229476/2020/CBA-I

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File No. 47011/7(6)/1993-CPAM/CA.Vol.II (FTS-301235)
Government of India
Ministry of Coal
CBA-I Section
***

Shastri Bhawan New Delhi,
Dated 4th June, 2020

OFFICE MEMORANDUM

Sub: Minutes of **42nd** Meeting of the Inter-Ministerial Group (IMG) held on 28.05.2020 under the Chairmanship of Additional Secretary (Coal) to review the issue of Bank Guarantee - reg.

The undersigned is directed to refer to the subject mentioned above and to forward herewith Minutes of **42nd** Meeting of the Inter-Ministerial Group (IMG) under the chairmanship of Additional Secretary (Coal) held on 28.05.2020 at 11 A.M. virtually to undertake review on the issue of Bank Guarantee of prior allottee, for information and necessary action.

Encl: As above

(Mukesh)
Under Secretary to the Govt. of India

To:
1. Joint Secretary (IE), Deptt. of Economic Affairs, Room No .67B, North Block, New Delhi.
2. Joint Secretary (Thermal), Ministry of Power, Shram Shakti Bhawan, New Delhi.
3. Joint Secretary, Dept. of Industrial Policy & Promotion, Udyog Bhawan, New Delhi.
4. Joint Secretary, Ministry of Steel, Udyog Bhawan, New Delhi.
5. Joint Secretary, Deptt. of Legal Affairs , Shastri Bhawan, New Delhi.
6. Shri B.P.Pati, Joint Secretary, Ministry of Coal
7. JS&FA, Ministry of Coal
8. Advisor (Projects), Ministry of Coal
9. Shri Shekar Saran, CMD, CMPDIL, Gondwana Place, Kanke Road, Ranchi.
10. Shri Anjani Kumar, Coal Controller, 1, Council House Street, Kolkata-700001
11. Shri Ajitesh Kumar, Deputy Secretary (CBA-I), Ministry of Coal
12. DM (Legal), Legal Cell, Ministry of Coal

Copy to:
1. PS to Hon'ble Minister of Coal
2. PSO to Secretary (Coal)
3. Sr.PPS to Additional Secretary (Coal) & Chairman, IMG.
4. STD (NIC) with request to upload on the website of MoC.

Minutes of 42stmeeting of the Inter-Ministerial Group (IMG) under the chairmanship of Additional Secretary (Coal) held on 28.05.2020 at 11:00 AM through Video Conferencing to undertake review on the issue of Bank Guarantee of certain prior allottees.

List of participants is placed at **Annexure-A**.

1. Welcoming the participants, Additional Secretary (Coal) & Chairman, IMG informed the participants that the present IMG has been convened to deliberate upon the issues circulated as per the Agenda which is placed at **Annexure-B**.

2. In the 41st meeting, it was decided that the details of 77 coal blocks for which no Show Cause Notice was issued and also details of 31 coal blocks for which Show Cause Notices were withdrawn be presented before the IMG in its next meeting.

3. DS (CBA-I) gave a brief presentation to the IMG about the details of these 77 coal blocks and 31 coal blocks. It was further deliberated that in respect of 3 other coal blocks viz., Urtan North, Bikram and Khappa & Extension, the review was conducted before Supreme Court cancellation and based on the same, deallocation orders were also issued to the allottees with stipulation that amount of BG to be invoked would be communicated later. However, before the amount of BG to be invoked could be communicated, the allottees approached court and obtained stay orders which continued till Supreme Court cancellation. Accordingly, this IMG in its 31st meeting had recommended that BG deduction, which had previously been calculated, be conveyed in respect of the above mentioned 3 coal blocks.

4. LE(KS) briefed the participants about the judgment passed by the Delhi High Court on 27.05.2020 in WP (C) No. 261/2016 filed in relation to Radhikapur (East) coal Block, which is one of the 31 coal blocks in whose case show cause notice was withdrawn. Initially the prior allottee- Tata Sponge Iron Limited (TSIL) filed a WP (C) No. 7674/2015challenging the withdrawal of show cause notice and reinstatement of order dated 23.11.2012. The said case was disposed off vide order dated 12.08.2015 to decide the representation of allottee affording them opportunity of oral hearing. The representation of allottee was considered and it was also granted an opportunity to give presentation in 32nd meeting of this IMG. IMG recommended that the order dated 23.11.2012 to continue to be in operation. The recommendation of IMG was accepted, and an order was issued on 28.12.2015. TSIL preferred the instant WP (C) No. 261/2016-against theorder dated 28.12.2015 as well as against the reinstated order dated 23.11.2012. The main argument of TSIL was that the delay was not attributable to it, rather was on part of Central Government, State

Government and their various functionaries and this fact was not considered while issuing order dated 23.11.2012. It was briefed to IMG that vide judgment dated 27.05.2020, Delhi High court has quashed the order dated 23.11.2012 and 28.12.2015 issued by the MoC and has remanded the matter to MoC to consider it afresh. It has further been directed that the MoC shall provide TSIL the comments received from the concerned State Government(s) on the aspect whether the delay in achieving the milestones is attributable to TSIL, the concerned authority shall afford TSIL an opportunity to be heard and pass an informed decision and pass a speaking order dealing with each points raised by the TSIL. TSIL has been directed to ensure that the bank guarantee furnished by it is kept alive till, the said decision is rendered by the MoC. It is also directed that the question whether the bank guarantee furnished by the TSIL could be invoked on account of delay in development of the coal mine (and not on account of any deficiency in production) is also required to be considered by the MoC for the reason that as per the Allocation Letter of block in question, the bank guarantees were to be invoked on account of deficiency in production.

5. After detailed deliberations, IMG decided to recommend the following:

i. Fresh show cause notices may be issued to the allottees of the 31 coal blocks whose show cause notices were withdrawn pursuant to recommendations made in 31st meeting of the IMG- for review for the entire period for which the respective blocks were held by the allottee- based on the principles for deliberation decided in 41st meeting.

ii. In relation to three coal blocks viz.- Urtan North, Bikram and Khappa & Extension, in whose case BG amount was calculated, but could not be communicated before the Supreme Court cancellation and was communicated only in pursuance of recommendations of 31st meeting of this IMG, as the calculations were made on the old principles, fresh show cause notices may also be issued for review for the entire period for which the respective blocks were held by the allottee based on the principles for deliberation decided in 41st meeting.

iii. Comments may be sought from respective State Governments on various applications made by the allottees and their disposal. CMPDIL may also be asked to offer their comments, if any.

iv. Comments received from State Governments may be shared with the respective allottees to allow them to submit any further comments, in line with the judgment of Delhi High Court. Similarly, replies submitted by prior allottees may also be shared with State Governments, seeking their comments there upon.

v. Opportunity to make presentation may be allowed to the prior allottees after submission of their comments before final consideration.

vi. Judgment dated 27.05.2020 passed by the Delhi High Court in WP (C) No. 261/2016- in relation to Radikapur (East) coal block will be circulated to members. The same is placed as **Annexure-C**.

vii. Twenty one (21) days time will be given to the allottee for reply of the Show cause notice.

The meeting ended with a vote of thanks to the chair.

