2023 STPL(WEB) 30 SC
SUPREME COURT OF INDIA

(S. RAVINDRA BHAT AND DIPANKAR DATTA JJ.)

M/S. SANVIRA INDUSTRIES

Appellant

VERSUS

RAIN CII CARBON (VIZAG) LTD. & ORS.

Respondent

Civil Appeal No(S). 3834-3838 of 2023 with Civil Appeal No(S). 3839-3843 of 2023-Decided on 3-7-2023

Civil

Constitution of India, Article 136 - Allocation of quantities of raw pet-coke (RPC) – Appeal fails - Contention on behalf of the appellant that there was a change of criteria adopted in the Public Notice dated 17.04.2020 issued by the GOI - Contrary to the earlier requirement of certification of production capacity by the Unit, the Public Notice dated 17.04.2020, required certification by the SPCB - In this case, the APPCB certified Sanvira's production capacity as on 09.10.2018 to be 3,30,000 MT and that figure was correctly considered while making allocation of RPC in its favour - It was urged that in the absence of any challenge to the Public Notice dated 17.04.2020 or the certificate issued by the APPCB regarding Sanvira's production capacity (as 3,30,000 MT as on 09.10.2018), the challenge by Rain CII was untenable and was liable to be rejected - It is argued that the orders dated 28.01.2019 and 08.07.2019 of this court merely clarified that the overall import of RPC has to be confined to 1.4 MMTPA - Contention that this court did not consider Sanvira's claim that as on 09.10.2018 its production capacity was in fact, 3.30 lakh MT –Reasoning of the impugned judgment is that there was no distinction (contrary to the conclusion of the single judge) regarding the public notice dated 17.04.2020 -between the certificate in the first part and the consent to operate in the second part –Held that the Division Bench noted, correctly that the annual total limit of import of 1.4 Million Metric Tonnes was based on the total production capacity as on 09.10.2018 which had been fixed by this court on the basis of the capacity disclosed by all the calciners - It was also observed that an SPCB could indicate the permissible limit of production of calcined petroleum coke - For Sanvira it was 2,00,000 MTPA; the consent to produce 3,30,000 MTPA of coke was given only after 29th November 2018 - Therefore, it could not have been considered by the court - The certificate dated 04.05.2020 issued by the APPCB merely certified that the installed capacity of Sanvira, as on 09.10.2018, for manufacturing calcined petroleum coke, was 3,30,000 Metric Tonnes per annum in terms of the consent to operate (CTO) - The total figure of 1.4 Million Metric Tonnes of RPC was based on the permissible capacity as on 09.10.2018 - The Division Bench, therefore, concluded that if production capacity had increased, the proportionate share to be given was after clearance by this court - View expressed by the impugned judgment held to be correct - Barring the fact that a clarification was issued on 04.05.2020, by the APPCB, there was no change in circumstance; the material document to be considered was the CTO, which for the relevant period (i.e. as on 09.10.2018) was 2,00,000 MT per annum, for Sanvira - Even according to it, the claim for enhancement was made later, and the CTO for the increased capacity was issued on 26.12.2019 - In these circumstances, the clarification of APPCB, that as on a particular date, the production capacity was 3,30,000 MTPA was of no consequence, because it was the CTO that was considered all along, in all previous meetings - Therefore, the findings and conclusions of the Division Bench cannot be faulted - The appeals fail, and are, liable to be dismissed.

(Para 28 to 30)

JUDGMENT

S. Ravindra Bhat, J.-In these appeals, the allocation of quantities of RPC which is the abbreviation for raw pet-coke, a residue of the leftover from the refining of petroleum products and sand crude as well as other heavy oils, is in issue. Pet-coke is cheaper and burns hotter than coal and is, therefore, used as a fuel, for several industrial uses. However, tests on imported pet-coke and crude coke evidence that they have extremely harmful effects in as much as their residues thrown into the atmosphere contain Sulphur as well as injurious particulate material.

2. The appellant in one of the appeals is M/s. Sanvira Industries (hereafter "Sanvira"). It is aggrieved by the decision of the Delhi High Court*[Dated 10.01.2023 in LPA 25/2021; LPA 70/2021; LPA 71/2021, W.P. (C) 5749/2021, and W.P. (C) 6258/2022.]*, which has interfered with and set aside the minutes of the meeting as well as the decision of the Central Government allocating pet-coke.

3. The necessary facts are that the Director General of Foreign Trade (DGFT) determined the criteria for the allocation of imported raw pet-coke (RPC) and allocated imported RPC among various entities. On 18.07.2018, the Central Ministry of Environment, Forest and Climate Change ("MoEF"), officers of the Environment Pollution (Prevention and Control) Authority for NCR and the Ministry of Petroleum and Natural Gas ("MPNG") decided in principle that import of pet-coke be ought to be restricted only to industries using it as a feedstock or as part of their manufacturing process and not as fuel. This court - seized of the public interest litigation ("PIL") in M.C. Mehta v. Union of India [W.P. No 13029/1985] (hereafter "M.C. Mehta Case") directed implementation of the minutes of the meeting of 18.07.2018 by its order dated 26.07.2018. The MoEF issued an office memorandum further to this court's order dated 10.09.2018, prescribing guidelines for regulation and monitoring of the import of RPC. Importers were obliged to obtain consent and registration issued by the concerned State Pollution Board or Pollution Control Committee ("SPB" and "PCC" respectively). Sanvira wrote on 12.09.2018 to the Environment Pollution Control Authority (hereafter "EPCA") intimating its production capacity of calciners and indicated that its capacity was 2,00,000 MT. The EPCA on 06.10.2018 filed a report before this court with regard to the import of RPC for aluminium, calciner, and steel industries in the context of restrictions imposed on the import of RPC. This was pursuant to litigation in M.C. Mehta Case. The EPCA recommended that the total import requirement of RPC was 1.4 million tonnes per annum ("MTPA") and Sanvira's capacity was taken as 2,00,000 MTPA. The EPCA report stated inter alia as follows:

