
(1998) 02 KAR CK 0043
In the Karnataka High Court
Case No : Writ Petition No. 10696 of 1997

Arun Kumar Agrawal and Another	Vs	APPELLANT
State of Karnataka and Others		RESPONDENT

Date of Decision : 27-02-1998

Acts Referred:

Constitution of India, 1950 — Article 142, 32
Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 156, 157, 195

Citation : (1999) 1 KarLJ 603

Hon'ble Judges : R.P. Sethi, C.J.;V. Gopala Gowda, J

Bench : Division Bench

Advocate : Sri S.K. Sen for Sri A.K. Agrawal, for the Appellant; Sri S. Vijaya Shankar, Advocate-General, Smt. V. Vidya, High Court Government Pleader, Sri Altaf Ahamed, Sri K.K. Venugopal, Sri Arun Jaitley and Sri Attak Settlawad Senior Advocates, Sri N.K. Gupta for Sri S.K. Kulkarni, Sri K.G Raghavan, Sri Sanjeev Puri, Sri P.B. Appaiah and Sri Udaya Holla, for the Respondent

Judgement

This Judgment has been overruled by : State of Karnataka Vs. Arun Kumar Agarwal and Others, AIR 2000 SC 411 : (1999) 9 JT 618 : (1999) 7 SCALE 441 : (2000) 1 SCC 210 : (1999) 5 SCR 278 Supp : (1999) AIRSCW 4556 : (1999) 10 Supreme 215

1. Corruption in a civilised society is a disease like cancer, which if not detected in time is sure to malignise the polity of country leading to disastrous consequences. It is termed as plague which is not only contagious but if not controlled spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as Royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking of the socio- economic-political system in an otherwise healthy, wealthy, effective and vibrating society.

2. The menace of corruption was found to have enormously increased by first and second world war conditions. The corruption, at the initial stages, was considered confined to the bureaucracy who had the opportunities to deal with a variety of State largess in the form of contracts, licences and grants. Even after the war the opportunities for corruption continued as large amounts of Government surplus stores were required to be disposed of by the public servants. As consequence of the wars the shortage of various goods necessitated the imposition of controls and extensive schemes of post-war reconstruction involving the disbursement of huge sums of money which lay in the control of the public servants giving them wide discretion with the result of luring them to the glittering shine of the wealth and property. In order to consolidate and amend the laws relating to prevention of corruption and matters connected thereto, the Prevention of Corruption Act, 1947 was enacted which was amended from time to time. In the year 1988 a new Act on the subject being Act No. 49 of 1988 was enacted with the object of dealing with the circumstances, contingencies and shortcomings which were noticed in the working and implementation of 1947 Act. The law relating to prevention of corruption was essentially made to deal with the public servants, as understood in the common parlance but specifically defined in the Act. The Legislators and the people had at that time not envisaged the inflow of corruption in the political arena. Corruption amongst politicians was unheard of in the Indian society. Such a corruption is generally related to the inflow of foreign capital investment in the Indian economy. The foreign investors being generally not amenable to the jurisdiction of the Indian Courts, are alleged to be finding it easy to resort to corruption amongst the politicians with the sole object of amassing wealth and earning profits. The latest phenomenon is attributed to the so called liberalisation policy permitting the foreign investors for the proclaimed object of strengthening the Indian economy for the alleged betterment of the people. Corruption amongst politicians is related to various scandals such as relating to Bofors, the Hawala, the Fodder Scam, Import of Sugar, Telecommunications, etc. etc. connected with or related to the foreign investors in their specified fields of activities.

3. In the backdrop of the scenario noticed above, we are called upon to peep into various circumstances in order to ascertain prima facie the alleged kickbacks and bribe stated to have been paid by respondent 5 and its allies to various persons and organisations known and unknown for the purposes of procuring Power Purchase Agreement (PPA) for the generation of 1000 MW of electricity at Mangalore under the so called suspicious and uncalled for circumstances.

4. In the Petition filed in Public Interest by a public spirited person it is prayed that this Court may:

(a) Order a joint enquiry by the Comptroller and Auditor General, Enforcement Directorate, the Central Bureau of Investigation and such other Agency or Agencies as this Hon'ble Court may deem fit to conduct a comprehensive investigation into the various document based allegations made by the petitioner.

(b) To direct the concerned authorities to initiate criminal proceedings against the guilty persons as per law.

(c) Set aside the Power Project entered by KEB with MPC and re-allot the power project through an open bidding process.

5. In order to ascertain the circumstances warranting a further probe, it is necessary to have cursory look into the circumstances as projected by the petitioners.