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Annexure-A

List of participants

Sl No.	Name (Shri/ Smt/Ms.)	Designation	Ministry/Department/ organisation/
1	Vinod Kumar Tiwari	Additional Secretary (Coal) (Chairman of IMG)	Ministry of Coal
2	B P Pati	Joint Secretary	Ministry of Coal
3	Vivek Kumar Devangan	Joint Secretary	Ministry of Power
4	R K Srivastava	Additional Legal Advisor	Department of Legal Affairs
5	N S Mondal	Chief Engineer	Central Electricity Authority
6	Anjani Kumar	Coal Controller	Coal Controllers, Organization, Kolkata
7	Ajitesh Kumar	Deputy secretary	Ministry of Coal
8	Peeyush Kumar	Chief Manager	Ministry of Coal
9	Pratibha Saxena	Under Secretary (ESPP)	Department of Economic Affairs
10	Arun Kumar	Under Secretary	Department of Promotion of Industry and Internal Trade
11	Nand Lal	Consultant	Department of Promotion of Industry and Internal Trade
12	Shekhar Sharan	CMD	CMPDIL
13	Kundan Sehgal	Legal Executive	Ministry of Coal

Annexure-B

Agenda note for 42nd meeting of IMG

In the last meeting dated 06.05.2020 (41st Meeting), IMG had noted that the recommendations by the IMG in its 31st meeting to withdraw show-cause notices with respect to the 31 coal blocks were made under the incorrect impression that the previous review covered the performance of prior allottee for the entire period for which the blocks were held by them. IMG had also noted that several cases had the recommendation of deallocation of coal blocks along with order of invocation of BG. IMG had directed that the details of the previous review orders in relation to these 31 coal blocks be presented before IMG in the next meeting.

2. IMG had decided to keep the following principles in mind for future deliberation in the matter:

   i.Irrespective of the fact that whether the allocation of block was cancelled by Hon'ble Supreme Court in 2014, or it was deallocated by the Ministry of Coal prior to that, it is to be ensured that the performance of prior allottee for each coal block has been reviewed for the entire period for which the respective block was held by the allottee.

   ii. While reviewing the performance, the factors considered by the IMG for review of remaining 96 cases (127 cases where show-cause notice was issued less 31 cases where they were withdrawn), viz. (a) Conditions of allocation letter; (b)Delay attributable to Government or Government agencies (whether Centre or State) and delay on the part of prior allottee(s) and (c) in case the delay is attributable to prior allottee(s), proportionate calculation i.e. 10% deduction for delay of every 3 months against the weightage/marks given for the respective milestone, shall be followed.

3.The meeting of IMG is being called to deliberate upon and take a decision on the future course of action with respect to these 31 coal blocks and with respect to such other blocks in which the performance have not been reviewed for the entire period for which the blocks were held by the allocatees in light of the opinion of Ld. ASG.

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.05.2020

\+ **W.P.(C) 261/2016 and CM No. 1049/2016**

M/S TATA SPONGE IRON PVT. ..... Petitioner

Versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Parag P. Tripathi, Senior Advocate with Mr V. Shyamohan, Mr Anand Varma, Mr Surya Prakash, Mr Srinivasan, Ms Sonali Jain and Mr Arnav Behra, Advocates.

For the Respondents :Mr Amit Mahajan, CGSC for UOI with Mr Rajat Gava and Mr Anant Negi, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Tata Sponge Iron Ltd. (TSIL) has filed the present petition, *inter alia*, impugning an order dated 23.11.2012 passed by the Ministry of Coal, Government of India (hereafter MoC), whereby the MoC accepted the recommendations made by the Inter Ministerial Group (hereafter 'IMG') and decided to invoke the bank guarantee submitted by TSIL to the extent of ₹32.50 crores. In terms of the order passed by this Court in Writ Petition (C) No. 7142/2012, the said impugned order was made effective after a period of one week from the date of the said order (that is, one week after 23.11.2012). TSIL challenges an order dated 28.12.2015, whereby the aforesaid decision

was reiterated. TSIL impugns the power of the Government of India to raise a demand in respect of Radhikapur (East) Coal Block including its right to invoke a bank guarantee furnished by TSIL pursuant to the letter of allocation dated 07.02.2006 (hereafter 'the Allocation Letter').

2. TSIL is, essentially, aggrieved by the decision of the MoC to invoke its bank guarantee furnished pursuant to the Allocation Letter. TSIL contends that since the said allocation has been declared to be illegal by the Supreme Court in ***Manohar Lal Sharma v. Principal Secretary: (2014) 9 SCC 516*** [hereafter ***'Manohar Lal Sharma(I)'***], the bank guarantee furnished by TSIL pursuant to the said allocation also does not stand and cannot be encahsed by the MoC. It is further submitted on behalf of TSIL that the delay in meeting the milestones for development of mine in question and production of coal was for reasons solely attributable to the Government of India, State Government or other Government Agencies and, therefore, TSIL could not be penalized for the same.

Factual context

3. TSIL is a subsidiary of Tata Steel Limited and has its manufacturing facility at Bilaipadain Keonjhar District in Odisha. TSIL had applied for allocation of a coal block to meet the coal requirements for production of sponge iron and for captive power generation. On 07.02.2006, MoC allotted Radhikapur (East) Coal Block under Option II (the *'Leader-Associate'* model) to TSIL as the

leader and M/s SCAW Industries Ltd. (now known as 'Narbheram Power & Steel Pvt. Ltd.') and M/s SPS Sponge Iron Ltd. (now known as 'M/s Concast Steel and Power Ltd.') as associates. It is stated that the said coal block also included certain forest lands. The allocation of coal block was subject to various conditions as set out in the Allocation Letter. The said conditions included the condition that the coal production from the captive block would commence within a period of forty two months. The mining lease would be executed in favor of the leader (TSIL); TSIL was required to make the entire investment and carry out the mining operations. A milestone chart was also enclosed along with the said Allocation Letter setting out the milestones to be achieved by the allottee (TSIL) and the timeframes in which to achieve them. In addition, the leader (TSIL) was also required to submit a bank guarantee of a sum of ₹32.50 crores, which was equal to one year's royalty amount based on the mine capacity. The Allocation Letter expressly provided that the mining lease of the coal block may be cancelled in the event of unsatisfactory progress in the development of the coal mine project or for any breach of the conditions mentioned in the Allocation Letter.

4. In terms of the Allocation Letter, TSIL submitted a bank guarantee for an amount of ₹32.50 crores. The said guarantee was renewed from time to time.

5. Admittedly, the milestones were not achieved within the period as stipulated. On 25.03.2008, a review meeting was held by the MoC to monitor the progress of mine in question and it was found that the

progress was not satisfactory. On 27.06.2008, the MoC issued a show cause notice (First SCN) calling upon TSIL to show cause why delay in achieving the milestones should not be considered as a violation of the terms and conditions of the allotment of Radhikapur (East) Coal Block – the Allocation Letter. TSIL responded to the said show cause notice by a letter dated 03.07.2008, *inter alia*, stating that the coal project was on schedule and it would achieve the projected coal production of 0.50 million tones in the year 2009-10 in conformity with the approved mining plan. TSIL admitted that there was delay in submission of the mining plan for approval by the Competent Authority, which was to be submitted within a period of six months from the date of the Allocation Letter. However, it is stated that the same was attributable to Central Mine Planning and Design Institute Limited (hereafter 'CMPDIL'), a subsidiary of Coal India Limited. TSIL stated that although it had applied for purchasing the Geological Report from CMPDIL within the first week but there was a delay because of an unreasonable stand taken by CMPDIL that Income Tax should not be deducted at source. TSIL was required to make a payment of ₹4,86,89,583.25/- to CMPDIL and it was required to deduct a sum of ₹26,30,506/- as TDS. In terms of Section 194J of the Income Tax Act, 1961 it was mandatory to deduct TDS from the payment made to CMPDIL. However, CMPDIL disputed the same; CMPDIL demanded that TSIL make the entire payment without deducting any tax at source (TDS). TSIL claimed that CMPDIL was not willing to furnish the geological report, unless the entire payment was made (without TDS). In view of the said dispute, TSIL filed a

writ petition (Writ Petition No. 16282/2006) in the High Court of Odisha. By an order dated 10.05.2007, the Odisha High Court directed TSIL to pay the entire amount to CMPDIL without deduction of tax at source and CMPDIL was directed to withhold an amount of ₹26,30,506/- in a separate account pending resolution of the said disputes. TSIL states that subsequently it was clarified by Central Board of Direct Taxes that TSIL was required to deduct tax at source and, therefore, its stand was vindicated. However, because of the said dispute, there was a delay of one year three months in achieving the milestone in question.