> "A.1.1 Calciners
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> This industry imports different grades of pet coke and then upgrades this produce to produce calcined pet coke through removal of moisture, volatile matter and by changing the crystalline structure. The pet coke is used as a feedstock in the manufacturing process and not as a fuel. The calcined pet coke is sold to the aluminium industry for feedstock in smelting process.
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> These are 28 calciners in the country, of which 6 are port based and entirely dependent on imported raw pet coke. These 6 calciners, manufacture 72 percent of the calcined pet coke produced in the country.
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> The 6 companies are as follows:
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> 1. Rain CII Carbon, plant based in Vizag, Andhra Pradesh.
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> 2. Sanvira Industries, plant based in Vizag, Andhra Pradesh
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> 3. Goa Carbon, with plants in Goa, Paradeep (Orissa) and Bilaspur (Chattisgarh).
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> 4. Kalinga Calciners Pvt. Ltd., plant based in Paradeep (Orissa)
>
> 5. India Carbon Ltd., plant based in Budge Budge, West Bengal

6. Petro Carbon N Chemicals Pvt. Ltd. Plant in Haldia, West Bengal.

The industry cannot use domestic pet coke as that grade called anode grade – is not readily available. The structure of the pet coke in India is different therefore, import becomes essential.

The industry also provided EPCA with details of the quantity required by the industry (see Annexure 1).

According to this estimation, the 6 industries, with combined production capacity of 1.17 million tonnes require 1.36 million tonnes of imported petcoke to produce 1 million tonnes of calcined pet coke annually.

The industry has also informed EPCA that it meets S02, NOx and particulate emission standards, as stipulated by CPCB.

A.1.2 EPCA Recommendation on Calciner Industry.

The Calciner industry should be allowed to import pet coke as its industry uses it for feedstock and not for fuel. This import is required as anode grade petcoke is not available in sufficient quantities in the country."

4. On 09.10.2018, based on the EPCA report, this court made an order directing that RPC import cannot exceed 1.4 MMTPA and that it could be used as feedstock for producing CPC. The figure of 1.4 MMTPA was based on the production capacity of calciners given by each one of them. This became the basis of an order by this court dated 09.10.2018. As a consequence, on the same day, a notification*[Notification No 42/2015-20]* was issued by DGFT amending the foreign trade policy in relation to the import of RPC. The amendment allowed the import of RPC for cement, calcium carbide, gasification, limekiln and graphite industries for use as feedstock or in the manufacturing process on an actual user basis. The regulation and monitoring of these imports were to be supervised on the basis of guidelines issued by the MoEF on 10.09.2018. The DGFT thereafter proceeded to allocate specific quantities of RPC out of a total import quantity of 1.4 million MT which was to be imported by each calciner on the basis of actual production capacity.

5. While so, on 26.11.2018, a public notice*[Public Notice No 50/2015-20]* was issued by the Ministry of Commerce and Industries, stipulating the manner in which DGFT would allocate the quota of RPC to eligible CPC manufacturing units within the given ceiling limit. According to this, eligible units wishing to avail of quota had to apply for an import license with a copy to the jurisdictional regional authority of DGFT along with the capacity of the unit as well as the consent certificate from the State Pollution Control Board in the name of the industrial unit user indicating the quantity permitted for import and its use. On 27.12.2018, the DGFT, in furtherance of the first public notice initiated the process for allocating RPC. Its allocation became the subject matter of controversy by Sanvira as well as Rain CII, the respondent contesting in these proceedings. Sanvira contended that its production capacity was 330,000 MTPA which was not taken into account while providing allocation. The Committee disposed of all these representations, not acceding to the request. Aggrieved, Sanvira, filed an application, being I.A. No. 12291/2019 in the proceedings in M.C. Mehta's Case before this court. The application specifically contended that in September 2017, Sanvira initiated Phase-2 expansion to expand the capacity from 2,00,000 MTPA to 3,30,000 MTPA and Phase-2 expansion was completed in October 2018 and that a consent to operate was received from the AP Pollution Control Board on 29.11.2018.

6. On 28.01.2019, this court dismissed I.A. No. 12291/ 2019 in the MC Mehta petition. Similar applications had been filed on behalf of others, including the contesting respondent (Rain CII). All the applications were rejected. The relevant portion of the order is reproduced hereunder:

"Heard learned counsel for the parties.

I.A. Nos. 168838 and 164302 of 2018 (Applications for impleadment) are rejected.

The order dated 09.10.2018 passed by this Court is clear. This Court has set the outer limit for import of raw pet coke cannot exceed 1.4 MT per annum in total.

In view of the aforesaid, prayers made on the basis of expansion etc. are totally misconceived and cannot be entertained. No further orders are required to be passed on these I.As. i.e. I.A. Nos. 168847/2018, 1451/2019 & 1847/2019 [filed on behalf of Rain CII Carbon (Vizag) Ltd.], I.A. No. 164303 (filed on behalf of Saket Agarwal), I.A. No. 12291/2019 (filed on behalf of Sanvira Industries Ltd.) and I.A. No. 13210/2019 (filed on behalf of Goa Carbon Ltd.). The same are hereby dismissed."

7. On 22.03.2019, a second public notice, in regard to allocation was issued. Sanvira had requested for enhancement of allocation to it, based on its claim of enhanced capacity to the extent of 1,30,000 MTPA. This application for enhancement was rejected by DGFT, which also rejected a similar application for increased capacity by the contesting respondent, Rain CII. The relevant part of the rejection order, dated 22.04.2019 is extracted below:

"7. The committee also observed that M/s Rain (CII) has drawn attention to DGFT's Office Memorandum No. 01 /93/180/03/AM-1 O/PC-2(A)/P-12485 dated 5th December, 2018. The Committee decided that in view of the order of the Hon'ble Supreme Court dated 28.1.2019 (as detailed in para. 5 in this minutes), the above communication dated 5th December, 2018 is infructuous.

