be at the stage of their LTPPAs and MTPPAs till the validity of their FSA.

- I. The agreement entered into between the petitioner and respondents includes only two condition precedents i.e. 2.8.1 and 2.8.2. Condition 2.8.2 describes the purchaser's condition precedents.
- J. The condition precedent 2.8.2.3 was not a part of the petitioner's FSA.
- K. On 01.04.2019, the SHAKTI Scheme was incorporated into the FSA executed between the petitioner and respondent No. 1 vide addendum No. 8 which is as under:-

1. For plants who have submitted Medium Term PPA in accordance to the SHAKTI Policy, supply under such Medium Term PPA shall be to the tenure of the Medium Term PPA and the quantity would be proportionate to the Medium Term PPA. The quantity, tenure etc. shall be monitored through a schedule to the Medium Term PPA.

2. Satisfaction of PURCHASER's Conditions Precedent will be up to 31.03.2022. however the PURCHASER required to furnish PPA with DISCOMS/PTCs having back to back agreement with DISCOMS within 31.03.2020 [as per recommendation of the Standing Linkage Committee (Long Term) in its meeting dated 29 June, 2017] or as may be clarified by the Competent Authority time to time.

3. Condition Precedents for supply of imported coal shall not be applicable and Schedule VII of the FSA No. N85 dated 26.03.2013 shall not be required to be executed for supply of coal under Medium Term PPA."

- L. According to respondent No. 1 after the inclusion of condition precedent 2.8.2.3 in the FSA, the supply of the imported coal will not be applicable and schedule 7 of the FSA dated 26.03.2013, will not be required to be executed for the supply of coal under the medium-term PPA.
- M. After receiving the representation from the petitioner, a meeting was held on 03.02.2022 to consider the request for coal linkage





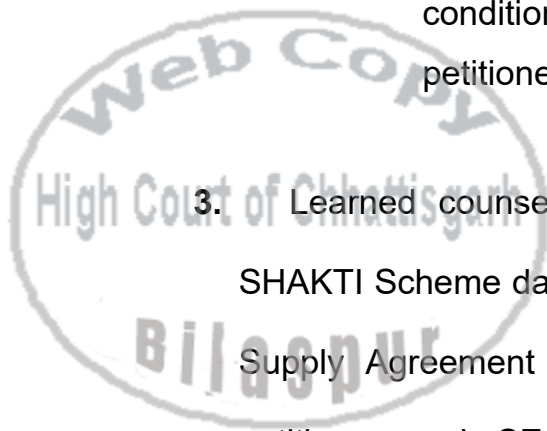
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to Central/State Sector Power Plants and to review the existing coal linkages/LoAs & other related matters. The extracts of Agenda item No. 2 of the meeting were in regard to the extension of time for entering into PPA as per condition precedent required under FSA.

N. The cut-off date was set as 31.03.2022 to furnish Long-Term Power Project Agreements (LTPPAs) either directly with distribution companies or through power trading companies, failing which, the companies have to apply for supply of coal according to the SHAKTI Scheme through e-auction.

O. In the meeting of SLC dated 28.10.2022, the claim of the petitioner was considered and rejected, and it was held that the condition precedent 2.8.2.3 squarely covers the FSA of the petitioner.

3. Learned counsel appearing for the petitioner would submit that the SHAKTI Scheme dated 27.05.2017 will not fade away or extinguish the Fuel Supply Agreement (FSA) as the same was entered into between the petitioner and SECL on 26.03.2013 along with all schedules; and, addendums (Side Agreements) were entered into between the parties from 20.03.2014 till 09.11.2020. It is further stated that by floating the SHAKTI Scheme new resumes have started for signing FSA with successful bidders, but at the same time, FSAs which were signed prior to 22.05.2017 would not automatically come to an end. The conditions mentioned in the earlier FSA cannot be amended or annulled by the introduction of the SHAKTI Scheme. It is also stated that the obligations and liabilities stated in the FSAs and the addendums will be operative despite the introduction of the SHAKTI Scheme. Learned counsel for the petitioner would further contend that the long-term PPAs were entered into between the petitioner and SECL. There is no such provision in the SHAKTI Scheme to fade away or extinguish the