6. Another review meeting was held by the MoC on 22-23.06.2009. It was noted that there were significant delays for obtaining the mining lease; securing the forest clearance; acquisition of land etc. TSIL claims that the delays were attributable solely to the Central Government, State Government and their agencies.

7. On 20.07.2010, a review meeting was held under the Chairmanship of the Additional Secretary, Coal, Government of India (MoC) and it was noted that the progress made by TSIL was unsatisfactory. Accordingly, it was decided to issue a show cause notice calling upon TSIL to show cause why the coal block in question not be de-allocated. TSIL sent a letter dated 11.09.2010 pointing out the progress made by it as well as certain impediments faced by it for achieving the milestones.

8. On 04.11.2010, MoC issued another show cause notice (Second SCN) calling upon TSIL to show cause why the delay in development of the allocated coal block not be held as violation of the terms and conditions of the allotment.

9. TSIL responded to the Second SCN stating that it had discharged all its responsibilities and obligations against each of the milestones as specified in the Allocation Letter and had made genuine efforts for development of the coal block in question. TSIL claimed that almost the entire delay in development of the mine and commencing the mining operation was attributable to State Government and its agencies.

10. No further action was taken by the MoC pursuant to the said show cause notice (Second SCN).

11. On 11.01.2012 and 12.01.2012, review meetings were held by the MoC and on 02.03.2012, an Office Memorandum containing the minutes of the said review meetings, was issued. The said Office Memorandum indicated that various issues that were impeding timely development of coal blocks, were considered and recommendations made. Insofar as the coal block in question is concerned, the minutes indicated that the Committee had found that it was one of the coal blocks where progress was unsatisfactory.

12. On 30.04.2012, TSIL sent a request to the MoC for revising the zero date/normative date for production in respect of the block in question, by a period of two years. TSIL requested that the Zero date

be revised from 07.02.2006 (the date of the Allocation Letter) to 07.02.2008. Accordingly, the normative date for production of coal would also be revised from 06.08.2009 to 06.08.2011. TSIL also referred to certain cases where MoC had considered revision of the zero date/normative date of production in respect of other allocatees.

13. On 04.05.2012, MoC issued a show cause notice (Third SCN) to TSIL pursuant to the deliberations of the review meetings held on 11.01.2012 and 12.01.2012. The Third SCN set out a tabular statement indicating the scheduled date of achieving each milestone; the actual date of achieving the same; and the delay in achieving the said milestone. It was alleged that TSIL had failed to keep its promise made to the MoC and thus, was not serious to develop the coal block within the stipulated time. TSIL was called upon to explain the delay in achieving each specific milestone.

14. TSIL filed a writ petition being W.P.(C) No. 7142/2012 impugning the Third SCN dated 04.05.2012 issued by the MoC. However, it also responded to the Third SCN on 15.05.2012. Its response was similar to the responses submitted earlier – it claimed that the delay was attributable to the State Government and another Government agencies.

15. Thereafter, discussions were held between representatives of TSIL and the Coal Controller on 04.06.2012 and TSIL was advised to submit a short note along with documents to explain why the development of Radhikapur (East) Coal Block was delayed. Pursuant

to the discussions held with the Coal Controller on 04.06.2012, TSIL sent a letter dated 08.06.2012 indicating the major reasons for delay in the timely development of the coal block in question.

16. Thereafter, on 04.09.2012, MoC issued a letter informing TSIL that the reply submitted by it was being considered by the Inter Ministerial Group (IMG) constituted to undertake a periodic review of the development of allocated coal / lignite blocks. TSIL was informed that it had been decided to afford TSIL an opportunity to make a presentation before the IMG with regard to the current status of the development of the allocated coal block and the reasons for delay in achieving the milestones. TSIL was called upon to appear before the IMG at 10:30 am on 07.09.2012 for the aforesaid purpose.

17. The representatives of TSIL appeared before the IMG at the scheduled time (that is, 10:30 am on 07.09.2012) and represented their case including providing an explanation for the delay in achieving the milestones within the stipulated period.

18. Thereafter, on 23.11.2012, the MoC passed an order (which is impugned herein) directing that the bank guarantee furnished by TSIL be invoked. It was noted in the order that the IMG had examined the delay in development of the coal block and the reasons for the same. The IMG also noted that TSIL had made an investment of ₹254.20 crores and other companies had also made significant investments for setting up their respective plants and expanding the capacity of their existing plants. Considering the above factors, the IMG recommended

that the coal block allocated to TSIL not be de-allocated but the bank guarantee be invoked for the shortfall in the production as per the formula as specified in the Allocation Letter. The recommendations of IMG were accepted by the MoC.

19. The writ petition being W.P.(C) No. 7142/2012 filed by TSIL impugning the Third SCN dated 04.05.2012 issued by the MoC, was dismissed as withdrawn by an order dated 09.11.2012 passed by this court. However, this Court also directed that in case an adverse order is passed, the same would not be given effect to for a period of one week. Therefore, in compliance with the aforesaid order, the impugned order dated 23.11.2012 also specified that it would be effective after expiry of the period of one week from the date of issue of the said letter.

20. Aggrieved by the order dated 23.11.2012, TSIL filed a writ petition, being Writ Petition (C) No. 7430/2012, impugning the order dated 23.11.2012 and challenging the decision of the MoC to invoke the bank guarantee for the sum of ₹32.50 crores. The said petition was listed before this Court on 30.11.2012 and an order was passed recording the statement made on behalf of the respondents that in the event a representation is made, the same would be considered and disposed of. The Court also directed that in the event the decision is taken to invoke the bank guarantee, three days prior notice would be issued to TSIL.

21. In compliance with the said order dated 30.11.2012, the office of the Coal Controller, MoC issued a letter giving three days prior notice for invoking the bank guarantee. Aggrieved by the same, TSIL preferred an urgent application in the pending writ petition [W.P.(C) 7430/2012] and by an order dated 26.12.2012, this Court stayed the notice dated 14.12.2012 issued by the MoC.

22. The principal ground urged by TSIL to impugn the order dated 23.11.2012 directing invocation of the bank guarantee was that the delay in achieving the milestones was not attributable to TSIL but to Central Government, State Government and other Government agencies. It is material to note that MoC did not file any counter affidavit in W.P.(C) 7430/2012, but sought repeated adjournments on the ground that it intended to file a transfer petition before the Supreme Court. At the request of the MoC, the hearing of the petition was adjourned from time to time.

23. While W.P.(C) 7430/2012 was pending, the MoC issued a notice dated 15.01.2014, whereby it sought to review the status of various coal blocks that had not began production.

24. TSIL filed yet another petition (being W.P.(C) 790/2014) impugning the abovementioned notice dated 15.01.2014, whereby MoC had sought to review the status of various coal blocks that had not began production of coal. TSIL also responded to the said show cause notice by a letter dated 05.02.2014, *inter alia,* stating that it had

invested substantial sums in development of the coal block and significant progress for commencing production had been made.

25. In the meanwhile, TSIL also filed a writ petition before the High Court of Odisha (being W.P.(C) 1782/2014), *inter alia*, praying that directions be issued to the State Government to expedite processing of the applications made by them.

26. On 11.02.2014, MoC rejected TSIL's representation dated 30.04.2012 seeking revision of the zero date/normative production date. TSIL immediately moved an application before this Court in W.P.(C) 790/2014 for restraining the MoC from taking any decision in respect of cancellation of the allocation of the coal block in question. The Court clarified that any order passed by the respondent would be subject to the orders passed by this Court. On 12.02.2014, this Court passed an order directing that respondents would maintain *status quo* till the next date of hearing and no steps would be taken by the Government to re-allocate the coal blocks nor any third party interest would be created till further orders.