8. In case of M/s Sanvira Industries Ltd. also, the Committee noted that the additional capacity of 1,30,000 MT was created after the Hon'ble Supreme Court's Order dated 9.10.2018 as per the official record. Hence, the request for additional quantity for the new capacity was rejected by the Committee."

8. The decision not to increase capacity, dated 22.04.2019 was challenged before the Delhi High Court in writ proceedings, by Sanvira by way of WP(C) No 4485/2019. On 29.04.2019, at Sanvira's request, the writ petition was adjourned to enable it to secure necessary clarification from this court. For this purpose, Sanvira filed another application IA 73242/2019 reiterating that its capacity had been wrongly recorded as 200,000 MTPA whereas it ought to be 330,000 MTPA. It was contended in that application that:

"(xiii) It is most humbly submitted that the issue that a total production capacity of 330,000 MTPA of CPC had been installed by the Applicant prior to order dated 9.10.2018 passed by this Hon'ble Court was not ,.pleaded before this Hon'ble Court in the Applicant's IA No.12291 of 2019 as such contention had earlier never been raised by the DGFT.

9. On 08.07.2019, this court rejected Sanvira's application (I.A. No. 73242/2019) in the following terms:

"INTERLOCUTORY APPLICATION NO. 73242/2019 (APPLNS. FOR DIRECTIONS ON B/0 SANVIRA INDUSTRIES LTD.)

Our order is clear. No further clarification is required.

This application is disposed of."

10. After the above order, Sanvira moved its pending writ petition before the Delhi High Court (WP No. 4485/2019). The High Court noticed the order of this court, rejecting Sanvira's contentions. The respondents in the writ proceeding i.e. DGFT were required, by the order of the Delhi High Court, (dated 06.12.2019) to consider the representation of Sanvira and pass a reasoned order. Sanvira's writ petition was therefore disposed of. On 13.02.2020, the Union Ministry of Commerce by its decision, recorded in the Minutes of Meeting rejected Sanvira's request, stating inter alia, that:

> "6. [..] The Committee observed that the contention of M/s Sanvira Industries Ltd. that the Hon'ble Supreme Court's order dated 28.01.2019 merely states that outer limit for import of RPC had already been fixed and any prayer seeking enhancement of that limit cannot be entertained and that the said order made no observation, as to whether the enhanced production capacity of the existing calciners were to considered or not is baseless. The Committee was of the view that the prayer before the Hon'ble Supreme Court (as in Para 1) was "to enhance/increase the import limit of 1.4 Million MT of RPC by an additional amount of 488,000 MT per annum for manufacturing CPC at the Applicant's SEZ Unit and accordingly direct the DGFT and other authorities, including the Ministry of Commerce, to allocate this additional RPC to the Applicant. To which the Hon'ble Supreme Court in its order dated 28.01.2019 directed that "the order passed by this Court is clear. This Court has set the outer limit for import of Raw Pet Coke cannot exceed 1.4 MT per annum in total. In view of the aforesaid, prayers made on the basis of expansion etc. are totally misconceived and cannot be entertained. No further orders are required to be passed on these I.As. The same are hereby dismissed." M/s Rain Cll (Vizag) Ltd. had prayed before the Hon'ble Supreme Court is clear neither the limit of 1.4 Million MT can be enhanced nor the expansion of the capacity by the calciners can be entertained. The Committee, therefore, did not approve M/s Sanvira Industries representation who was seeking allocation for its additional capacity of 1,30,000 MT.
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> 7. The Committee while consideration the submission of M/s Sanvira Industries Ltd. was of the view that the capacity of each applicant was decided on the basis of Consent to Operate certificate available with the firm on the date of passing of order dated 09.10.2018 by the Hon'ble Supreme Court in WP No.13029 of 1985. The firm was not having Consent to Operate on 09.10.2018 for their plant and accordingly it was not considered by the Committee which decided the allocation of pet coke amongst all eligible applicants.
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> 8. M/s Sanvira Industries Ltd. after filing the W.P.(C) 4485/2019 & CM No.31904/2019 before the Delhi High Court, filed IA No.73242/2019, before the Hon'ble Supreme Court inter alia praying to challenge the Minutes of Meeting dated 22.04.2019 regarding allocation of RPC. The said application was disposed of by the Hon'ble Supreme Court observing "our order is clear. No further clarification is required. This application is disposed of." In view of the above directions of the Hon'ble Supreme Court, where the minutes of the meeting dated 22.04.2019 has been challenged by the calciners earlier, the Hon'ble Supreme Court has reiterated that no further clarification is required. Therefore, the EFC decided that the request petitioner for allocation of RPC for its additional capacity cannot be acceded to.
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> 9. The Committee while considering the submission of the M/s Sanvira Industries Ltd. was of the view that
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> > i. the capacity of each applicant was decided on the basis of consent to operate available with the firm on 09.10.2018 i.e. the date on which the Hon'ble Supreme Court passed the order. The firm was not having consent to operate on 09.10.2018. Any other criteria for deciding the capacity will be a highly contentious issue and will be fraught with endless interpretations.
> >
> > ii. That the firm had challenged the Minutes of Meeting dated 22.04.2019 regarding allocation of RPC in Hon'ble Supreme Court and the application was disposed of by

the Hon'ble Supreme Court observing - “our order is clear. No further clarification is required. This application is disposed of."

10. In view of the above, the Committee decided to reject the submission made by the applicant to allocate additional quantity of RPC for the new capacity added by the firm after 09.10.2018.”