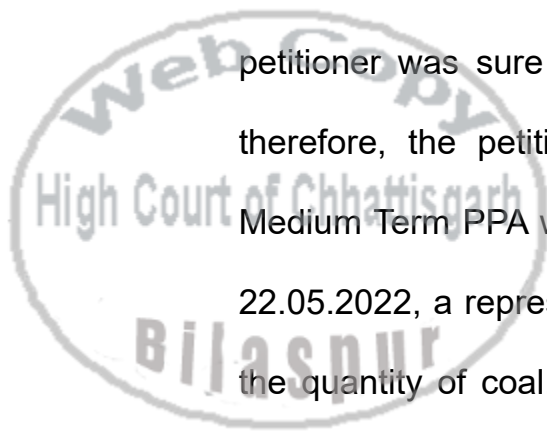




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existing FSAs. He would further argue that addendum No. 8 was executed on 01.04.2019 to the FSA and according to one of the clauses, the satisfaction of Purchaser's Condition Precedent will be up to 31.03.2022, and at the same time, the purchaser who has submitted PPA in accordance with the SHAKTI Scheme, supply under such medium term PPAs will be to the tenure of medium-term PPA and the quantity would be proportionate to that PPA. He would also contend that the FSA was entered on 26.03.2013 and the Condition Precedents (CPs) of FSA were satisfied by the petitioner and in this regard, a letter was issued on 13.07.2015 and 27.04.2016. He further submits that according to the terms and conditions of the FSA, the petitioner was sure that it would get the enhanced ACQ from the SECL; therefore, the petitioner participated in the bid with respect to 150MW Medium Term PPA with Haryana DISCOM and signed it on 18.05.2022. On 22.05.2022, a representation was made by the petitioner for the increase in the quantity of coal. The SECL referred the letter of the petitioner to Coal India Ltd. (CIL). The Central Electricity Authority also recommended to SECL to consider the letter of the petitioner. The Ministry of Coal vide letter dated 27.09.2022 reprimanded CIL as to why matters like that of the petitioner were not brought to the notice of the SLC.

4. It is also submitted that in the petitioner's FSA, there were only two condition precedents and both were fully satisfied in the years 2015 and 2016 and the condition precedent subsequently entered into FSA would not be binding upon the petitioner. He would argue that the SHAKTI Scheme has fixed the cut-off date of 31.03.2022 for the commissioning of the power plants and a lifeline has been given to the LoA holders to satisfy the mandatory third condition. He would further argue that the decision taken by





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the SLC dated 28.10.2022 is unreasonable; the SLC has misinterpreted the SHAKTI Scheme; that scheme has overridden the petitioner's FSA; the cut-off date was wrongly fixed; and, under the SHAKTI Scheme, there is no bar to supply the increased demand of coal according to the terms and conditions of the FSA. He would also argue that the claim of the petitioner was not considered properly by the SLC. He would thus submit that the respondent authority may be directed to supply the increased coal according to the demand made by the petitioner.

5. Learned counsel for the petitioner would further state that Clause 19.2 of the agreement expressly provides that the agreement cannot be modified or amended except by prior written agreement between the parties.

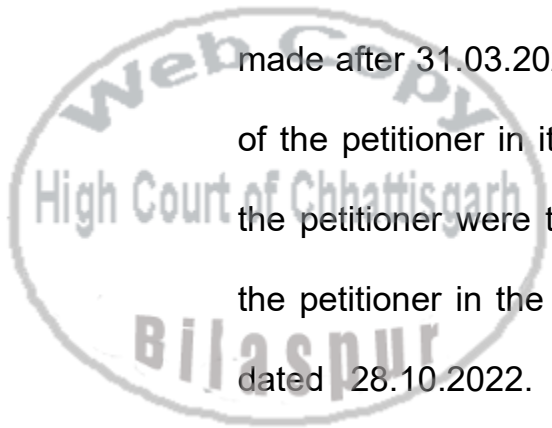
6. Per Contra, learned counsels appearing for the respondents would oppose the submissions made herein-above.

7. Mr. Vivek Ranjan Tiwari, learned Senior Advocate appearing for respondent No. 1/SECL would submit that the Fuel Supply Agreement (FSA) was entered into between the petitioner and SECL on 16.03.2013 and condition precedents were part and parcel of the agreement. He further submits that the agreement was executed when the petitioner fulfilled Clauses 2.8.2.1 and 2.8.2.2. He would also submit that one of the condition precedents was the submission of the Power Purchase Agreement (PPA) within 24 months from the date of signing of the agreement. He would state that the SHAKTI Scheme was notified on 22.05.2017 and according to this Scheme, the coal has to be allotted through e-auction in order to bring in transparency in the coal distribution system after 31.03.2022. He would further state that Clause 4.1.1 of the agreement, which deals with Annual Contracted Coal Quantity (ACQ) among the parties, permits side



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agreements in case of increase in the quantity of coal. In compliance with Clause 4.1.1, the petitioner and SECL entered into a Side Agreement called Addendum No. 8 on 01.04.2019 and it was agreed by the parties that the SHAKTI Scheme will be part of addendum No. 8. He would also state that sufficient time was granted to the FSA holders by the Central Government according to the SHAKTI Scheme and the cut-off date was set as 31.03.2022 for submission of PPAs to get coal under the old regime. He would contend that the petitioner participated in the bid floated by the Haryana DISCOM after 31.03.2022 and failed to submit PPA before 31.03.2022, as the claim of the petitioner for an increase in coal supply was made after 31.03.2022, therefore, the SLC (LT) declined to accept the claim of the petitioner in its meeting dated 28.10.2022 and all grounds raised by the petitioner were taken into consideration. He would further contend that the petitioner in the present case has not challenged the order of the SLC dated 28.10.2022. He argues that the petitioner cannot approbate or reprobate at the same time. He would also contend that when the petitioner agreed to adopt the SHAKTI Scheme by agreement/Addendum No. 8, at the same time, it cannot contend that the terms and conditions of the SHAKTI Scheme would not apply. He would further argue that Clause 17 of the FSA deals with the force majeure clause. He would also argue that the SHAKTI Scheme is a law which holds the field with regard to the supply of coal and the petitioner cannot be benefited beyond the scope and object of the SHAKTI Scheme. In support of his contentions, he placed heavy reliance on the judgment rendered by the Hon'ble Supreme Court in the matter of **APM Terminals B.V. v. Union of India, 2011 (6) SCC 756**, wherein, it has been observed and held that a change in policy by the Government can have an