27. MoC accepted the recommendations of the IMG to de-allocate the coal block and issued a letter dated 07.02.2014 communicating its decision to do so.

28. Thereafter, TSIL filed two more writ petitions: W.P.(C) 4358/2014 impugning the decision dated 11.02.2014, whereby the MoC had rejected TSIL's request to revise the zero date/normative date of production and W.P.(C) 4406/2014 challenging the decision of

MoC to accept the recommendations of IMG to de-allocate the coal block in question.

29. While the aforesaid petitions were pending before this Court, the Supreme Court delivered the judgment in ***Manohar Lal Sharma (I)***, *inter alia,* holding that allocation of coal blocks as per the recommendations made by the Screening Committee in 36 meetings from 04.07.1993 and the allocation through Government dispensation route, were illegal.

30. At the material time, several petitions were pending before this Court, whereby the petitioners, who were allocatees of coal blocks, had challenged the decision of the MoC to de-allocate the coal blocks and/or to invoke the bank guarantees. These petitions also included the four petitions filed by TSIL: W.P.(C) 7430/2012, W.P.(C) 790/2014, W.P.(C) 4358/2014 and W.P.(C) 4406/2014. The said petitions were taken up on 30.10.2014 and this Court held that in view of the decision of the Supreme Court in ***Manohar Lal Sharma (I)***, no relief with regard to cancellation or de-allocation of the coal blocks could be granted. And, the only issue that remained to be considered was with regard to invocation of the bank guarantees, which were furnished by the petitioners for allocation of the coal blocks. This was in the context of the claims that delay in achieving the specified milestones for development of the coal blocks was for reasons attributable to Central Government, State Government and/or their agencies.

31. On that date (30.10.2014), it was stated on behalf of the MoC that the issue regarding invocation of the bank guarantees furnished by the allotees was currently under consideration of the MoC. In view of the above submission, this Court disposed of the batch of petitions with the following directions:

> "1. That the petitioners would keep alive all bank guarantees that are currently alive in favour of the respondents, for a further period of three months.
>
> 2. That the respondents shall take a decision in respect of each individual case whether the bank guarantees ought to be invoked or released within a period of eight weeks from today.
>
> 3. The said decision of the respondents would be communicated to the petitioners within a period of one week, thereafter.
>
> 4. In the event the respondents decides to invoke the bank guarantee or pursue its encashment, the respondents shall not do so for a further period of two weeks after communicating their decision to the petitioners, to enable the petitioners to take appropriate action in accordance with law."

32. The Department of Legal Affairs, Ministry of Law and Justice, Government of India examined the matter and opined that it would be necessary for the MoC to take a decision in respect of each individual case whether the bank guarantee ought to be invoked or released within the period of eight weeks as directed by the order dated 30.10.2014.

33. Thereafter, the IMG held a meeting (28th meeting) to review the issue regarding the bank guarantees furnished by the prior allocatees. The contention that bank guarantee ought to be released because of the decision of the Supreme Court *in* ***Manohar Lal Sharma (I)*** declaring the allocation of the blocks as illegal, was rejected. The IMG was of the view that since the allocation was valid at the material time, the allotees were not absolved from achieving the milestones as required. Insofar as the issue regarding delays and lapses on the part of the allotees was concerned, IMG was of the view that the same would have to be examined case-wise and, therefore, recommended that show cause notices be issued afresh to all coal block allocatees calling upon them to explain why the bank guarantee furnished by the allocatee should not be deducted for any delay in development of the allocated coal block. IMG was also of the view that representatives of the concerned State Government as well as Ministry of Environment and Forests be co-opted to take a considered view whether the delay is on account of the Government agencies or on the part of the allocatees.

34. In terms of the decision of the IMG taken at the 28th meeting, show cause notices dated 16.01.2015 were issued to prior allocatees including TSIL (Fourth SCN). TSIL was once again called upon to show cause as to why the delay in development of the coal blocks not be considered as a violation of the terms and conditions of the Allocation Letter.

35. TSIL responded to the Fourth SCN by a letter dated 03.02.2015. TSIL once again set out the reasons for the delay. According to it, the delay was caused on account of reasons attributable to various State agencies. Apart from the above, TSIL also contended that the bank guarantee furnished by it ought not to be invoked since the allocations had been declared to be illegal by the Supreme Court of India. It also claimed that it had made a total investment of ₹584,01,66,872/- up till 30.09.2014 and reserved its rights to claim damages and compensation for the acts of the MoC.

36. Since the process of issuing show cause notice and further examining the response submitted by coal allottees could not be completed within the specified time, the MoC sought extension of time from this Court to complete the said exercise. The request made by the MoC was accepted and by an order dated 29.01.2015, the time period for examining the issue relating to invocation of the bank guarantee was extended by a further period of three months.

37. The matter was once again taken up at the 29th meeting of the Inter Ministerial Group (IMG) held on 16.04.2015. It was, *inter alia,* decided by the IMG that further time would be given to various State Governments to submit their comments and if no comments were received by 23.05.2015, it would be presumed that the State Governments had no comments to offer and the decision would be taken on the said basis. It was also decided that the Coal Controller would calculate the bank guarantee amount to be deducted depending on the comments received from the State Governments / CMPDIL

against the slippages and weightages as per the conditions of the Allocation Letter. The same was to be done by 25.04.2015.

38. The IMG held its 30th meeting on 29.04.2015 to review the matter regarding deduction/forfeiture of the bank guarantees in respect of one hundred and twenty seven coal blocks. The Coal Controller (MoC) submitted the calculations of the Bank Guarantee amounts to be deducted depending on the comments received from State Governments / CMPDIL. The IMG noted that fifty-five court cases had been filed by various prior allocatees and considered it expedient to take those cases first to resolve the issue relating to the invocation of the Bank Guarantees. The Coal Controller was directed to revisit the comments of various State Governments / CMPDIL and recalculate the BG amount after computing the slippages against each milestone in respect of the said fifty-five cases. The calculations were directed to be submitted by 05.05.2015.

39. The IMG (Inter Ministerial Group) held its 31st meeting on 07.07.2015. It appears from the minutes of the said meeting that IMG resiled from its earlier decisions. It now decided that in respect of thirty-one coal blocks where MoC had already passed orders regarding de-allocation and/or deduction of Bank Guarantees, there was no requirement to re-evaluate the said issue; the decision taken on the 28th meeting to issue show cause notices to prior allotees was an inadvertent error; and it was not necessary to review the decisions in each individual case. The IMG, accordingly, recommended that the show cause notice issued to the prior allotees (Fourth SCN to TSIL) be

withdrawn. It is also relevant to note that in respect of certain coal blocks (fifteen in number), IMG decided to invoke the Bank Guarantees. It directed that the amount of bank guarantee to be encashed, be calculated by the Coal Controller by taking the following factors into consideration:

> "(a) Conditions of allocation letter.
>
> (b) Delay attributable to Government or Government agencies (whether Centre or State) and delay on the part of prior allottee(s).
>
> (c) Delay attributable to prior allottee(s) was proportionately calculated i.e. 10% deduction for delay of every 3 months against the weightage/marks given for the respective milestone."

40. Pursuant to the decision taken by the IMG at its 31st meeting held on 07.07.2015, the MoC uploaded a letter on its website addressed to TSIL stating that the show cause notice dated 16.01.2015 (Fourth SCN) stood withdrawn and the bank guarantee would be deducted in terms of the MoC's order dated 23.11.2012.