11. This decision was again challenged by Sanvira, by filing WP No. 1858/2020 before the Delhi High Court. On 17.04.2020, DGFT had issued a public notice, which indicated the procedure for allocation of quota for the import of PET coke (RPC and CPC); it inter alia stated that:

ii. "The annual quantity limitation in import will be operated on fiscal year basis. · Accordingly, the total quantity permitted for import per annum by the Hon'ble Supreme Court and available for import is

(i) Calcined Pet Coke for use as Calcined Pet coke in Aluminium Industry is 0.5 Million MT and

(ii) Raw Pet Coke for CPC manufacturing industry is 1.4 Million MT. This is available for all industrial units in these two sectors including the petitioners.

iii. All eligible entities desiring to avail quota as mentioned above, may apply for import license as per procedure mentioned in Trade Notice No. 49 dated 15th March, 2019 along with State Pollution Control Board Certificate (SPCB)/ Pollution Control Committee (PCC) indicating capacity of the unit as on 9.10.2018 (Hon’ble Supreme Court Order in Writ Petition No. 13029/1985) and also valid consent certificate from SPCB/ PCC, In the name of user industrial units indicating the quantity permitted for import and its usage on a monthly and yearly basis.

iv. Completed on line application form and the documents mentioned at (iii) above must reach on or before 5th May 2020. Application fee shall be paid in accordance with the procedure as in Appendix 2K of Appendices & Aayat Niryat Forms and deposited online along with the application.

v. If documents received are found in order, application will be considered in Exim Facilitation Committee. (EFC) for import of restricted items and the concerned jurisdictional RA will grant authorization. The import license/ authorization will be valid till 31.03.2021 only for the purpose of imports.

vi. If, after obtaining permission/ license, importer cannot utilize/ import the entire quantity for which the license has been issued, the applicant shall Intimate the same to DGFT at petcokeimport-dgft@gov.in and import-dgft@nic.in on or before 31.12.2020 in order to facilitate distribution of the unutilized quota to other applicants who had applied initially..”

Sanvira responded to the public notice, by applying on 21.04.2020, contending that its production capacity had increased to 3,30,000 MT as in September, 2018. Sanvira also moved an application [CM Appl. No. 10528/2020 in WP (C) No. 1858/2020] seeking a direction that it ought to be allocated a proportionate quantity of RPC having regard to its capacity of 3,30,000 MT. The High Court dismissed the application observing that such a relief could not be claimed by an application, by its order dated 02.05.2020. The court also recorded the Union’s objection to the grant of such relief; the Union had contended that repeated requests for enhancement was an abuse of the process of the court.

12. On 04.05.2020, the Andhra Pradesh SPCB issued a letter stating that as per its record, based on inspection of Sanvira’s unit, the latter’s capacity for manufacture of calcinated petroleum coke was

3,30,000 MT per annum and the power generation capacity was 16 MW. On 03.06.2020, the DGFT held a meeting to finalize the quantum of allocation of CPC and RPC pursuant to the public notice dated 17.04.2020. Rain CII's request for enhanced allocation based on its claim of increased capacity was also considered. The minutes of meeting recorded on that day, i.e. 03.06.2020 are as follows:

> "4. M/s Rain CII Carbon (Vizag) Ltd, SEZ Unit has submitted an application for quantity of 4,88,000 MT of RPC in addition to an application for the DTA unit. It was noted that the CTO from Andhra Pradesh Pollution Control Board had been obtained vide their Consent Letter dated 6.3.2020. The Committee noted that since the CTO does not specify the installed capacity as on 9th October 2018, the Committee accordingly decided to not consider the request for allocation of quota.
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> 6. The Committee examined the SPCB certificates of all the applicants for RPC imports. On examination, Committee observed that the SPCBs have adopted varying conversion rates for calculating the requirement of RPC for producing CPC. In their CTO certificates, the Committee also noted that consumption requirement is not indicated in SPCB certificates of all the firms. To bring uniformity, the Committee decided to allocate RPC by adopting following criteria:
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> > i. The production capacity of the applicant is to be calculated on annual basis. Wherever, SPCB certificates shows production figures in TPD, the annual production capacity is to be arrived at by multiplying the capacity with 350 days (average operational days for the unit) to bring uniformity.
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> > ii. The production capacity for each applicant to be converted to input/raw material requirement by taking industry average conversion rate i.e. 1:1.36 (as mentioned in the EPCA report).
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> > iii. The additional capacity added by the applicants after the Hon'ble Supreme Court's order dated 9.10.2018 is not taken into consideration;
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> > iv. The quota be divided on a proportionate basis as per the following formula:-
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> > Quota allocated = Total Quota available for allotment multiplied by the demand of applicant divided by the Total demand for all applicants
> >
> > v. In cases where requested quantity is lower than eligible quantity, the surplus on their heads are redistributed among others proportionately."

13. Rain CII challenged the increased allocation to Sanvira, in its writ petition. A learned single judge, after considering the pleadings and submissions of the parties, sought to distinguish the various public notices issued by the GOI, and was of the opinion that this court's orders did not preclude the allocation of a different quantum as the orders were only indicative of the total quantity that could be imported. The single judge considered the previous orders of the committee and said that it placed reliance on the orders of this court and also clarified that production capacity had been determined on the basis of "Consent to Operate" as "any other criteria for deciding the capacity will be highly contentious issue and will be fraught with endless interpretation." The court also held that the Public Notice dated 17.04.2020 was not challenged by Rain CII and, absent such challenge, it was not for the court to adjudicate whether a certificate issued by the APPCB certifying the production capacity of M/s. Sanvira Industries in the absence of the Consent to Operate as on 09.10.2018 would suffice for making allocation of RPC in its favour. The court also held that the validity of the APPCB certifying the production capacity of M/s. Sanvira Industries as on 09.10.2018 was not in challenge. On the basis of all these reasoning, Rain CII's petition was rejected.