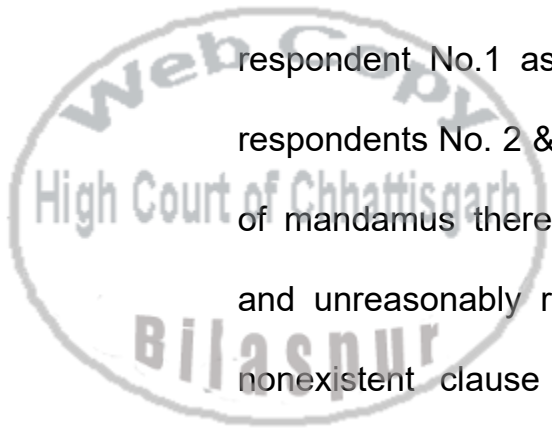
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overriding effect over private treaties between the Government and a private party, if the same was in the general public interest provided such change in policy was guided by reason.

8. Mr. Ramakant Mishra, Dy. SG would adopt the submissions put forth by the learned Senior Counsel.

9. I have heard learned counsel appearing for the respective parties, considered their rival submissions made herein-above and perused the documents placed on the record with utmost circumspection.

10. Having heard arguments addressed by the learned Counsel appearing for the petitioner and the learned Senior Counsel appearing on behalf of respondent No.1 as well as the learned Dy. SG appearing on behalf of respondents No. 2 & 3, it is conspicuous that the petitioner has sought a writ of mandamus thereby restraining respondent No. 1/SECL from arbitrarily and unreasonably reading into the Petitioner's FSA dated 26.03.2013, a non-existent clause 2.8.2.3 which forms part of FSAs of some other companies, restraining respondent No. 1 from arbitrarily and unreasonably applying extensions and/or Cut-Off Dates, including the Cut-Off date of 31.03.2022 pertaining to the said clause 2.8.2.3 to the Petitioner's FSA dated 26.03.2013 particularly when the Petitioner's FSA does not contain the said clause 2.8.2.3, and further consequently that respondent No.1 to supply coal in accordance with the existing terms of the Petitioner's FSA dated 26.03.2013 for the entire duration of the FSA, including all of the quantity required for generation of power agreed to be supplied towards the 150 MW Medium Term PPA dated 18.05.2022 with Haryana DISCOM (from the date of Petitioner's request dated 24 May 2022) and in respect of any and all other Long-Term and/or Medium Term PPAs that may be executed by the





Petitioner for the remaining contract period (i.e., until 26.04.2036) under the Petitioner's FSA 26.03.2013.

11. SECL/respondent No. 1 vide letter dated 06.06.2009 issued a Letter of Assurance ('LoA') for the supply of coal to the Petitioner. The preamble of said LoA reads as under:-

"Preamble

In consideration of the request Anuppur TPP (Unit-1&2) of M/s MB Power (Madhya Pradesh) Limited, 43B, Okhla Industrial Estate, New Delhi-110020 (hereinafter referred to as the "Assured") for issuance of Letter of Assurance (hereinafter referred to as "LOA") requiring 41,62,000 tonnes per annum (tpa) of F Grade coal for its 1000 MW Power Plant located at Anuppur TPP (Unit-1&2) of M/s MB Power (Madhya Pradesh) Limited, Mouhari, Auppur Distt., Madhya Pradesh (hereinafter referred to as "the Plant"), from about () as requested by the Assured, SECL (hereinafter referred to as the "Assurer") hereby provisionally assures that it would endeavour to supply coal to the Assured subject to the following terms and conditions."*

12. A plain reading of the Preamble of LoA shows that the SECL/respondent No. 1 had assured the supply of coal to the Petitioner's power plant subject to certain terms and conditions. The Annexure-I appended to LoA provided for milestones to be achieved by the Assured during the validity of LoA – IPPs & Pvt. GENCOs. Further, the Petitioner and SECL/respondent No. 1 also entered into a Fuel Supply Agreement (FSA) dated 26.03.2013. As per Clause 2.2 of the FSA, the term of the agreement is twenty years from the effective date or the life of the power plant. Clause 2.8 prescribes Condition Precedent (CP) under which Clause 2.8.1 talks about Seller's Conditions Precedent and Clause 2.8.2 talks about Purchaser's Condition Precedent namely, clauses 2.8.2.1 and 2.8.2.2.

13. Clause 4 of the FSA deals with the Annual Contracted Quantity



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guaranteed to the Petitioner. From a bare reading of Clause 4.1.1 and Schedule I of the FSA it is quite vivid that the Annual Contracted Quantity (ACQ) shall be in proportion to the percentage of generation covered under long-term PPAs executed by the Petitioner with the DISCOMs either directly or through PTC(s) on a back-to-back basis. In addition, whenever there is any change in the percentage of PPAs, a corresponding change in ACQ shall be effected through a side agreement, and such changes shall be allowed to be made only once a year, effective from the beginning of the next quarter.

By virtue of Addendum 11 dated 09.10.2020 executed between the parties, the 100% normative quantity of power plant of the purchaser at 85% PLF is mentioned as 5.548 Million tonnes. Vide letters dated 13.07.2015 and 27.04.2016 SECL/respondent No. 1 acknowledged the satisfaction of CPs provided in the FSA. From the documents placed on the record, it is quite evident that the petitioner has also entered into as many as 11 Addendums (Side Agreements), consequently, the ACQ was enhanced proportionately with the increase in the PPAs entered into by the petitioner each and every time. Thereafter, the petitioner entered into a 150 MW medium-term PPA with the Haryana Power Purchase Centre (DISCOM) on 18.05.2022.