41. Aggrieved by the same, TSIL filed another writ petition, being W.P.(C) 7674/2015 once again impugning the order dated 23.11.2012 passed by the MoC for invoking the bank guarantee in respect of the coal block in question [Radhikapur (East) Coal Block]. TSIL also impugned an order dated 04.08.2015, whereby the MoC had accepted the recommendations of the IMG made at its 31st meeting. In addition, TSIL also prayed that it be declared that it was not in breach of the terms and conditions of the Allocation Letter dated 07.02.2006.

42. The said writ petition was taken up by this Court on 12.08.2015. On that date, the learned Additional Solicitor General appearing on behalf of MoC stated that the MoC would pass a fresh order after affording the petitioner an opportunity to be heard, within a period of eight weeks from that date and the same would be communicated to the petitioner. This Court disposed of the said writ petition with certain directions. The operative part of the said order is set out below:

> "Mr. Sanjay Jain, learned ASG appearing on advance notice submits that the respondent shall pass a fresh order after affording an opportunity to the petitioner within eight weeks and the same shall be communicated to the petitioner.
>
> In view of the above, the writ petition is disposed of with the following directions:-
>
> 1. The petitioner shall validate the bank guarantee for a period of 12 weeks.
> 2. The respondents shall take a decision on the issue whether the bank guarantee ought to be invoked or released within a period of eight weeks from today.
> 3. The said decision of the respondents shall be communicated to the petitioner within one week thereafter.
> 4. In the event the respondents decide to invoke the bank guarantee or pursue its encashment, the respondents shall not do so for a further period of two weeks after communicating their decision to the petitioner, to enable the petitioner to take appropriate action in accordance with law.

> With the aforesaid observations, the petition and the application stand disposed of."

43. In terms of the aforesaid order, the petitioner was issued a notice dated 28.09.2015 informing it that the 32nd meeting of the IMG would be held in 30.09.2015 at 10:30 AM and TSIL was requested to attend the said meeting. The representative of TSIL attended the said meeting and also submitted written submissions on the issue of invocation of the bank guarantee. TSIL claimed that in view of the judgment of the Supreme Court in ***Manohar Lal Sharma (I)*** the issue regarding bank guarantee did not survive and the MoC did not have the power to invoke the bank guarantees or take any advantage under the Letter of Allocation as the same had been declared void.

44. TSIL also contended that the MoC had on prior occasions acquiesced with the delays and was now estopped from taking a different position. It reiterated its submission that the delays in achieving the milestones were not for reasons attributable to it but to the State and its agencies. By a letter dated 28.12.2015 – which is impugned in this petition – the MoC communicated its decision to reject the above contentions. MoC held that the decision of the Supreme Court in ***Manahor Lal Sharma (I)*** would not override the terms of the allocations as the allocations were valid at the material time. Insofar as TSIL's claim that the delay in development of the coal block in question was not attributable to it but to various State/State agencies, the MoC rejected the aforesaid contention by noting that TSIL's claim in this regard had been evaluated and rejected by the MoC.

45. The aforesaid communication dated 28.12.2015 is also impugned by TSIL in this petition.

Submissions

46. Mr Tripathi, learned senior counsel appearing for TSIL assailed the decision of the MoC to invoke the bank guarantee furnished by TSIL on, essentially, five fronts. First of all, he submitted that the allocation of the coal block had been declared as void by the definitive judgment of the Supreme Court in ***Manohar Lal Sharma (I)***. He submitted that in its subsequent decision in ***Manohar Lal Sharma v. Principal Secretary: (2014) 9 SCC 614*** [hereafter '***Manohar Lal Sharma (II)***'], the Supreme Court had cancelled the allocation of coal blocks that had not began production. In respect of the coal mines that had commenced production, the Supreme Court had passed orders for the allocatees to effectively disgorge any benefit that they had derived from working the mines. He submitted that since the allocation had been declared illegal, the Allocation Letter was, void *ab initio*. Consequently, the MoC could not invoke the bank guarantee, which was in the nature of a performance guarantee. He submitted that the essential purpose of furnishing the bank guarantee was to secure MoC for due performance of the terms and conditions of the Allocation Letter. Once the said Allocation Letter had been declared as illegal, the question of MoC recovering any amount on account of performance of the terms and conditions of such allocation did not arise.

47. Mr Tripathi referred to the decision of the Supreme Court in ***Chairman-cum-MD, Coal India Ltd. v. Ananta Saha: (2011) 5 SCC 142*** and ***The State of Punjab v. Davinder Pal Singh Bhullar: (2011) 14 SCC 770*** in support of his contention that if the foundation is not in accordance with law, all subsequent proceedings would also fail. He referred to Section 65 of the Indian Contract Act, 1872 (Contract Act) and submitted that in terms of the aforesaid Section, the legal consequences of a void contract would be that any person who has received any advantage under the agreement or the contract is bound to restore the same. He submitted that since the allocation had been declared as illegal, the MoC could not derive any benefit from the same and, therefore, their decision to invoke the bank guarantee was flawed. He also relied on the texts of Chitty on Contracts, 32th Edition and Cheshire, Fifoot and Furmston's Law of Contract, 14th Edition in support of the aforesaid proposition. He also referred to the decision of this Court in ***Sahibabad Steels Pvt. Ltd. v. Engineering Projects (India) Ltd. and Ors.: (1987) 33 DLT 237*** and ***DS Contractions Ltd. v. Rites Ltd. And Anr.: AIR 2006 (DEL) 98*** in support of his contention.

48. Second, he contended that there was a jurisdictional error inasmuch as the IMG/MoC had not complied with the earlier orders passed by this Court. He stated that despite several orders directing the IMG/MoC to examine the issue of invocation of bank guarantee, it had failed to do so but had merely reiterated the earlier decision as reflected in the impugned order dated 23.11.2012. He earnestly

contended that the said order could not be relied upon in view of the subsequent orders passed by this Court.

49. Third, he contended that there was, in fact, no delay on the part of TSIL in taking steps to meet the milestones as stipulated in the Allocation Letter. He submitted that the delay was caused for various reasons, which were attributable to either the Central Government, the State Government or their agencies. He referred to a tabular chart submitted by TSIL indicating the reasons for the delay and contended that these had not been examined by the MoC.

50. Fourth, he submitted that the decision of the MoC to treat the comments received from the State government to TSIL's contentions as final without providing the same to TSIL violated the principles of natural justice.

51. Fifth, he submitted that the timelines as stipulated in the Allocation Letter were impossible to achieve. He stated that this was examined by the Supreme Court in ***Samaj Parivartana Samudaya and Ors. v. State of Karnataka: W.P.(C) 562/2009*** and it was noted that the time schedule stipulated in the rules were not followed by any of the agencies. He further submitted that the timelines as stipulated were more stringent than the timeline specified in various rules. He submitted that the timeline for securing the forest clearance under the Conservation Rules, 2003 and 2004 is 360 days for Stage-I Clearance (processing by State Government 210 days and processing by Central Government 150 days). In addition, Stage-II clearance would also take

approximately 180 days. However, the Allocation Letter provided for only 180 days for securing the forest clearance. He submitted that although TSIL had taken all possible steps to secure the said permissions, there were significant delays in securing the clearance for various reasons which were not attributable to TSIL but to the Government and/or their agencies.

Reasons and conclusion

52. The first and foremost question to be addressed is whether the Bank Guarantee furnished by TSIL is unenforceable by virtue of the decision of the Supreme Court in ***Manohar Lal Sharma (I)*** and/or ***Manohar Lal Sharma (II)***. In ***Manohar Lal Sharma (I)***, the Supreme Court held as under:

> 163. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14-7-1993 in 36 meetings and the allocation through the Government Dispensation Route suffers from the vice of arbitrariness and legal flaws. The Screening Committee has never been consistent; it has not been transparent; there is no proper application of mind; it has acted on no material in many cases; relevant factors have seldom been its guiding factors; there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based

> on the recommendations made in all the 36 meetings of the Screening Committee is illegal."