6. It is submitted that in the year 1991, the respondent-Government decided to introduce privatisation in the power sector with the avowed object to augment resources and to supplement the efforts of the public sector. The implementation of the policy is alleged to have been marred by the absence of competitive bidding by interested private parties necessitating bilateral negotiations with a view to benefit foreign chosen companies. It is alleged that such a course adopted by the Government resulted in discouragement to the Indian corporate sector including those who had a track record in establishing power plants and running the same successfully under the local conditions. Sovereign guarantees were decided to be given to the foreign companies, the Cogentrix-respondent 5 being one of those. It is contended that the resort to introduce foreign investors was initiated ignoring Indian entrepreneurs who were willing to execute large power projects without insisting on guarantees. Sovereign guarantees were assured to the foreign companies like the Cogentrix to enable them to raise foreign loans based on such guarantees vide Government Order No. DE 100 PPC 92, dated 24th July, 1992 (Annexure-A) the Government of Karnataka authorised the Commissioner and Secretary to Government to sign orders with certain foreign firms stipulating certain facilities/conditions for private participation in power generation. Memorandum of Understandings (MoUs) were signed for 10 foreign companies including Cogentrix for their projects at Man-galore and Bangalore with capacity of 2 x 250 MW (500 MW) at each of the places. By Government Order No. DE 96 PPC 90 (Volume I), Banga- lore dated 18-3-1993, the Government decided to modify certain provisions of its earlier order insofar as it related to the Cogentrix by taking the following decisions:

"Thermal Power Plant of 1000 MW at Mangalore

(a) M/s. Cogentrix of USA is permitted to set up this plant in three phases of 334 MW (each phase consisting of 2 units of 167 HW MW) subject to obtaining the approval of the Government of India in respect of foreign investment in Karnataka and also subject to obtaining other statutory clearances under the relevant Acts.

(b) M/s. Cogentrix is permitted to sell power directly to industrial units of the area at the mutually negotiated rates between M/s. Cogentrix and the industrial units, subject to approval by the State Government.

(c) To permit KEB to evacuate power produced by M/s. Cogentrix through its grid

system subject to the capacity of the grid system and subject to payment of wheeling and banking charges payable to KEB by M/s. Cogentrix after evacuating power produced by KPCL.

(d) The company has to sell the balance power to KEB at a tariff to be fixed according to the norms laid down by the Government of India vide notification dated 31-3-1992.

(e) KEB will make wheeling and banking arrangements for M/s. Cogentrix on payment of wheeling charges.

(f) KEB is permitted to enter into an agreement with M/s. Cogentrix regarding power purchase subject to approval by the State Government.

(g) The question of giving guarantee to M/s. Cogentrix in the event of default by KEB in the purchase of power will be examined in consultation with the Government of India.

(h) The period of validity of the Memorandum of Understanding is extended by 6 months".

7. The Government of India, Ministry of Industry, Department of Industrial Development, vide its letter dated 11th of May, 1993 (Annexure-B) conveyed the Central Government's approval regarding their proposal to set up 1000 MW coal based power project in Mangalore, Karnataka, subject to various terms and conditions specified therein.

8. The estimated cost of the project was 580 Million US Dollars, which was to be financed as follows:

Total cost of US \$ 530m for Block A (estimated) would be financed approximately as follows: Foreign equity of US \$ 90 million/foreign debt of US 250 million/and the rest from domestic equity of US \$ 70 million and domestic debt of US \$ 120 million. Unless otherwise required or requested by Cogentrix. The financing for Blocks B and C is expected to be similar to that for Block A. It is noted that foreign debt would be raised from multilateral sources, export credit agencies, vendors, commercial banks etc.

The foreign equity holdings were to be:

56.25% amounting to US 90 million of which US \$ 45 million would be contributed by you together with M/s. General Electric, USA, US \$ 15 million by your other foreign associates and remaining US \$ 30 million by International Finance Corporation, Asian Development Bank and others. The remaining 43.75% amounting to US 70 million would be raised by you in India in the total proposed equity capital of US \$ 160 million.

9. Respondent 5 as promoter was to undertake or arrange for the construction, management, equity, investment and operations management of the project, while M/s. General Electric, USA was to be the equipment supplier having right to

participate in the equity capital, also being the financial structuring and arrangement partner. The Government of India agreed to provide sovereign guarantee only for loans taken for the project from the World Bank, and Asian Development Bank or any other bilateral aid sources that required such guarantee under their statutes without providing guarantees for external commercial borrowings. Assurances were also given regarding the proposal of the Cogentrix for Government of India guarantee of obligations under the PPA including assured payments for power purchase and guarantee against exchange rate risks of equity and debt investors over the life. Import of capital equipment, components and raw materials was agreed to be allowed as per the import policy prevailing from time to time. The approval was conveyed to be valid for a period of two years from the date of issue.