14. With the change in requirement, vide letter dated 24.05.2022 the petitioner made a request to SECL/respondent No. 1 for addendum in ACQ of FSA dated 26.03.2013 on account of medium-term PPA signed with Haryana Power Purchase Center (HPPC) for 150 MW power supply to Haryana DISCOMs. It was specifically stated therein that even with the aforesaid demand, the total ACQ would be 46,35,020 TPA. Vide letter dated 20.08.2022 again a similar request was put forward stating that the supply of



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power to Haryana from the petitioner's thermal power station has already commenced w.e.f. 19.07.2022.

15. Against the backdrop, the Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India known as the 'SHAKTI Scheme' was introduced by the Ministry of Coal, Government of India on 22.05.2017. The object of the said scheme was to bring the transparency in coal distribution system all over the country and to monitor the supply of coal throughout the country. The SHAKTI Scheme, 2017 contemplated phasing out of the LoA-FSA regime. But at the time when the SHAKTI Scheme was introduced, the Petitioner had already executed the FSA with SECL, and the coal supply was being done as per the provisions of the FSA.

16. In the said scheme, under Clause A (i) and (ii) it is specifically spelt out that the outer time limit within which the power plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022 failing which LoA would stand cancelled. The Coal supply to these capacities may be at 75% of the ACQ and the same may be increased in future based on coal availability. The pending applications for grant of LoAs were closed. Clause A(i) of the SHAKTI Scheme contemplates the execution of further FSAs with the existing LoA holders subject to those LoA holders commissioning their power plants by 31.03.2022. The SHAKTI Scheme, therefore, does not seem to extinguish the existing FSAs but creates one last opportunity for execution of further LoAs subject to the satisfaction of the above conditions. Since the petitioner already has a valid and effective FSA, this clause is not applicable to the petitioner. Clause A(iii) of the SHAKTI Scheme specifically says that the capacities totalling about 68,000 MW as per the decision of the CCEA dated 21.06.2013 would continue to get coal at 75% of the ACQ even



beyond 31.03.2017. The coal supply to these capacities may be increased in future based on coal availability. This clause is applicable to the petitioner. It gives a kind of assurance to the companies like the petitioner that they would continue to get the coal under their FSA even beyond 31.03.2017 and this ACQ of 75% may be increased based on the coal availability. It is further stated in Clause A(iv) that about 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.03.2015. Coal supply to these capacities may be allowed at 75% of the ACQ against FSA provided these plants are commissioned within 31.03.2022. In the facts and circumstances of the case in hand, this clause would not be applicable to the petitioner. In Clause A(v) it is stated that actual coal supply to power plants shall be to the extent of long-term PPAs with DISCOM/State Designated Agencies (SDAs) and Medium Term PPAs to be concluded in future against bids to be invited by DISCOMs as per bidding guidelines issued by the Ministry of Power. The SHAKTI Scheme even permitted the inclusion of Medium Term PPAs. Immediately after Clause A(v), it is stated that the old regime of LoA-FSA would come to finality and fade away.

17. From a plain reading of the SHAKTI Scheme itself, it is quite vivid that there is nowhere stated a cutoff date for submission of PPAs for inclusion under FSA, particularly with respect to existing FSAs. The SHAKTI Scheme forbids execution of new FSA but with regard to existing FSAs, there is no whisper. The sentence '*with these, the old regime of LOA-FSA would come to finality and fade away*' means that with the execution of the last batch of FSAs in favour of pending LoA holders, subject to their plants being commissioned by 31.03.2022, no further FSAs would be executed nor LoAs would be granted. The expression '*fade away*' has its own meaning.



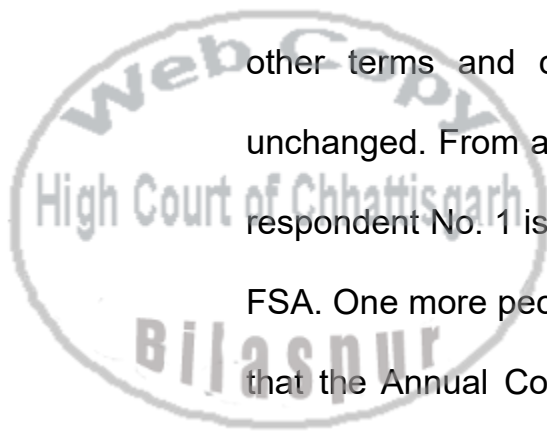
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However, the above-stated sentence does not mean that the old regime or existing FSAs would be completely and automatically wiped out or that the concluded and binding FSAs executed between the parties would be extinguished. It comes with only caveats:-

- (i) after the execution of 'these' last batch of FSAs in favour of pending LoA holders;
- (ii) subject to plants being commissioned by 31st March, 2022, no further FSAs would be executed nor LoAs shall be granted.

18. In addendum No. 11 (Side Agreement for enhancement of ACQ) dated 09.10.2020 executed between the parties it was expressly clarified that all other terms and conditions of the FSA dated 26.03.2013 will remain unchanged. From a bare reading of Clause 4.1.1 of FSA, it is apparent that respondent No. 1 is under obligation to supply the coal for the entire term of FSA. One more peculiar fact of the case which may be taken into account is that the Annual Contracted Quantity (ACQ) to be supplied by respondent No.1/SECL to the petitioner according to FSA is 55,48,000 tonnes whereas if the PPA submitted by the petitioner entered with Haryana DISCOM and request for supply of additional coal is accepted, it would be below the enhanced/already agreed quantity.