14. Rain CII preferred appeals and writ petitions to the Division Bench of the Delhi High Court*[LPA 25/2021; LPA 70/2021; LPA 71/2021, W.P. (C) 5749/2021, and W.P. (C) 6258/2022 Rain CII Carbon (VIZAG) Ltd. vs. Union of India and Ors.]*, challenging the judgment of the Single Judge and also impugning the public notice dated 17.04.2020. The Division Bench, in its impugned judgment, held that on 09.10.2018, when this court passed the order, every calciner had given its capacity. The total capacity of all the calciners put together came to 11,72,750 MTPAs and the production and the total import that was necessary for the calciners to continue producing pet coke from raw pet coke was assessed as 1.4 MMTPA. This was based entirely on the total production capacity. On 09.10.2018, Sanvira's recognition to increase its capacity from 2,00,000 Metric Tonnes to 3,30,000 MT had not been placed, rather the consent to operate dated 22.04.2017 restricted Sanvira to produce only 200000 MT of pet coke. The impugned judgment held that Sanvira's increased capacity (of 1,30,000 MT) was granted only on the basis of an agenda item placed before the APPCB on 29.11.2018 and that though Sanvira could produce 3,30,000 MTs, that did not automatically lead to the inference that they were entitled to an increase in their share of the total import permissible by the orders of this court, dated 09.10.2018. The court also held that the fixation of 1.4 MMTs per annum was on the basis of the total capacity of each of the calciners. It was held that minor adjustments or a few more persons were permitted to get a share of the raw pet coke without affecting the capacity given under the EPCA Report did not mean that the total permissible capacity was variable for the reason that the inter se allocation was made only on the allocation of the capacity essentially on the six calciners. The reasoning made in the judgment of the single judge that the public notice dated 17.04.2020 distinguishes between the certificate in the first part and the consent to operate in the second part and if both, the certificate and consent to operate, were of the same document, then there was no need to mention both in the two parts of the public notice and thus granting of certificate by APPCB was reasonable, was held to be contrary to the entire scheme as envisaged by this court. The total limit of import of 1.4 MMTPA was based on the total production capacity as on 09.10.2018 which had been fixed by the court on the basis of the capacity disclosed by the calciners themselves.

15. It is argued on behalf of Sanvira and the GOI, which are in appeal, by special leave that the impugned judgment is in error and that the judgment of the single judge is correct. It is argued that there was a change of criteria adopted in the Public Notice dated 17.04.2020 issued by the GOI. Contrary to the earlier requirement of certification of production capacity by the Unit, the Public Notice dated 17.04.2020, required certification by the SPCB. In this case, the APPCB certified Sanvira's production capacity as on 09.10.2018 to be 3,30,000 MT and that figure was correctly considered while making allocation of RPC in its favour.

16. It was urged that in the absence of any challenge to the Public Notice dated 17.04.2020 or the certificate issued by the APPCB regarding Sanvira's production capacity (as 3,30,000 MT as on 09.10.2018), the challenge by Rain CII was untenable and was liable to be rejected. It is argued that the orders dated 28.01.2019 and 08.07.2019 of this court merely clarified that the overall import of RPC has to be confined to 1.4 MMTPA. This court did not consider Sanvira's claim that as on 09.10.2018 its production capacity was in fact, 3.30 lakh MT.

17. In reply Rain CII argued that the Committee had from the very beginning rejected requests for enhancement of allocation on the ground that any capacity increase after 09.10.2018 would not be taken into consideration. This consistent stand was reflected in the EPCA's minutes of the meeting prior to 03.06.2020. In fact, even the GOI defended the rejection of Sanvira's request, barely five weeks before the impugned allocation by contending before the High Court that Sanvira was abusing the judicial process by repeatedly requesting the same relief. Having regard to these facts, there is no change of circumstances - much less new development or new facts which could have persuaded the committee as held by the Single Judge. There was in fact no change in the criteria. On behalf of Rain CII, it was highlighted that all facts pertaining to the alleged increase in capacity prior to 09.10.2018 i.e. the issuance of the CTO, the fact that inspection had been conducted by Sanvira's creditors i.e. State Bank of India on 28.09.2018, were all mentioned in the previous requests for enhancement and even in the two applications filed before this Court. Having regard to all these circumstances, the

issuance of the certificate or letter by the APPCB almost two years after 09.10.2018, certifying that the second phase of Sanvira's expansion had increased its capacity by 1,30,000 MT, was not any new development. In these circumstances the view expressed by the Division Bench in the impugned order was reasonable.

18. The facts reveal that the order of this court had fixed the outer limit of import of RPC at 1.4 million tonnes per annum. This was based on the assessment by EPCA which evaluated the requirements of various industries and units, engaged in the production of diverse commodities and raw materials (such as steel, aluminium, cement, clinker and those of calciners). The EPCA took into consideration the availability of appropriate grade domestic pet-coke, the overall impact on the environment and climate, of such essentially polluting feed based on this detailed examination, reported to this court, that 1.4 MMT ought to be the cap for imported RPC.

19. The EPCA which examined the issue elaborately raised the concern that RPC is a highly polluting fuel in its report (No. 91) to this court:

> "EPCA concern is that pet coke is a highly polluting fuel and therefore, after months of deliberations there has been an agreement to control the import of this fuel. The exemptions given to industries should not negate the efforts being made to control the usage of this fuel in the country.
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> This is all the more important as it is difficult to ensure that the industries do not use the fuel for combustion or that the use of the pet coke does not lead to pollution because of fugitive emissions."

The recommendations of EPCA in the same report are as follows:

> "A.1.2 EPCA Recommendation on Calciner Industry
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> The calciner industry should be allowed to import pet coke as its industry uses it for feedstock and not for fuel. This import is required as anode grade pet coke is not available in sufficient quantities in the country."