53. However, the Supreme Court did not proceed further to indicate the consequences of its decision that the allocations made were illegal and relisted the matter for considering the same. This is clear from paragraph 166 of the said decision, which reads as under:

> "166. As we have already found that the allocations made, both under the Screening Committee Route and the Government Dispensation Route, are arbitrary and illegal, what should be the consequences, is the issue which remains to be tackled. We are of the view that, to this limited extent, the matter requires further hearing."

54. In ***Manohar Lal Sharma (II)***, the Supreme Court considered the question as to what should be the consequences of its earlier decision rendered in ***Manohar Lal Sharma (I)***. In the said proceedings, the Central Government filed an affidavit mentioning that forty coal blocks were in production. The said list also included two coal blocks which were allotted to Ultra Mega Power Projects, which had not been disturbed by the decision of the Supreme Court in ***Manohar Lal Sharma (I)***.

55. In addition to the forty coal blocks, the Central Government also specified that there were six other coal blocks that were in a position to produce coal virtually with immediate effect.

56. The coal blocks were classified in two categories; the first consisting of the above forty-six coal blocks and the second consisting of coal blocks that had not yet commenced production.

57. Insofar as the second category of allocatees that had not entered into a mining lease and had not commenced production, the Supreme Court held that the said allotments must be quashed. The Court also observed *"whether they are 95% ready or 92% ready or 90% ready for production (as argued by some learned counsel) is wholly irrelevant."* Accordingly, the Court quashed the said allotments.

58. Insofar as the first category of coal blocks was concerned, the Court found that four of the said coal blocks (three in production and one virtually ready for production) had been allotted to public sector undertakings and, therefore, the said allotments were not required to be interfered with. But the other allocations were required to be cancelled. The Court quashed the allocations/leases of the remaining forty two coal blocks but made it clear that the cancellation would take effect six months from the date of the decision. Paragraph 37 of the ***Manohar Lal Sharma II*** indicating the above is set out below:

> 37. In view of the submissions made, although we have quashed the allotment of 42 out of these 46 coal blocks, we make it clear that the cancellation will take effect only after six months from today, which is with effect from 31-3-2015. This period of six months is being given since the learned Attorney General submitted that the Central Government and CIL would need some time to adjust to the changed situation and move

> forward. This period will also give adequate time to the coal block allottees to adjust and manage their affairs. That CIL is inefficient and incapable of accepting the challenge, as submitted by the learned counsel, is not an issue at all. The Central Government is confident, as submitted by the learned Attorney General, that CIL can fill the void and take things forward."

59. In view of the above, it was contended on behalf of the respondents that the coal blocks allocated had not been cancelled *ab initio* but some of the coal blocks, which were in production, had been cancelled with effect from a future date. It was contended that, therefore, the allocations made to TSIL should be considered valid till the MoC's decision to cancel the same (which was prior to the decision of the Supreme Court in ***Manohar Lal Sharma I*** and ***Manohar Lal Sharma II***). It was also contended on behalf of the respondents that even if it is held that the allocation of coal blocks was void as being illegal, TSIL could derive no benefit of the same by virtue of being a party to the said transaction. The learned counsel relied on the maxim – *in pari delicto portior est conditio possidentis*. It was submitted that TSIL was equally a party to the illegality and, therefore, the Court would not render any assistance to such a party.

60. The maxim *in pari delicto portior est conditio possidentis* sets out the proposition that in case of equal fault the position of the possessor is better. If the two disputing parties are equally at fault then the party in possession of the disputed property retains it.

61. In ***Holman v Johnson, 1 Cowper 341 decided in 1775***, Lord Mansfield had explained the principle in the following words:

> "..the objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principles of public policy is this: *ex dolo malo non oritur action*.No court will lend its aid to a man who founds his cause of action upon immoral or an illegal act. If, from plaintiffs own stating or otherwise, the cause of action appears to arise *ex trupi causa,* or the transgression of positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the later would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*"

62. In ***Gibbs and Sterrett Mfg. Co. v. Prucker: 28 LEd 534***, the US Supreme Court referred to the above principle in the following words:

> "The elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."

63. The principle of *in pari delicto* is based on the public policy that the courts would not lend assistance to any plaintiff in any action,

which is founded or arises out of an illegal transaction. The object being to not lend assistance to a party who has willingly entered into an illegal transaction. Clearly, this principle would have no application where the party bringing an action is not *in pari delicto* (equally at fault).

64. In ***Sita Ram vs Radhabai And Ors: 1968 AIR 534, 1968 SCR (1) 805*****,** the Supreme court held as under :

> "The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari deucto portior est conditio defendentis. But as stated in Anson's 'Principles of the English Law of Contracts', 22nd End., p. 343: 'there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which be has entered cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant. (c) where the plaintiff does not have to rely on the illegality to make out his claim."

65. It is at once clear that the said maxim has no application in the facts of the present case. There is no material to establish that TSIL was aware that the allocation of the coal block made by the MoC was illegal.

66. In ***Manohar Lal Sharma (I)***, the Supreme Court had held that the Central Government was not empowered to allocate the coal

blocks in the manner in which it had done since the same was neither contemplated by the Coal Mines (Nationalization) Act, 1973 nor the Mines and Minerals (Development and Regulation) Act, 1957. It held that if the said statutes required to do things in a certain manner, all other methods of performance were necessarily forbidden.

67. In that case, it was contended by the Attorney General before the Supreme Court, that the allocation letter did not itself confer any right to work the mines and the identification of the coal block did not impinge upon the rights of the State Government under the Mines and Minerals (Development and Regulation) Act, 1957. He contended that allocation was only the first step and the allocatee was required to apply to the State Government for grant of the prospecting license/mining lease in accordance with the Mines and Minerals (Development and Regulations) Act, 1957. Issuance of an allocation letter did not mean that the allocatee would automatically get the clearances and approvals as required.

68. The Supreme Court rejected the aforesaid contention and held that the allocation letter by the Central Government conferred a valuable right on the allottee. The Court also noted that it was admitted that an applicant could not directly approach the State Government for grant of a mining lease without an allocation letter by the Central Government. In view of the above, the contention of the respondents that TSIL should be considered equally at fault cannot be readily accepted. It is clear that TSIL could not have approached the State Government directly for obtaining a mining lease without an

allocation letter from the Central Government as that was the procedure, which was insisted upon at the material time.

69. The respondents' contention cannot be accepted for yet another reason. If the respondents desired to set up a case that TSIL was also a party to subverting the law, it was necessary for the respondents to have filed an affidavit making such allegations. However, there is no material on record, which would establish or even remotely suggest that TSIL had also subverted the process or had used any illegal means to secure any favours from the respondents. In fact, the respondents have not controverted any of the averments made by TSIL in this petition despite being afforded sufficient opportunity to file a counter affidavit. It is also not disputed that respondents had not filed any counter affidavit in the earlier writ [W.P.(C) 7430/2012] filed by TSIL, as well.

70. It is also well settled that if a party is not an equal participant in illegality he may be allowed relief by rescission or restitution. Wiliston on Contracts Fourth Ed. Sets out this proposition in the following words:

> *"if a party is chargeable with some knowledge of the facts, rendering the transaction illegal, but is not pari delicto, the party is generally allowed to recover monies paid of properties transferred" (see .§12.6 Wiliston on Contracts Fourth Ed.)*

71. In ***Pullman's Palace Car Co. vs Central Transp.Co, 171 US 139 (1898)*** the US Supreme Court allowed recovery of the value of

the property that was handed over in terms of an illegal contract. The court referred to earlier decisions and held that:

> "They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for recovery of property delivered under an illegal contract where in order to maintain such recovery it is necessary to have recourse to that contract. The right to recovery must rest upon a disaffirmance of the contract, and is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which, in justice, he ought to recover. But courts will not, in such endevour, permit any recovery which will weaken the principles of public policy already noted."