10. Consequent upon the MoU and the guarantee of the Central Government, the Cogentrix promoted and incorporated an Indian Company on 3-1-1994, which was called Mangalore Power Company, respondent 3 herein, which had a paid up capital of Rs. 2,000/- only with unlimited liability. As per the Articles of Association respondent 3 was to be Private Limited Company having a maximum membership of 50 and issue of and transfer of shares were to be strictly regulated. It was incorporated with only two Indian Directors. It is alleged that the entire Board of Directors of respondent 3 is controlled by Cogentrix Energy of USA and the General Electric has no Director on the Board of the Mangalore Power Corporation. Respondent 3 thereafter proceeded to negotiate terms with the Karnataka Electricity Board-respondent 2 herein.

11. A draft PPA was prepared on 30th of June, 1994 between respondents 2 and 3 (Annexure-E), which was ultimately finalised and executed on 30th of September, 1994 providing that the power plant was no more to be a despatch load plant as earlier envisaged in the MoU signed on 18th of March, 1993. The entire power was agreed to be purchased by respondent 2 and the direct supply to the industries on mutually agreed terms was abandoned. Cogentrix was agreed to be the sole promoter of the power project and being the owner of respondent 3.

12. Respondent 3-Company became responsible for causing the facility to be designed, equipped, constructed, financed, commissioned and tested so that it will be capable of delivering its net electrical output to the respondent-Board at the interconnection point. The respondent 3-Company had the right to operate and maintain or caused to be operated and maintained the facility in accordance with the procedures developed pursuant to Section 4.4 of the agreement and prudent operating practices. The respondent 3-Company was to procure and purchase all fuel required for the operation of the facility and the generation of electric energy. It had to maintain a 30 to 45 days stock of primary fuel at the facility. If at any time during the term of agreement the full amount of fuel requirements were not provided for under one or more Long Term Fuel Contracts or any existing fuel supplier defaulted of its obligations to supply, the Company

was to submit to qualified fuel suppliers any RFP for one or more Long Term Fuel Contracts. The Company had the right at any time to obtain fuel or transportation services pursuant to a Spot Market Fuel Contract without prior Board review or approval. The respondent 2-Board agreed to co-operate with the Company and use its reasonable efforts to assist the Site, all necessary legal approval, local Government's assistance, acquisition of necessary interests in land, construction, back-up, supplemental and emergency power and other services required for the construction, operation and maintenance of the facility in the manner contemplated by the agreement. The respondent 3-Company agreed to sell and deliver and respondent 2-Board agreed to accept and purchase, the net electrical output of each Unit, subject to the terms and conditions of the agreement.

13. According to the petitioners the Sponsors (Cogentrix and GE) were to collectively own only 26% of the total shares for a minimum period of three years after a commercial operation date. The Company is also reported to have given an undertaking of non-payment of bribes, commission, etc. to any officer/employee/agent of the Board or any other Government official. The PPA though mentioned General Electric as a sponsor, yet in reality General Electric at no point of time owned any share in the Mangalore Power Corporation, nor did it sign any document or enter into any agreement with the Government. The Mangalore Power Company is however alleged to have submitted a techno-economic feasibility report, in which respondent 3 was described as a subsidiary of Cogentrix and General Electric Capital. It is alleged that the name of General Electric was deliberately misused by both Cogentrix and Government to lend credibility to the agreement. The Government of Karnataka in 1994 is stated to have commissioned a study to review the PPA for the Mangalore Power Project. The consulting team comprised of GOPA (Germany), SAIC of USA and Tata Energy Institute of India. It is alleged that the commissioning of the team of experts showed that neither the Government of Karnataka nor the respondent 2-Board possessed the expertise to negotiate the PPA nor were they in a position to apply their mind. The Review Committee concluded amongst other things that the capital cost of the MPC Project was higher by 20% to comparable plants; the tariff heat rate was roughly 10% higher than the average heat rates achieved by the similar plants in the US; operation and maintenance cost of 3% was held to be an extra source of income for the MPC and the interest rate was higher by above 10%. The Report is also alleged to have commented adversely on the exclusive dependence of imported coal, inflation risk, force-majeures etc. It is further alleged that respondent 2-Board, for reasons known to it, ignored to take into consideration the recommendations of the Consulting Team while signing the PPA (Annexure-F).