19. From an in-depth scrutiny and analysis of the aforesaid terminology it comes to light that the old system/regime of firstly, grant of LOA and then the FSA would come to a grinding halt. It can also be deciphered at ease that further or future LoAs or FSAs or the like would be executed/entered into between the parties only through the way/mode prescribed under the SHAKTI Scheme. However, this does not in any way affect the existing FSAs including that of the petitioner which have a term of 20 years as stated





above.

20. One more important aspect of the matter that cannot be lost sight of is that there was no intent of the SHAKTI Scheme to extinguish/terminate all the existing FSAs otherwise it must have expressly provided for the same. In the absence of any expression provision in this regard, this Court cannot presume the contrary. The SHAKTI Scheme, with the introduction of a new and transparent policy, further streamlined the future coal allocation policy for the power sector. Thus, with the coming into operation, the SHAKTI Scheme did not touch upon the sanctity of the petitioner's FSA. In other words, the SHAKTI Scheme did not seek to override the Petitioner's FSA which continued to remain in effect. The provisions of the SHAKTI Scheme did not intend to affect the term of the existing FSAs or to prematurely extinguish them. Thus, in view of the discussion held so far it can safely be held that the SHAKTI Policy dated 22.05.2017 did not fade away or extinguish the Fuel Supply Agreement (FSA) of the petitioner.

21. Moving further, addendum 8 dated 01.04.2019 was executed between the parties in order to give effect to Medium Term PPA, and also certain issues in the FSA concerning commissioning, minimum assured supply level etc., were required to be amended thus for the pending FSA modification, the aforesaid Addendum/Side Agreement was executed for enabling supply of coal. The aforesaid agreement provides that the SHAKTI Scheme of the Ministry of Coal dated 22nd May, 2017 shall be part and parcel of this agreement. Clause 1 of the aforesaid Addendum states that for plants who have submitted Medium Term PPA in accordance with the SHAKTI Policy, supply under such Medium term PPA shall be to the tenure of the medium-term PPA and the quantity would be proportionate to the Medium Term PPA.



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Clause 2 further states that satisfaction of Purchaser's Condition Precedents will be up to 31.03.2022 however the Purchaser is required to furnish PPA with DISCOMs/PTCs having back-to-back agreement with DISCOMs within 31.03.2020 [as per recommendation of the Standing Linkage Committee (Long Term) in its meeting dated 29th June, 2017] or as may be clarified by the Competent Authority.

22. Clause 2 of the Addendum 8 mandates for twin conditions to be satisfied:-

- (i) Satisfaction of Purchaser's Conditions Precedent will be up to 31.03.2022;
- (ii) Purchaser is required to furnish PPA with DISCOMs/PTCs having back to back agreement with DISCOMs within 31.03.2020 (as per recommendation of the Standing Linkage Committee in its meeting dated 29th June, 2017).

23. Vide minutes of meeting dated 17.07.2017, the SLC (LT) for Power Sector held on 29.06.2017 discussed the issue of Extension of time for fulfillment of Condition Precedent Clause No. 2.8.2.3 of FSA under Agenda Item No. 2. Brief description of Agenda item is that the issue of extension of Condition Precedent clause No. 2.8.2.3 of FSA was placed before the SLC (LT) in its meeting held on 17.07.2015 in the context of a particular TPP. However, the Committee made a general recommendation that the extension of time for fulfilling all such projects, except COD and commissioning may be granted up to 31.03.2016. The recommendation of the SLC (LT) was submitted to the competent authority ie. MoS (I/C) for Coal. Based on the recommendation of the Ministry of Power, SLC (LT) it was recommended that "*CP clause 2.8.2.3 may be extended up to 31.03.2020 for all TPPPs having FSAs*".

24. It is pertinent to take note of the fact that in the FSA dated 26.03.2013



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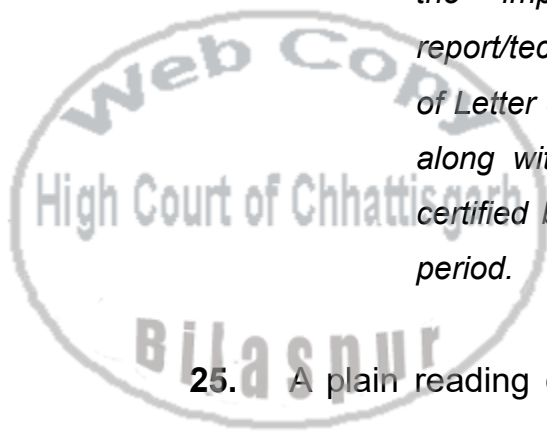
entered into between the petitioner and SECL/respondent No. 1, the petitioner's FSA had only two Condition Precedents viz. under Clause 2.8.1 and 2.8.2. Further, in clause 2.8.2, there are only two sub-clauses 2.8.2.1 and 2.8.2.2. The 'Purchaser's Condition Precedent' are reproduced herein below for reference:-

2.8.2 Purchaser's Condition Precedent

2.8.2.1 *The Purchaser shall have obtained from the lawful authority all necessary clearances, authorizations, approvals and permissions required for, construction, commissioning, operation and maintenance of plant.*