72. In view of the above, there can be no dispute that if the allocation is held to be *void ab initio*, the MoC would not be entitled to claim any damages for non-performance of the said contract. It can at best recover any cost or expenditure that may have been incurred by it. In the present case, the MoC seeks to invoke a bank guarantee, which was furnished to secure the MoC for due performance of the terms of the allocation. A plain reading of the Allocation Letter indicates that the bank guarantee furnished by TSIL is for a sum equivalent to one year's average royalty that would have been received by the Government if the mining operations had been carried out. Thus, the Government had sought to secure itself against the amount of royalty, which it would have received if the terms of the Allocation Letter had been duly implemented. Plainly, if the allocation

itself is held to be *void ab initio*, the question of respondents securing themselves of the benefit that could have been drawn from due performance of the terms and conditions of the allocation does not arise.

73. Although it is trite law that a bank guarantee is an independent contract, however, if the underlying contract is vitiated on account of being fraudulent or is void on account of any illegality that is attributable to the beneficiary, the beneficiary would not be entitled to take benefit of any illegality to which it is a party.

74. In ***Mahonia Ltd. v. J.P. Morgan Chase Bank and Anr.*** (*supra*), the Queen's Bench Division Commercial Court refused to enforce a letter of credit, which to the claimant's knowledge was created to support an unlawful purpose. Thus, plainly, if the claimant is a party to creating a contract, which is illegal or for unlawful purposes, it cannot enforce a bank guarantee for securing performance of such a contract; a performance, which it otherwise cannot insist upon.

75. A bank guarantee is a contract where the bank stands as a surety for discharge of the obligations by a contracting party (the principal debtor). In terms of Section 128 of the Indian Contract Act 1872, "the liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract". It is trite that if the principal debtor is discharged from performance of the contract so is the surety. Thus, if the allocation is held to be void *ab inito,* the bank

guarantee furnished for due performance of the terms and conditions of the Allocation Letter would be unenforceable.

76. Having stated the above, the key question is whether the allocations made in favour of TSIL was declared void *ab initio* by the decision of the Supreme Court in ***Manohar Lal Sharma (I)*** and/or ***Manohar Lal Sharma (II)***.

77. First of all, it is necessary to bear in mind that the coal block allocated to TSIL was not one of the subject coal blocks that were considered by the Supreme Court in ***Manohar Lal Sharma (II)***. This was for the reason that the MoC had already taken a decision to cancel the said allocation.

78. Secondly, in ***M/s Strategic Energy Technology Systems Pvt. Ltd. v. Union of India and Ors.: LPA 255/2016***, the Division Bench of this Court rejected the contention that in ***Manohar Lal Sharma***'s case the Supreme Court had declared the allocation of coal blocks *void ab initio*, in the following words:

> "Apparently, the order dated 17.02.2014 came to be passed by the Ministry of Coal, consequent to which the bank guarantee was sought to be encashed, for an entirely different reason, i.e., the alleged failure of the appellant / writ petitioner to meet the milestones prescribed in developing the coal block. The order of the Supreme Court in ***Manohar Lal Sharma's case*** (supra) declaring the allocation of the coal blocks made by the Union of India during the period 1993 to 2010 as arbitrary and illegal was a subsequent event. It

> may be true that W.P. (C) No. 1173/2014 was disposed of as having become infructuous in view of the decision of the Supreme Court in ***Manahoar Lal Sharma's case*** (supra), however, in our considered opinion, the same does not invalidate the order dated 17.02.2014 since by that time, the Letter of Allotment in favour of the appellant/writ petitioner was very much valid and was in operation. Hence, we do not find any substance in the contention of the learned Senior Counsel for the appellant that in view of the order of the Supreme Court in ***Manohar Lal Sharma's case*** (supra) the Letter of Allotment has been rendered *void ab initio*."

79. It is also relevant to note that an SLP was filed against the aforesaid decision (SLP No. 16888/2017), which this Court is informed is pending consideration by the Supreme Court. The Division Bench of the High Court of Chhattisgarh had by an order dated 15.11.2017 in ***W.P.(C) 2136/2012*** captioned ***Ultratech Cement Ltd. v. Union of India and Anr.*** vacated an order staying the invocation of the bank guarantee pursuant to the decision of the Supreme Court in ***Manohar Lal Sharma (I)***. The said decision is also subject matter of the Special Leave Petition – ***SLP No. 35575/2017*** captioned ***Ultratech Cement Ltd. v. Union of India and Anr*** – and by an order dated 09.01.2018, the Supreme Court has stayed the invocation of the bank guarantee furnished by the appellant in that case, till further orders and has tagged the matter with SLP NO, 16888/2017: ***M/s Strategic Energy Systems Pvt. Ltd. vs Union of India***.

80. The decision of the Division Bench in ***M/s Strategic Energy Technology Systems Pvt. Ltd.*** (*supra*) is binding on this Court. And, in view of the above, the contention that the Allocation Letter issued to TSIL had been declared *void ab initio* has to be rejected. Consequently, the bank guarantee furnished by TSIL, which was invoked earlier, cannot be interdicted on the ground that the allocation was rendered *void ab initio*.

81. The next question to be examined is whether there was any delay on the part of TSIL in complying with the terms and conditions of the Allocation Letter. As noticed above, TSIL has consistently claimed that the delay in meeting the milestones cannot be attributed to it but to the State Government and various other State agencies. It is material to note that this aspect is extensively pleaded by TSIL in its writ petition, which remains uncontroverted because the respondents have not filed any counter affidavit to the writ petition despite sufficient opportunity.

82. It is also seen that the respondents had on two occasions made statements before this Court to the effect that the aspect regarding invocation of the bank guarantees would be examined. However, it appears that the respondents have not done so. On the first occasion such a statement was made on 30.10.2014, whereby it was stated on behalf of the respondents that the question regarding invocation of bank guarantees was under consideration of the respondents. The matter was examined by the IMG at its 28th meeting and a decision was taken to issue show cause notices to all prior allocatees including

TSIL. It was also decided to examine each case separately. However, thereafter, IMG changed its stand – in this court's view quite inexplicably – and took a view that it was not necessary to re-examine the issue as it stood concluded in terms of the order dated 23.11.2012 (the impugned order). This, obviously, is erroneous since the said order was subject matter of the writ petitions that were disposed of on 30.10.2014 in view of the statement made that the respondents were considering the issue of bank guarantees. Plainly, if the respondents' stand was that the order dated 23.11.2012 was to stand, TSIL would be entitled to have its challenge considered on merits.

83. Aggrieved by the decision of the IMG to standby the earlier order dated 23.11.2012 without considering the TSIL's contention, TSIL filed another writ petition [W.P.(C) 7674/2015]. This petition was disposed of on 12.08.2015 in view of the statement made on behalf of the MoC that it would pass a fresh order after affording TSIL an opportunity to be heard. Although a notice dated 28.09.2015 was issued to TSIL affording it an opportunity to be heard, the respondents did not examine the issue afresh, but decided to simply stand by its earlier decision without dilating on the merits of the explanation for the delay provided by TSIL. This was communicated to TSIL by the letter dated 28.12.2015.

84. Having made statements before this court that the matter would be re-examined, it was incumbent on MoC to have considered TSIL's contention on merits before deciding to invoke the bank guarantee.

85. At this stage, it is important to note that the respondents have decided not to invoke bank guarantees furnished by allocates in cases where the delay in meeting the obligations is not attributable to the allocatee. This is apparent from the minutes of the 33rd meeting of the IMG held on 03.12.2015. In the said meeting IMG had noticed that there were eighteen coal blocks where the delay in achieving the milestones was not attributable to prior allocatees as the same was pending with Government agencies. In the circumstances, the IMG had recommended that the bank guarantees furnished in respect of the said eighteen coal blocks be not invoked and returned to the prior allocatees. If TSIL's contention is accepted, it cannot be treated any differently. If it is found that the delay in development of the coal block was not attributable to TSIL but to other Government agencies, it would be highly arbitrary and unreasonable for the respondents to invoke the bank guarantees. This also made it imperative for the respondents to examine TSIL's explanation regarding the delay on merits.