14. It is alleged by the petitioners that the claim of the Cogentrix of being the largest independent power producers in USA was a blatant lie as was evident from the Balance Sheets produced along with the petition. According to the Balance Sheet ending on 30th of September, 1995, the paid up capital of the

Cogentrix was 1,30,000 US Dollars being equivalent to Rs. 45 Lakhs only. The total long term liabilities of the Company in the year 1994 was 897 million dollars against the owned funds of 46.5 US million Dollars. The debt equity ratio of the company was 19.2:1 (898:46.5). It is alleged that for mega projects the banking norms of debt to equity is 3:1 and a debt to equity 19.2 to 1, which was exceptionally high, amounted to bankruptcy. Such companies cannot raise financial resources on their own strength to meet the requirement of mega projects. It is emphatically alleged that the Cogentrix did not even have the money to fund its equity commitment in the MPC Project. The said Company was alleged to be trading in the development of power projects, on account of buying and selling of power projects midway at the developmental stage before the power project became operational. The price realised on selling a power project at the development stage was dependent on the future profitability of the power purchase agreement entered into with the buyer. The Cogentrix is reported to have sold a 50% interest in a 65 MW cogeneration power facility in Michigan and realised a net gain of 10.2 Million US Dollars. It is submitted that if the same yardstick is applied to the Power Project at Mangalore, it would be worth at least Rs. 1,000/- crores in the international market on receipt of all the clearances and guarantees and counter guarantees from the Government. The Power Purchase Agreement along with the cost padding can find ready buyers for much higher amount in the international market. The Balance Sheet of the Cogentrix further allegedly shows that it does not have the financial capability to execute the project on its own. It reveals that the said Company is not averse to trading in part ownership of a power project at the developmental stage. It is contended that in order to conceal its financial weakness, the Cogentrix first used the name of General Electric to gain credibility at the initial stage of negotiations and even misled the Government regarding the Mangalore Power Company being a subsidiary of General Electric Capital Corporation as is claimed to be obtained from the Techno-Economic Feasibility Report submitted in January, 1995 (Annexure-G). At that time the General Electric Capital Corporation did not hold any share in the MPC. The Cogentrix is also alleged to have entered into an agreement with China Light Power, a Company registered in Hong Kong. The said Company is stated to be a power producing Public Limited Company, which supplies power to the main land side of Hong Kong Colony having a production capacity of 50% in excess of the demand. It is stated to have allowed Citi Pacific, a Chinese Company, to buy 20% of its shares. The President of Citi Pacific who is stated to be Lang Yung, son of the Chinese Vice-President Rong Yinen. Mr. Lang Yung is stated to be on the Board of China Light and Power and is alleged to have been a privy to all the secrets of China Light and Power including the payment of kickbacks, if any, on behalf of Mangalore Power Company. The Balance Sheet of China Light and Power for the year ending 30th of September, 1995 shows the provision of 122 Million Hong Kong Dollars towards development cost incurred by its subsidiary companies in relation to power projects outside Hong Kong. The corresponding development cost of the said Company for the previous year was nil. The development costs have been treated as a loss by writing it off from the

profit and loss account and has not been shown as investment or loan to the subsidiary Company, leading to a suspicion regarding the payment of kickbacks and bribe. The cost of 122 Million Hong Kong Dollars is allegedly with respect to the Indian contract at Mangalore.

15. Referring to the Balance Sheet of the MPC, Cogentrix and China Light and Power Company, the petitioners have alleged that:

"The Balance Sheet shows the share capital of the Company as 15.85 Lakhs and a further 2.26 crores advance against share capital. As the total amount received from Cogentrix Mauritius Company and Cogentrix International Holding, Netherlands in the earlier Balance Sheet was 76.77 Lakhs on 25-8-1995 (Annexure-D) and 15.85 lakhs worth of shares were allotted during the year, the maximum amount of money that could have been remitted to India towards investment in shares therefore could be 1.65 crores. If China Light and Power Company was the remitter of 1.65 crores, then the same should have been received by MPC within a period of 15 days between 15-9-1995 (the date of AGM of MPC and 30-9-1995 (the last date of the Balance Sheet of China Light and Power which shows Hong Kong \$ 122 million or Rs. 55 crores approximately as development costs".