2.8.2.2 *The Purchaser shall have completed the construction as per the implementation schedule specified in detailed project report/techno-economic feasibility report submitted during the validity of Letter of Assurance (LoA), and the completion of such construction along with readiness of the power plant for lighting up has been certified by an Independent Engineer within the Condition Precedent period.*

25. A plain reading of the above depicts that in order to get the supply of domestic coal, the Petitioner was required to satisfy only two condition precedents which were (i) obtaining necessary clearances, authorizations, approvals and permissions required for construction, commissioning, operation and maintenance of the Plant; and (ii) completion of construction of the power plant along with the readiness of the power plant for lighting up by an Independent Engineer within the condition precedent period. These two condition precedents for the Petitioner were fulfilled and acknowledged by SECL on 13.07.2015 and 27.04.2016 for Unit 1 and Unit 2, respectively. There appears to be no dispute between the parties regarding the satisfaction of all the condition precedents under the FSA. This Court notes that there exists no additional condition precedent and that Clause 2.8.2.3 is





not present in the Petitioner's FSA, however, this clause finds a place in the FSAs of the other companies.

26. Clause 2.8.2.3 of the FSAs of the other companies (not of the petitioner) reads as under:-

“2.8.2.3 [Applicable to Purchaser who has signed FSA without entering into long term PPA]

The Purchaser shall have to furnish the long term Power Purchase Agreement (PPA) either directly with Distribution Companies (DISCOMs) or through Power Trading MB Power (ies) (PTC) who has/have signed back to back PPAs (long term) with DISCOMs within the Condition precedent (CP) period as per clause 2.8.2.1”

27. Vide letter dated 19.07.2022, SECL/respondent No. 1 sought clarification from CIL on whether the medium-term power purchase agreements submitted by the petitioner after 31.03.2022 are to be accepted or not in light of SLC (LT) meeting dated 03.02.2022, wherein SLC (LT) had prescribed the cut-off date of 31.03.2022 for submission of any power purchase agreement for supply of linkage coal. The relevant extract of the SECL's letter dated 19.07.2022 is as below:-

“In the light of the above decisions of SLC (LT), it seems that the aforesaid decision is applicable for the FSA holders through LOA route who have not been fulfilled their Condition Precedent as per the provisions of the FSA by submitting any valid PPA (amongst one of the condition of Purchasers' CP as per provision of the FSA) within 31.03.2022.”

28. Further, the Petitioner, vide its letter dated 20.08.2022, requested the Central Electricity Authority, Ministry of Power, Government of India to recommend SECL to issue an amendment to FSA. Vide letter dated 26.08.2022 the CEA directed the SECL/respondent No. 1 to consider the request of the petitioner for amending the existing FSA for additional coal



supply against the medium-term PPA of 150 MW. The relevant extracts of CEA's letter dated 26.08.2022 are as under:-

“3. Again, SLC (LT) in its meeting held on 28.05.2020 recommended for extension of timelines for entering into PPA as per CP clause under FSA till 31.12.2021. Further, in SLC Order in meeting held on 21.03.2022 it was recommended that timeline for obtaining PPA as per CP clause cannot be extended beyond 31.03.2022.

*4. However, it is relevant to mention that CP clause 2.8.2.3 is not present in the FSA signed by the MB Power with SECL. **Therefore, decision of SLC (LT) with regard to CP Clause 2.8.2.3 is not applicable for the MB Power.***

5. MB Power has signed the Medium Term PPA through competitive bidding process in accordance with bidding guidelines of Ministry of Power. Therefore as per para A(v) of SHAKTI Policy 2017, this PPA qualifies for coal drawl under existing LOA route FSA.

*6. In view of the above, **SECL may consider the request of MB Power for amending the existing FSA for additional coal supply against the above-mentioned medium term PPA of 150 MW (net).** This issues with the approval of Competent Authority”*

29. It is important to note the fact that the Central Electricity Authority is a statutory body under the Ministry of Power, Government of India. It was observed in the recommendation that condition precedent Clause 2.8.2.3 is not present in the FSA executed between the Petitioner and SECL. The CEA had recommended SECL/respondent No. 1 to consider the request of the Petitioner to amend the existing FSA for additional coal supply against the medium-term PPA with HPPC.

30. On 27.09.2022, the Ministry of Coal wrote to Coal India Limited (CIL) to provide the details of all such erstwhile FSA cases where FSAs are effective on submission of partial PPAs. It was also stated as to why the matter referred to vide letter under reference has not been brought to the notice of the SLC (LT) earlier. Pursuant to the above, the CIL vide letter dated



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14.10.2022 informed that three plants including that of the petitioner, whose FSAs were signed prior to the CIL directives dated 27.05.2013 are still having balance untied PPA capacity under FSA. However, these FSAs have already been made effective on submission of partial PPAs. It was further stated that the cases of FSAs already effective on partial PPAs and submitting additional PPAs subsequent to 31.03.2022 have arisen only recently for consideration. It was stated thus:-

“ix. The cases of FSAs already effective on partial PPAs and submitting additional PPAs subsequent to 31.03.2022 have arisen only recently for consideration. In one such case, CEA vide their letter no. 268/Shakti Misc./TPP&D/CEA/2022/340-43 dated 26.08.2022 (further amendment letter dated 01.09.2022) on the issue of “Amendment in FSA of M/s MB Power and consequent supply of coal against medium term PPA signed with Haryana Discom” vide point no. 4, following has been mentioned.