86. TSIL was issued the Third SCN and it had replied to it by a letter dated 15.05.2012. A plain reading of the said letter indicates that TSIL had set out the reasons for the delay in some detail and had also furnished an explanation why the delay was not attributable to it. TSIL claimed that it had taken steps well within the timelines prescribed. But the delay was on account of various State agencies. Thereafter, the MoC had passed the order dated 23.11.2012 (impugned order). A plain reading of the said order indicates that it had noted the terms of

the Allocation Letter and had further observed that in the earlier review meetings the Committee had expressed dissatisfaction over the progress made by TSIL. After setting out the tabular statement indicating the delays in meeting the milestones and after narrating the past history, the IMG had concluded as under:

> "Taking into account all factors including substantial progress and investment made, the IMG did not consider it appropriate to recommend de-allocation of the coal block at this stage. However, taking into account all factors, IMG recommends that BG made be deducted for shortfall in production as per formula mentioned in the letter of allocation and made be calculated from the date of production i.e. 7.8.2009."

87. The impugned order dated 23.11.2012 merely recorded that the recommendations of IMG had been considered and accepted by the MoC. The impugned order does not indicate any reason why the explanations furnished by TSIL were rejected or had not found favour with the IMG.

88. It would not be apposite for this Court to examine any dispute whether the delay in achieving the milestone is attributable to State Agencies or TSIL, on merits. But it is undeniable that TSIL is justified in insisting that its explanation for the delay ought to have considered by the concerned authority before deciding to invoke the bank guarantee. Failure to do so vitiates the entire action as arbitrary and unreasonable and falls foul of Article 14 of the Constitution of India.

89. The impugned order dated 28.12.2015 also does not shed any light as to the reasons that had prompted IMG to reject TSIL's explanation regarding the delay in achieving the milestones. Once again the facts relating to issuance of show cause notices and the representations received by TSIL were noted and after noting the past history, the IMG concluded that "*the second contention of TSIL that delay was attributable to Government and its agencies is not tenable since opportunity of personal hearing was granted to TSIL at each and every relevant time to present its case for delay in development and the IMG at every relevant time duly considered as to whether the delay was on the part of TSIL or Government/its agencies and accordingly a final decision regarding deduction of BG was recommended which was accepted by the Government.*"

90. Thus, the minutes of the 32nd meeting of the IMG also do not specifically indicate as to why the explanations furnished by TSIL were found to be unmerited.

91. This Court is of the view that the explanations furnished by TSIL for the delay in achieving the milestones and its contention that the same is on account of Government agencies, is required to be considered by the MoC and it is required to take an informed view before seeking to invoke the bank guarantee. The decision made by the MoC must be informed by reason. It must conclude either way whether TSIL's contention that the delay is attributable to Government/its agencies has any merit. Although TSIL has been afforded an opportunity to be heard but the said opportunity is

meaningless if TSIL's contentions have not been specifically dealt with. Providing a hearing cannot be a mere formality. It is an opportunity for a party to present its explanation and it must necessarily follow that the said explanation must be considered. If the explanations are found to be unmerited, the reasons for finding so must be communicated.

92. It is apparent from the record that certain comments from the State Government had been received by the IMG/MoC. However, a copy of the same was not furnished to TSIL. The same have also not been placed on record and, therefore, this Court is unable to consider the same. The orders impugned in this petition also does not indicate the comments made by the State Government and it is, therefore, difficult to accept that the same were considered by the IMG/MoC. Plainly, if the MoC had considered the comments of the State Government and its agencies – which was necessary to decide whether there is any merit in TSIL's contention that the delay is attributable to Government/its agencies – it would also be necessary that the said comments be furnished to TSIL. This would enable TSIL to also deal with the same and assist the MoC/Government in taking an informed view.

93. This Court finds merit in the contention that failure to furnish a copy of the said comments despite TSIL seeking the same falls foul of the principles of natural justice.

94. There is another aspect of the matter that requires to be considered. The Allocation Letter provided for furnishing of a bank guarantee and the manner in which it would be deducted. Clauses (iii) and (v) of the Allocation Letter are reproduced below:-

> "iii. The Leader shall submit a bank guarantee of Rs. 32.50 crores (equal to one year's royalty amount) based on mine capacity of mtpa assessed by CMPDIL, grades of coal from A to G grades and the weighted average royalty @ Rs. 65 per tonne within 3 months from the date of this letter. Subsequently upon approval of the mining plan the bank guarantee amount will be modified based on the final peak/rated capacity of the mine.
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> * * * * *
>
> v. The progress of the mine will be monitored annually with respect to the approved mining plan, which will mention zero date. In case of any lag in the production of coal, a percentage of the bank guarantee amount will be deducted for the year. This percentage will be equal to the percentage of deficit production in the year with respect to the rated/peak capacity of the mine, e.g., if rated/peak capacity is 100, production as per the approved mining plan for the relevant year is 50 and actual production is 35, then (50-35)/100x100=15% will lead to deduction of the 15% of the original bank guarantee amount for that year. Upon exhaustion of the Bank Guarantee amount the block shall be liable for de-allocation/cancellation of mining lease. The Leader shall have to ensure that the Bank Guarantee remains valid at all times till the mine reaches its rated capacity or till the Bank Guarantee is exhausted."

95. It appears from the plain language of the said Allocation Letter that the bank guarantees were to be invoked on account of deficiency in production. It was pointed out that in its 33rd meeting IMG had

noticed that there were sixteen coal blocks where 100% of the BG was linked to production. The IMG reasoned that since eleven coal blocks out of the sixteen had not commenced production before their cancellation by the Supreme Court, no BG amount was required to be deducted. The IMG had also perused the condition of the BG mentioned in the allocation letters pertaining to those alocatees. A plain reading of the minutes indicate that the clause relating to calculation of the bank guarantee amounts to be encashed in those cases, was similar to the clause as set out in the Allocation Letter.

96. Thus, the question whether the bank guarantee furnished by the TSIL could be invoked on account of delay in development of the coal mine (and not on account of any deficiency in production) is also required to be considered by the MoC.

97. It was also contended by TSIL that the timelines as set out in the Allocation Letter are impossible to achieve. This Court does not consider it apposite to entertain this plea. TSIL was fully aware of the terms of the Allocation Letter when it had accepted the same. Even during the initial review meetings, TSIL had not taken a plea that the timelines as set out in the Allocation Letter are impossible to achieve. TSIL did not challenge the terms of the Allocation Letter at any stage. On the contrary, TSIL had responded to the First SCN by stating that it would meet the production targets as scheduled. Thus, it is not open for TSIL to now impugn the conditions as set out in the Allocation Letter. Its well settled that remedies under Article 226 of the Constitution of India are discretionary remedies. This Court does not

consider is apposite to entertain such a plea while exercising its jurisdiction under Article 226 of the Constitution of India.

98. In view of the above, this Court sets aside the impugned orders dated 23.11.2012 and 28.12.2015 and remands the matter to MoC to consider it afresh. The MoC shall provide TSIL the comments received from the concerned State Government(s) on the aspect whether the delay in achieving the milestones is attributable to TSIL. The concerned authority shall afford TSIL an opportunity to be heard; it would take an informed decision and pass a speaking order. In the meanwhile, TSIL shall ensure that the bank guarantee furnished by it is kept alive till the said decision is rendered by the MoC.

99. The petition is disposed of in the above terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 27, 2020
RK/MK/pkv