16. The Balance Sheet of respondent 3 showed that the money had been received as advance against the share capital and if China Light and Power is the remitter of 1.65 crores, then the same should have been shown as investment and not written off from the Balance Sheet of China Light and Power. It is further contended that the Balance Sheet of respondent 3 for 3-1-1994 to 31-3-1995, which has been signed by an internationally reputed auditing firm-Arthur Anderson and Associates does not show any expenditure for the 15 months periods though Rs. 37,480/- have been paid towards incorporation of the Company. The Balance Sheet of the relevant period is stated to be showing total funds of Rs. 2,000/- which ex facie shows that the Balance Sheet is fictitious. M/s. Arthur Anderson are also alleged to be in active abetment with the Company in alleged bogus accounts in violation of FERA, Company Law and Undertakings given in PPA and Accounting Standards prescribed by the Institute of Chartered Accountants. All the respondents are alleged to have entered into a conspiracy and required to be punished under Penal Law, FERA, the Company Law and other statutory provisions applicable in the case.

17. It is alleged that 191 Million Hong Kong Dollars have been paid through the subsidiary, China Light and Power Company as bribe, kickbacks, commission, etc., during the years 1994-95 and 1995-96 in violation of Prevention of Corruption Act, the Indian Penal Code and FERA for the following reasons:

(a) Bribes/kickbacks are considered a part of development cost internationally.

(b) In foreign accounting practices, there is no generation of black money and any amount paid for the purpose of bribe/kickback is through the books and camouflaged under acceptable heads.

(c) The shifting of the subsidiary company from Hong Kong to British Virgin island for the purpose of making payments on the so called "development costs" was to ensure confidentiality and secrecy. The British Virgin island is known for its laws which can protect investigation of money laundering/bribes and the laws are more stringent than Swiss Banking Laws. The shifting of the company to British Virgin island was consequent to allegations of kickbacks in the deal and this alone raises strong presumption of bribes and kickbacks. Incidentally, China Light in its 90 years of history has not held a subsidiary registered in British Virgin island.

(d) That a part of the development costs has been incurred on the Indian Project MPC has been admitted by China Light and Power Company. Further, the refusal to give details of the amount and the break-up of the total development costs of HK\$ 191 million incurred by China Light is sufficient ground to raise presumption of kickback. If the amount was small or insignificant and also properly accounted for, the same would have been revealed by the Company.

(e) According to the disclosures made in the Balance Sheet of China Light and Power, most, if not all, of the development costs could have only been incurred on the Indian Power Project, M.P.C.

(f) The development cost in the immediate preceding year when China Light had not entered into an agreement with Cogentrix was nil (Annexure-K).

(g) Though China Light was considering other investment opportunities in Asia, the Indian project was the only one in which investment was actually made.

(h) The development cost has been written off from the profits of the respective years in the Balance Sheet of China Light and Power and neither shown as investment or loan to the corresponding subsidiary, as bribes/kickbacks are never recovered. They are always written off from the profit and loss account.

(i) Though M.P.C. has been described as a subsidiary of China Light and Power Company, (Annexure-Q), in the detailed project report submitted to the Government in October 1995, China Light did not hold a single share in MPC as per the records available with the Registrar of Companies.

(j) MPC does not figure as a subsidiary or associate company in the Balance Sheet of China Light and Power (Annexure-K and P).

(k) The additional money received from undisclosed sources as advanced against share capital in the Balance Sheet of MPC (dated 31-3-1996) is only 1.65 crores against approximately Rs. 55 crores shown as development costs in the Balance Sheet of China Light and Power in the corresponding year. Though the source of Rs. 1.65 crores in the Balance Sheet of MPC is not disclosed, the same cannot explain the Rs. 55 crores shown as development cost in the Balance Sheet of China Light and Power (Annexure-K, O and N).

(l) The money received by MPC, was on account of investment and not on

account of development costs. The development costs incurred by China Light and Indian Project MPC whether paid in India or abroad and not accounted for in the Balance Sheet of MPC, is violative of Sections 8 and 9 of FERA.

(m) The Balance Sheet of MPC audited by its auditors M/s. Arthur Anderson and Associates, Chartered Accountants lacks credibility for the reasons mentioned hereinafter.

(n) The findings of the study commissioned by the Government of Karnataka to review the PPA at a cost of US\$ 1,00,000/- were deliberately suppressed and was not made public. The study had shown cost padding at various stages and the exceptionally high rate of return offered to MPC. If all the cost paddings are factored for calculating the profitability, then MPC would be entitled to a Dollar denominated return of around 400 crores to 500 crores each year, on an actual investment of not more than 200 crores. The fact that the Government and the KEB disregarded the report and negotiated the PPA with all the cost padding leads to the suspicion that the study to review the PPA was commissioned only for extraneous reasons.

(o) The shifting of half of the project from Bangalore to Mangalore was done deliberately to facilitate the justification of using imported coal as fuel stock.