However, it is relevant to mention that CP clause no. 2.8.2.3 is not present in the FSA signed by the M/s MB Power with SECL. Therefore, decision of SLC (LT) with regard to CP clause 2.8.2.3 is not applicable to MB Power.”

31. Further, the Petitioner, vide its letter dated 07.10.2022 approached the Ministry of Power requesting to recommend the SECL to issue an amended FSA. In response, the Ministry of Power vide letter dated 13.10.2022 recommended to SECL that the Petitioner’s request to issue an amended FSA may be considered favourably. It was observed thus:-

“3. With respect to the submissions in Para 6 & 7, wherein MB Power has submitted that it has approached SECL to enhance ACQ under FSA for a new medium term PPA signed with the Distribution Companies of Haryana and SECL has sought clarification from CIL in light of SLC (LT) No.1/22 MoM dated 21st March 2022. CEA examined the matter and concluded that -

The timelines of 31st March 2022 as recommended in SLC (LT) MoM dated 21st March 2022 are applicable for those coal purchasers who



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have signed FSA without any long term PPA & comes under Clause No. 2.8.2.3. 4.

4. In the light of our examination, CEA concludes that

- Firstly, CEA has already written to SECL vide its letter dated 26th Aug 2022 that the FSA (dated 26th March 2013) signed between MB Power & SECL was with long term PPA of Madhya Pradesh & has no provision of Clause No. 2.8.2.3 in this FSA. Henceforth, the applicability of Clause No.2.8.2.3 and the timelines as per SLC (LT) MoM dated 21st March 2022 on MB Power FA does not hold even in light of Addendum No. 8 dated 1st April 2019 to FSA.
- Secondly, MB Power has signed medium term PPA with Haryana Distribution Utilities through competitive bidding under Sec 63 of the Electricity Act 2003 and henceforth this PPA qualifies for coal drawl under A(v) Clause of SHAKTI Policy 2017.
- **Accordingly, MB Power's request for amendment in FSA with respect to medium term PPA (net 150 MW) with Haryana may be considered favorably."**

32. Subsequently, the Ministry of Power, Government of India vide Office Memorandum (OM) dated 28.10.2022 recommended that the power plants that do not have condition precedent clause 2.8.2.3 in their FSA are entitled to draw coal as and when they submit the PPA under Section 63 of the Electricity Act until the validity of their FSA with the coal company. It was stated thus:-

15. Therefore, the power plants which either does not have CP 2.8.2.3 in their FSAs or have met this condition are entitled to get coal under A (v) provided they have signed PPA under section 63 of the Electricity Act.

16. In view of the above following may be recommended:

Power plants which have fulfilled the CP clause 2.8.2.3 even by submitting partial PPA and the **power plants which does not have CP 2.8.2.3 in their FSA are entitled to draw coal as and when they**





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submit the PPA under section 63 of Electricity Act till the validity of their FSA with the coal company.”

33. Vide letter dated 01.11.2022 the petitioner made a representation before SECL/respondent No. 1 wherein in para 8 it was stated as under:-

Importantly, under the FSA, while the FSA Quantity shall remain constant, entitlement of MB Power to receive supply of coal shall be commensurate to concluded PPAs.

“4.1 Annual Contracted Quantity (ACQ):

4.1.1 The Annual Contracted Quantity of Coal agreed to be supplied by the seller and undertaken to be purchased by the Purchaser, shall be 14,98,176 tonnes per year from the Seller’s mines and/or from import, as per Schedule I. for part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in proportion to the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPAs, corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a year and shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LoA quantity as mentioned in Schedule I.”

34. The petitioner has filed certain documents on 05.12.2022 obtained under the Right to Information Act (RTI). The minutes of the meeting dated 28.10.2022 of SLC (LT) published on 22.11.2022 state that ‘NITI Ayog stated that Clause 2.8.2.3 is not present in the FSA of the few power plants and the Condition Precedents as per the FSA were complied with’. It was also observed that ‘there has to be a mechanism to accommodate such cases’. It reads thus:-

“NITI Aayog stated that Clause 2.8.2.3 is not present in the FSA of few power plants and the Condition Precedents as per the FSA



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were met. It is a possibility that more Medium Term PPAs will come up in future and there has to be a mechanism to accommodate such cases. NITI Aayog suggested that Ministry of Power may study the matter further for accommodating these power plants through some mechanism.”

35. Vide the above minutes, the Central Electricity Authority (CEA) also recommended that Medium Term PPAs submitted after 31.03.2022 may be allowed to draw coal till the expiry of the FSA as the Condition Precedents have already been met and there are 15 such power plants and Clause 2.8.2.3 is not present in the FSA of 3 power plants. It reads thus:-

“CEA also recommended that the Medium Term PPAs submitted after 31.03.2022 may be allowed to draw coal till the expiry of the FSA as the Condition Precedents have already been met. CEA informed the Committee that there are 15 such power plants and the untied capacity of 15 power plants is 2825 MW and the Clause 2.8.2.3 is not present in the FSA of 3 power plants.”