20. Concededly, the estimation with respect to the capacity and the utilization of imported RPC was based on the figures provided by the industry itself. The EPCA report clearly states that the total capacity was 1.17 million tonnes; in arriving at this figure the EPCA took note of the capacity based upon the Consent to Operate (CTO) issued by the concerned Pollution Control Board. In the case of Rain CII, the capacity recorded was 500,000 MTPA, and in the case of Sanvira- 2,00,000 MTPA. The guidelines for regulation and monitoring of imported pet coke had been issued on 10th September 2018 by an office memorandum – through the MOEF, GOI. The relevant guidelines are extracted below:

> "1. Guidelines for Regulation and Monitoring of Imported Petcoke in India
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> As per notification of Director General of Foreign Trade (DGFT) dated 17.08.2018, imported of Petcoke for use as fuel is prohibited. However, import of Petcoke is allowed for the following industries namely, cement, lime kiln, calcium carbide and gasification for use a feedstock or in the manufacturing process only on actual user basis as per the conditions stipulated below:
>
> (1) Petcoke importing industries namely, cement, like kiln, calcium carbide and gasification shall obtain the consent of and registration with the concerned State Pollution Control Boards (SPCB) / Pollution Control Committees (PCC).

(2) Consent issued by the concerned SPCB /PCC shall clearly specify the quantity permitted for import and its use on a per month and per annum basis.

(3) Only registered industrial units with valid consent from SPCBs/PCCs as per clause (1) shall be permitted to directly import pet coke and consignment shall be in the name of user industrial units for their own use only.

(4) Import of pet coke for the purpose of trading shall not be permitted.

(5) Authorised importers of Petcoke shall furnish opening and closing stock of imported Petcoke to the concerned SPCB/ PCC on a quarterly basis."

21. As can be seen, the consent issued by the concerned SPCB or the PCC had to clearly state what was the capacity or quantity permitted for import by the concerned unit. In the present case, it is not disputed that the Consent to Operate (CTO) issued by APPCB in Sanvira's favor recorded the total capacity at 2,00,000 TPA. The copy of this CTO dated 24.04.2017 has been placed on record, which states as follows:

S. No.	Product	Quantity
1.	Calcined Petroleum Coke	2,00,000 TPA
2.	Generation of Electricity	08 MW

Interestingly, the same CTO also records as follows:

"10. The industry shall not increase the capacity beyond the permitted capacity mentioned in this order."

22. If one sees the disputes in terms of these facts, what is clear is that the CTO mentions Sanvira's capacity at 2,00,000 TPA. Sanvira's position is that the CTO for an additional 1,30,000 TPA was granted on 29.11.2018 and that the application for such capacity was made on 29.10.2018. It argued for the longest period (unsuccessfully) that though the CTO for the increased capacity was issued on 29.11.2018, that capacity had in fact existed prior to that date. It relied heavily upon the Inspection Report, by its creditor - the State Bank of India and the report of the Inspecting Officer of the APPCB dated 03.10.2018. These facts were repeatedly mentioned and urged on several occasions including the two applications filed before this Court. Although the order of this court is cast in general terms, the fact remains that a pointed reference to increased capacity was made on 08.07.2019 which rejected the claim for clarification. That claim for clarification was based upon Sanvira's plea with respect to its increased production capacity to 3,30,000 TPA.

In its application I.A. No 73242/2019, Sanvira contended as follows:

"(a) In September 2017 the applicant initiated capacity addition from 200,000 to 330,000 MTPA comprising of approximately furnaces having a capacity of 40,000 MTPA each and expansion of power point_ capacity from 8 MW to 16 MW.

(b) The total cost of capacity addition undertaken by the Applicant is Rs. 75 Crores, of which Rs. 50 Crores has been raised through a loan from EXIM Bank. Copy of loan sanction letter dated 03.01.2018 issuing by EXIM Bank is annexed hereto and marked as Annexure A-4 (Pages 30-56).

(c) By March 2018, the Applicant had installed the first furnace of 40,000TPA and had a total installed capacity of 240,000 MTPA. Minutes of the consortium of Bank meeting dated 05.05.2018 and 13.08.2018 which note that 240,000 MTPA capacity was operational since

01.08.2018 are annexed hereto and Marked as Annexure A-S (Pages 57 -6) and Annexure A-6 (Pages 62-67).

Report dated 17.04.2018 of the Lender Engineer appointed by the Bank Consortium which notes that Applicant had erected and commissioned additional CPC capacity of 40,000 MT as of 28.02.2018 is annexed hereto and marked as Annexure A-7 (Pages· 68-71).

(d) By June 2018, the Applicant had a total installed production capacity of 330,000 MTPA having completed Installation of furnaces (which comprise of the CPC production facility). Power plant related works were at the final stages of completion. Progress Report dated 30.06.2018 submitted to the Lenders by the Applicant is annexed hereto and marked as Annexure A-8 annexed (Pages 72-75).

The report also indicates that the Applicant had spent the entire sanctioned loan amount of Rs. 50 Crores by 30.06.2018.

(e) By September 2018, the Applicant had also completed power plant expansion (except for turbine Installation). Turbine and ACC were the final stages of completion, Progress Report dated 30.09.2018 submitted to the Lenders by the Applicant is annexed hereto and marked as Annexure A-9 (Pages 76-79)

Site Inspection Report dated 28.09.2018 of State Bank of India reporting the progress of capacity addition from 200,000 MTPA to 330,000 MTPA is annexed hereto and marked as Annexure A-10 (Pages 80-82).

(f) On 27.11.2018 the APPCB issued consent to operate the additional capacity. Copy of Consent Order dated 29.11.2018 issued by the APPCB is annexed hereto as Annexure A-11 (Pages 83-87)."