(p) The original MOU entered into with Cogentrix provided for sale of electricity directly to industries and not to KEB which was later revised to the sale of the entire electricity directly to the KEB. This was done deliberately as there was no market for direct supply of cost padded and expensive electricity to the industry.

(q) Though neither General Electric Capital nor China Light and Power held any shares in MPC; MPC was allowed to misrepresent that it was their subsidiary while submitting the techno-economic feasibility report and the detailed project report in January 1995 and October 1995 respectively.

(r) The Government guarantee and counter guarantee is being given to the MPC Project so that Cogentrix can raise money on the strength of the guarantee and also to enable it to get a better price for trading in the power project at the development stage. MPC is a project which cannot be set up without Government guarantee as its promoter Cogentrix is financially unsound.

(s) The Government is now proposing as per newspaper reports (Annexure-R) to invest over 100 crores as equity in the MPC project which is going to be higher than the actual investment of Cogentrix in the project. This clearly shows that the Government itself is capable of implementing this project.

(t) The KEB dues to the KPC is around 400 to 500 crores. While the outstanding dues are not being paid by the KEB, the state is giving a guarantee and a counter guarantee on behalf of KEB to pay the future outstandings of MPC as and when they fall due. If the Government were to treat KPC on the same footing with MPC, the former would be in a position to set up the project on its own. The State is now subjecting KPC to hostile discrimination.

(u) Complete discretion was given to MPC in selecting the Construction Management Contract, subject to its production of five international bidders of which three were to be short listed (Article 2.1 of the PPA-Annexure-F). This has enabled the promoter to produce sham bids and select the equipment that gives it the maximum cost padding or select equipment that suits the interest of China Light and Power Company which is facing a massive demand recession.

(v) KEB has allowed the promoter of MPC to trade in the project in the development stage by giving it complete control over the distribution of the equity capital. Cogentrix need not invest more than 26% of the capital, i.e., 6.76% of the total capital of MPC as per the terms signed in the PPA as is evidenced in page 4 and page 21 of the PPA (Annexure-F).

(w) According to the Techno-Economic Feasibility report (Annexure-G), Cogentrix along with its sponsors is bringing only Rs. 283 crores. The Indian investment alone is over Rs. 1,500 crores of which the investment of KEB is over 100 crores. It does not stand to reason that while the Indian capital contribution is over five times the contribution of Cogentrix and its sponsorers, all the risks are to be borne by the Indian institutions and the mega profits will accrue to Cogentrix and its sponsorers.

(x) According to the Techno-Economic Feasibility Report submitted by MPC in January 1995, the return to MPC on its equity is Rs. 338 crores each year, which is around 28%. The above calculation does not take into account the cost padding on fixed cost, fuel cost, operation and management etc. Such massive benefits in a contract favouring the power developer can only be negotiated on the basis of kickbacks. The exorbitant cost of the power will have to be borne by the consumers year after year because some of the key decision makers were more interested in their petty kickbacks without realising the full implication of the decision and the cost that the future generation will have to pay.

18. The Petitioners have also referred to various other circumstances suggesting that the disputed deal was not fair and free from the suspicion. It is contended that the alleged kickbacks and illegitimate payments must have been made abroad to various persons and authorities at the helm of the affairs. Intervention of the Court is sought for the purposes of preserving the purity in the Indian politics and strengthening the belief and confidence of the common man in the rule of law.

19. Justifying the deal with the respondent-Cogentrix, the respondent-State in the statement of objections supplemented by such additional statement have submitted that earlier to 1991 the power sector in India was in the domain of the Government, whereafter the Government of India introduced a liberalised policy and took steps to provide incentives for private participation in the development of power sector. Such a policy was changed allegedly in view of financial constraints of the State. In furtherance of their policy, wide publicity is stated to have been given through the media both in India and abroad. Brochures were