36. In the absence of Purchaser's Condition Precedent Clause 2.8.2.3 in the petitioner's FSA, the petitioner cannot be compelled to furnish a long-term Power Purchase Agreement (PPA) within the Condition Precedent period as per Clause 2.8.3.1 for the reason that the SHAKTI Scheme does not fade away or extinguish the petitioner's FSA dated 26.03.2013. Even otherwise, the PPA of the petitioner ought to have been accepted by SECL/respondent No. 1 and SECL/respondent No. 1 being the seller ought to have supplied the coal as per the terms and conditions of the FSA. The SCL failed to consider this aspect which ought to have been taken into consideration. Clause 2.8.2.3 of the FSA, as indicated in the SLC (LT) minutes of the meeting dated 21.03.2022, applies only to those purchasers who have signed an FSA without entering into a long-term PPA. However, the



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Petitioner had already entered into a long-term PPA with MPPMCL before signing the FSA with SECL, and thus, it does not apply to the Petitioner. Also, where the matter is governed by the express terms of the contract, SECL/respondent No. 1 being the 'seller' cannot go beyond the contract. Further, Clause 19.2 of the FSA expressly provides that the agreement cannot be modified or amended except by prior written agreement between the parties. In any case, such a clause does not exist in the Petitioner's FSA with SECL or any of its subsequent addendums (Side Agreements). Thus, when the third Condition Precedent did not exist in the petitioner's FSA, it can't be made applicable to the petitioner. Consequently, Addendum 8 also did not have any bearing on the petitioner's FSA and it remained valid and binding for its entire term of 20 years.

37. The petitioner got additional coal supply in the year 2019 till March 2022 in respect of the previous 175 MW Medium-Term PPA with Haryana DISCOM despite the inclusion of the SHAKTI Scheme in addendum No. 8. In continuation with the FSA, the petitioner signed a new 150 MW PPA with Haryana. On 21.04.2022, Haryana DISCOM inquired about the status of the petitioner's linkage and on 21.04.2022 reply was given through email. The petitioner ensured the Haryana DISCOM for a stable supply of coal on the basis of the Fuel Supply Agreement (FSA) and side agreements entered into between the petitioner and SECL. On 24.05.2022, the petitioner made a request to SECL to increase the quantity of coal and vide letter dated 19.07.2022, the SECL sought instruction from Coal India Limited. Coal India Limited (CIL) disclosed its view that the FSA of the petitioner is valid; therefore, it is entitled to get increased demand. The Central Electricity Authority also recommended in favour of the petitioner. The Ministry of Coal



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specifically stated that the FSA is effective till the submission of PPAs and it was observed by the CIL that the third condition precedent was introduced in the FSA of the petitioner pursuant to the subsequent decision. The Ministry of Power vide letter dated 17.10.2022 found the request of the petitioner genuine. Though the power is vested with the SLC being the higher forum to decide the claim of the power company, at the same time, the claim of the petitioner was within the purview of the FSA entered into between the parties. Earlier also, the time was extended by the SLC in its meeting. The claim of the petitioner could have been considered by the SLC in the meeting dated 28.10.2022 but the decision was taken by the SLC (LT) on 28.10.2022, wherein the claim of the petitioner has been rejected. However, the petitioner has not challenged the decision taken by the SLC (LT) dated 28.10.2022 in the instant petition.

38. It is well-settled law that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter partes until it is successfully avoided or challenged in a higher forum.

39. The Hon'ble Supreme Court in the matter of ***State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (Dead) and others, (1996) 1 SCC 435***, has clearly held that even a void order or decision rendered between parties will be effective inter partes until it is successfully avoided by observing as under:-

“7. ... even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter partes until it is successfully avoided or challenged in a higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea



that the order is invalid or illegal. It can be avoided. ...”

40. The Hon’ble Supreme Court following the principle of law laid down in **M.K. Kunhikannan Nambiar's case (supra)**, in the matter of **Krishnadevi Malchand Kamathia and others v. Bombay Environmental Action Group and others, (2011) 3 SCC 363**, again held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum. Their Lordships of the Supreme Court observed in paragraphs 17, 18 and 19 as under: -

“17. In State of Punjab v. Gurdev Singh, (1991) 4 SCC 1 this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in Smith v. East Elloe RDC 10, wherein Lord Radcliffe observed: (AC pp. 769-70) “.....An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity [on] its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

18. In Sultan Sadik v. Sanjay Raj Subba, (2004) 2 SCC 377 this Court took a similar view observing that once an order is declared non est by the court only then the judgment of nullity would operate erga omnes i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a



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nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person.”

41. The SLC (LT) is the highest body which comprises of the Ministry of Coal, NITI Ayog, Ministry of Power, Central Electricity Authority, Ministry of Shipping, Ministry of Steel and CMDs of PSUs. The SHAKTI Scheme has been introduced for the transparent, fair and effective distribution of coal within the country between the power companies. But the petitioner has not challenged the minutes of the meeting of SLC (LT) dated 28.10.2022 in this petition whereby the claim of the petitioner was rejected. Actually, the petitioner is aggrieved with the decision taken by the SLC (LT) in the meeting dated 28.10.2022. The petitioner ought to have challenged the aforesaid decision taken by SLC (LT) dated 28.10.2022. In the absence of such a challenge, no relief can be granted in favour of the petitioner.

42. As a result, the instant petition fails and is hereby **dismissed**, however in the facts and circumstances of the case in hand, there shall be no order as to costs.

Sd/-

(Rakesh Mohan Pandey)
Judge