23. It is a matter of record that the APPCB issued the CTO for the quantity of 3,30,000 TPA only for 23.12.2019, the concerned Order APPCB/VSP/VSP/305/HO/CFO/2019. The relevant part of the CTO (dated 26.12.2019) reads as follows:

"This consent order is valid for manufacture the following products along with quantities indicated only:

S. No.	Product	Quantity
1.	Calcined Petroleum Coke	3,30,000 Tons/Annum
2.	Generation of Electricity	16 MW

The industry is permitted to use the following quantity of pet coke as feed stock to produce Calcined Petroleum 3,30,000 Tons/ Annum:

Pet coke quantity I day	Petcoke quantity/month	Petcoke quantity/annum
1246.7 Tons	37400 Tons	4,48,800 Tons

This order is subject to the provisions of 'the Acts' and the Rules' and orders made thereunder and further subject to the terms and conditions incorporated in the schedule A, B & C enclosed to this order."

24. The consistent position of the GOI is that any capacity added by the procedures after the Order of this Court dated 09.10.2018 would not be taken into consideration while allocating the RPC. This is clear from the narration from the Order made on 13.02.2020 which records as follows:

> "(iii) Procedure for allocation of quota for import of Raw Pet Coke for CPC manufacturing industry was notified by Public Notice No. 81/2015-20 dated 23.03.2019. As per the Public Notice the EFC in DGFT has to evaluate and allot quota among applicants.
>
> (iv) Accordingly, a meeting of the EFC was held on 05.04.2019. In order to bring uniformity in allocation of RPC it was decided to allocate as per the production capacity on a proportionate basis. One of the criteria adopted by the committee was that the additional capacity added by the applicants after the Supreme Court's order dated 09.10.2018 will not be taken into consideration while allocating RPC. In the meeting held on 05.04.2019 for considering allocation of 1.4 million MT of Raw Pet Coke, the committee observed that M/s Rain CII Carbon (Vizag) Ltd. and M/s Sanvira Industries Ltd. had submitted additional requirement of 4,88,000 MT and 1,30,000 MT of RPC respectively. The committee further observed that M/s Rain CII Carbon (Vizag) Ltd. and M/s Sanvira Industries Ltd. were also both petitioners before the Supreme Court of India in IA Nos. 1451 of 2019 and 1229/2019 in the W.P.(C) 13029/1985, where the prayer before the Hon'ble Supreme Court was-
>
> > a. to enhance/increase the import limit of 1.4 Million MT of RPC by an additional amount of 488,000 MT per annum for manufacturing CPC at the Applicant's SEZ Unit and accordingly direct the DGFT and other authorities, including the Ministry of Commerce, to allocate this additional RPC to the Applicant.
> >
> > b. to enhance/increase the import limit of 0.5 million MT of CPC by an additional amount of 3 70,000 MT per annum for blending purposes at the Applicant's SEZ Unit, subject to the condition that the Applicant exports CPC of equivalent quality of its CPC imports and accordingly direct DGFT and other authorities, including Ministry of Commerce, to allocate this additional CPC to the Applicant; and
> >
> > c. to direct the Development Commissioner, APSEZ to grant an extension of the Letter of Approval for the SEZ Unit being set up by the Applicant in the Andhra Pradesh Special Economic Zone, a sought by the Applicant vide letter/application dated 31October, 2018; and
> >
> > d. pass such further/orders as in the facts and circumstances of this case be deemed fit and proper. "
>
> (v). The Hon'ble Supreme Court in its order dated 28.01.2019 while disposing off the I.A. No.168847/2018, 145112019 & 1847/2019 (filed on behalf of Rain Carbon), I.A. No.12291/2019 (filed on behalf of Sanvira Ind. Ltd.) and I.A. No.164303 (filed on behalf of Saket Agarval) and I.A. No. 13210/2019 (filed on behalf of Goa Carbon Ltd.) had pronounced that "the order passed by this Court is clear. This Court has set the outer limit for import of Raw Pet Coke cannot exceed 1.4 MT per annum in total. In view of the aforesaid, prayers made on the basis of expansion etc. are totally misconceived and cannot be entertained. No further orders are required to be passed on these LA.s The same are hereby dismissed. "
>
> (vi) The Committee having noted that the request for additional requirement of RPC by these two applicants have been set aside by the Hon'ble Supreme Court decided that it cannot grant any extra quality based on the new capacity added by these two firms after the date of the order of the Hon'ble Supreme Court i.e., 09.10.2018. the Committee uploaded the draft Minutes of the EPC meeting (held on 05 .04.2019) on DGFT website to enable the applicants

to represent their grievances by 15.04.2019 and based on the representation, if any. Committee will take a decision and allocate the final quantity."

The same documents i.e., the minutes also recorded that Sanvira's additional capacity was created after this court's order dated 09.10.2018.

25. From all these facts, it is evident that Sanvira kept on contending that its capacity was 3,30,000 MTPA. The minutes of the meeting dated 13.02.2020, also allude to the previous attempts by Sanvira, to have its capacity increased, as on 09.10.2018 in an effort to secure more allocation. All such contentions were rejected. In this background, the view expressed by the single judge, that the principle for allocation was changed somewhat in the public notice, dated 17.04.2020, is not tenable. The relevant part of that notice reads as follows:

> "All eligible entities desiring to avail quota as mentioned above may apply for import license as per procedure mentioned in Trade Notice No. 49 dated 15th March 2019 along with State Pollution Control Board Certificate (SPCB)/ Pollution Control Committee (PCC) indicating capacity of the unit as on 9.10.2018 (Hon'ble Supreme Court Order in Writ Petition No. 13029/1985) and also· valid consent certificate from SPCB/ PCC, In the name of user industrial units indicating the quantity permitted for import and its usage on a monthly and yearly basis."