published and sent to the reputed concerns outside the country. In pursuance to the said policy, the State Cabinet by its decision dated 15-7-1992 approved entering into the Memorandum of Understanding for generation of power with various private companies in order to set up power plants in different parts of the State. A team led by the then Chief Minister accompanied by the Secretary, Energy Department, the Principal Secretary to the Chief Minister, Director, Industries and Commerce Department, the resident Commission, Karnataka visited USA, UK and Italy, aspects as also the technical expertise, the aforesaid team came to the conclusion that M/s. Cogentrix, respondent 5 would be a better choice as they had an aggregate capacity of 1,000 megawatts and were reported to have set up several projects of various capacities ranging from 15 to 300 megawatts in USA. It is contended that no Indian company had come forward at that time to put up the project at Mangalore. Prior to 1991 the Government of India is reported to have proposed to establish a 2,240 megawatts plant at Mangalore which was to be set up by M/s. National Thermal Power Corporation with aid from the Soviet Union. As the setting of the plant did not materialise the NTPC dropped the idea of setting up of the plant. Keeping in view the shortage of power in the State of Karnataka, respondent 5 was invited to set up the power plant near Mangalore. The sovereign guarantee and permission to use the imported coal are claimed to be part of the guidelines issued by the Government of India in the year 1992. Such guarantee was necessitated to encourage the setting up of power plants which otherwise were not feasible. Respondent 5 had earlier been permitted to put up 500 megawatts power plant at Bangalore and 500 megawatts at Mangalore. However, in view of the scarcity of water at Bangalore the plant initially intended to be located at Bangalore was shifted to Mangalore and respondent 5 was permitted to put up 1,000 megawatts power project there. It is admitted that respondent 5 was initially permitted to sell power directly to the industrial units. But allegedly keeping in view the severe shortage of power exports in the State of Karnataka, it was felt that the said project being the first major project in the State having sufficient power be directed to make the power available to the grid of the Karnataka Electricity Board. It is further claimed that in order to enable the KEB to supply constant power to its consumers it was decided that the entire power to be generated by respondent 5 be purchased by KEB on negotiated rates based on the two part tariff notification issued by the Government of India in the year 1992. It is submitted that the draft Power Purchase Agreement signed on 30-9-1994 has undergone substantial modifications consequent to the several rounds of discussion which were held with various departments of the Government of India. In clause (6) of the MoU a provision has been made permitting the respondent-generating company that they at any time during the exclusive period or thereafter assuming the development project to continue, may enter into partnership or other similar relationship with third parties which may share the responsibilities with it as described therein. At the time of submission of the techno-economic feasibility report in January 1995 it was envisaged that the power project would be set up by M/s. Cogentrix and M/s. General Electrics of

USA who shall hold equity holdings in the proposed projects for which the Government of India, vide its letter dated 11-5-1993 had accorded approval. During the negotiations, the representatives of respondents 5 and 8 had both participated. A committee was constituted on 23-3-1994 to examine the draft PPA under the chairmanship of the then Additional Chief Secretary, the other members of the Committee being the Additional Chief Secretary and Finance Commissioner, Secretary to Government, Department of Energy, Secretary to Government, Department of Law and Parliamentary Affairs and Chairman of the KEB. As per the advise of the said Committee the Government by its order dated 31-5-1994 entrusted the work of setting of PPA to M/s. Tata Energy Research Institute (TERI) before signing the technical aspects of the PPA. The suggestions of M/s. Houston and Williams, an American Law firm is also claimed to have been considered.

20. Process of selection of Cogentrix has been tried to be explained on the basis of the exigencies of prevailing conditions and the crisis which the country was reportedly facing in foreign exchange. It is submitted that the foreign exchange reserves had fallen to precariously low levels which showed that the public finance was wholly inadequate to finance the growing need of investment in the power generation sector. In pursuance of the Government of India's policy deciding to throw up investment in power generation to the private sector, M/s. Cogentrix were invited to attend a seminar on the power sector in June, 1992. During the seminar the Cogentrix company was introduced to the Government of Karnataka. The said company had forwarded a draft MOU to the Government of India on 2-7-1992 in which they had proposed for setting up two power plants of 2 x 250 megawatts each. The cabinet considered the request of the Cogentrix and permitted the Cogentrix to set up initially two plants each of 165/250 MWs. without specifying the upper limit. The proposed plant at Mangalore was to be in addition to thermal project proposed by the NTPC and for the plant at Bangalore a suitable area depending upon the availability of water was to be identified outside Bangalore City. The delegation led by the Chief Minister, as noticed earlier had proceeded abroad after the State Cabinet had considered the aforesaid request and the proposed MOU submitted by the Cogentrix. During the tour which commenced from 19-7-1992 to 8-8-1992 the team led by the Chief Minister is reported to have discussed with 14 foreign companies their proposals and offers to construct, own and operate power plants in Karnataka. The MOU signed by the Cogentrix did not contain any commercial terms or commitments beyond granting Cogentrix the right to exclusively negotiate with the Government for 180 days, the period during which the Cogentrix was to undertake the feasibility study. No rights were conferred upon the Cogentrix which could be assigned and traded. Regarding shifting of the plant from Bangalore to Mangalore, it is submitted that the Cogentrix when invited by the Government of India for preliminary discussion in June 1992 had agreed to conduct further discussions and study including the availability of water at the preliminary identified sites. On 26-8-1992 the Commissioner and Secretary,