Interestingly, even as on that day, i.e. 17.04.2020, there was no confirmation by the APPCB that Sanvira's unit had the capacity it claimed (3,30,000 MT annually). The CTO for that capacity had been issued only on 26.12.2019. As on that day, there was nothing to show that the earlier CTO stood amended with effect from the date it was issued (i.e. 24.02.2017), or any date prior to 09.10.2018. In such background, Sanvira wrote to APPCB, on 21.04.2020 seeking a "clarification":

> "To
>
> The Environmental Engineer
>
> Andhra Pradesh Pollution Control Soard
>
> Regional Office, Visakhapatnam
>
> Andhra Pradesh
>
> Dear Sir,
>
> 21·04·2020
>
> Sub: Request to certify installed capacity of Sanvira Industries limited as on 09.10.2018 as 330, 000 MTPA of Calcined Petroleum Coke Sanvira Industries Limited had completed line-2 expansion (130,000 MTPA) of its Calcined Petroleum Coke (CPC) production facility by September 2018 thus taking Its total production capacity from 200,000 MTPA to 330,000 MTPA as per record.
>
> For allocation of Raw Petroleum Coke for FY 2020-21, DGFT has stated vide public notice No. 04/2015·20 dated 17th April 2020 that a certificate indicating capacity of the unit as on 09.10.2018 is required from the State Pollution Control Board.
>
> We sincerely request you to provide such a certificate to enable us to apply for the RPC allocation for FY 20·21."

APPCB replied with refreshing alacrity, on 04.05.2020, inter alia, clarifying that:

> "With reference to the above letter, upon examining the records of this office and other relevant information available during the inspections it is to certify that the installed capacity of M/s Sanvira Industries, Chatametta Village, Visakhapatnam Dist as on 09.10.2018 for manufacture of calcined petroleum coke was 3,30,000 MT per annum and the power generation capacity was 16 MW."

26. This letter virtually became the gateway for a review of the entire system of allocation. Clearly, the GOI had altered its position, within five weeks, because in the order dated 02.05.2020, in an application moved by Sanvira, in the pending writ petition, its position, through the statement of its counsel, was that there was no change in the allocation method, by the public notice of 17.04.2020:

> "4. Ms. Maninder Acharya, learned ASG submitted that repeatedly the applicant/petitioner has been seeking the same relief which was denied to it by the Supreme Court and not only the instant application but the writ petition itself was an abuse of the process of the court. The learned ASG submitted that merely because a public notice was issued, no fresh cause of action accrued in favour of the applicant/petitioner and its grievance, if any could be redressed only by approaching the Supreme Court."

27. Despite the above statement, the Minutes of the meeting dated 03.06.2020, treated the letter of 04.05.2020 (by APPCB) as if Sanvira's original capacity was 3,30,000 MTPA, ignoring the consistent position, whereby its claims to that effect were rejected about five times previously. Keeping this background, the single judge concluded as follows:

> "37. A reading of the above Public Notices would show the marked departure made in the Public Notice dated 17.04.2020. While in terms of the Public Notices dated 26.11.2018 and 22.03.2019, the eligible entities were to produce "capacity of the unit and a valid consent certificate from SPCB/PCC", in terms of Public Notice dated 17.04.2020, the eligible entities were to produce "State Pollution Control Board Certificate indicating capacity of the unit as on 09.10.2018 and also valid consent certificate from SPCB/PCC". Therefore, while under .the Public Notices dated 26.11.2018 and 22.03.2019, the applicant was to produce documents showing its Production capacity, in the Public Notice dated 17.04.2020, only a Certificate from the State Pollution Control Board indicating capacity of the unit as on 09.10.2018 could suffice. No other document for supporting claim of Production Capacity as on 09.10.2018 could have been taken into account in terms of the Public Notice dated 17.04.2020."

28. The reasoning of the impugned judgment is that there was no distinction (contrary to the conclusion of the single judge) regarding the public notice dated 17.04.2020 -between the certificate in the first part and the consent to operate in the second part. The Division Bench noted, correctly that the annual total limit of import of 1.4 Million Metric Tonnes was based on the total production capacity as on 09.10.2018 which had been fixed by this court on the basis of the capacity disclosed by all the calciners. It was also observed that an SPCB could indicate the permissible limit of production of calcined petroleum coke. For Sanvira it was 2,00,000 MTPA; the consent to produce 3,30,000 MTPA of coke was given only after 29th November 2018. Therefore, it could not have been considered by the court. The certificate dated 04.05.2020 issued by the APPCB merely certified that the installed capacity of Sanvira, as on 09.10.2018, for manufacturing calcined petroleum coke, was 3,30,000 Metric Tonnes per annum in terms of the CTO. The total figure of 1.4 Million Metric Tonnes of RPC was based on the permissible capacity as on 09.10.2018. The Division Bench, therefore, concluded that if production capacity had increased, the proportionate share to be given was after clearance by this court.

29. This court is of the considered opinion that the view expressed by the impugned judgment is correct. Barring the fact that a clarification was issued on 04.05.2020, by the APPCB, there was no change in circumstance; the material document to be considered was the CTO, which for the relevant period (i.e. as on 09.10.2018) was 2,00,000 MT per annum, for Sanvira. Even according to it, the

claim for enhancement was made later, and the CTO for the increased capacity was issued on 26.12.2019. In these circumstances, the clarification of APPCB, that as on a particular date, the production capacity was 3,30,000 MTPA was of no consequence, because it was the CTO that was considered all along, in all previous meetings. Therefore, the findings and conclusions of the Division Bench cannot be faulted.

30. For the above reasons, it is held that there is no infirmity with the findings and conclusions of the Division Bench, in the impugned judgment. The appeals fail, and are, accordingly dismissed, without order on costs.