Energy Department, Government of Karnataka addressed a D.O. Letter to the Commissioner and Secretary, Commerce and Industries Department stating that a suitable site be identified near Sathanur for the Bangalore project which should be acceptable from the environmental angle and be close to the perennial water source also having the benefit of a railway line in close proximity for easy transport of coal and raw material. In their letter dated 29-1-1993, the Cogentrix raised the issue of the site for the project submitting that the site of the project at Mangalore was crucial in providing access to the port. The Government of Karnataka was changed and a new Government assumed office on 19-11-1992 which resolved on 21-12-1992 that all the MOUs signed by the previous Ministry be re-examined and approached before the Cabinet for its consideration. The Chief Secretary is stated to have conducted meetings on 18-1-1993, 27-1-1993, 2-2-1993 and 27-2-1993 to review all MOUs. On 23-11-1993 the Cogentrix had submitted:--

"The facility development process was initiated in July of 1992 with the signing of two Memoranda of Understanding with the State of Karnataka for 500 MW of thermal power at sites in Bangalore and Mangalore. Given the difficulty in siteing the proposed facility in Bangalore coupled with an insufficient water supply, it was decided that only the Mangalore Project would be pursued as a 1000 MW facility. A primary site in Mangalore has been selected, with several suitable and available contingency sites identified".

The Central Government is stated to have expressed its concern with respect to the adverse repercussions which were likely to result if the Government of Karnataka decided to cancel any of the MOUs entered into by the former Government of the State. It is contended that the officers of the Central Government felt that the State Government may consider permitting Cogentrix to put up a 1,000 MW plant to enable the company to go ahead with their offer to find finance in USA who were insisting on 1,000 MW for financing the project without linkage to the proposed power plant to be set up at Mangalore. The question relating to the signing of the MOU is stated to have been deliberated by the Cabinet in its meeting on 3-3-1993, wherein it was suggested that:-

(i) M/s. Cogentrix be permitted to put up 1000 MW thermal plant at Mangalore, to be implemented in 3 phases of 334 MWs. (each phase consisting of 2 units of 167 MW).

(ii) The Company may be permitted to sell power to local industries to meet their demand at the mutually negotiated rates between them; such tariff agreement shall come into force after the State Government gives its approval as per 3.2 of the notification of the Government of India dated 31st March, 1992, the Company has to sell the balance power to KEB at the tariff to be fixed according to the norms laid down in the GOI notification referred to above.

21. The Government is claimed to have changed the condition of direct sale of power as earlier envisaged in the MOU to one of sole sale to the KEB after a

detailed consideration of the matter by the Committee of Secretaries constituted to undertake negotiations with the Cogentrix. Though initially, the Government had approved that the power could be sold to the independent industrial consumers yet the committee of the Secretaries is stated to have re-examined the issue in the light of the report of the consultants, TERI and keeping in view the financial position of the KEB. It is submitted that a large body of consumers in the State are supplied subsidised power at very low rates. Such consumers are claimed to be agriculturists and other poor sections of the Society. The policy regarding sale of power generated by the company is claimed to have been necessitated in the interests of the State and for the betterment of the common citizen. It is submitted that under the two parts tariff notification issued by the Government of India in March 1992, the total charge/unit has to be paid to the generating company which comprise of two components i.e., the fixed charges and the variable charges. The terms of the fixed component were to be calculated as a percentage of the project cost which was to be cleared by the Central Electricity Authority (CEA) who is statutorily empowered to issue the Techno-economic clearance for the power projects. The CEA clears the power project only if the cost of tariff is reasonable. The variable charges comprising of the fuel costs are to pass through the State Electricity Boards which means that if the cost of fuel were to vary then the SEB, and through the SEB its consumers had to bear the advantages or disadvantages and the burden of such a variance in the tariff. The fuel purchase and transport arrangements are claimed to be under the scrutiny of KEB. It is submitted that under the circumstances, the Cogentrix would not gain any pecuniary advantage from the relocation to Mangalore which would give them access to imported coal having a high calorific value and low ash content.

22. The respondent-Board in their reply have submitted that the petitioner is not entitled to the grant of relief as claimed in the petition. The writ petition is stated to be premature and liable to be dismissed in the absence of final agreement. The petition is termed to be another attempt to scuttle the project as another similar writ petition is reported to be pending in this Court which according to the respondents stood decided at the time of final arguments of this petition. The allegations made in the writ petition are alleged to be vague and based on assumptions, presumptions and surmises. As the petitioner is shown to have not approached any of the authorities with any specific allegations before filing the present petition, no relief could be granted to him. The allegations made by the petitioner have been termed to be wild allegations on the basis of only draft PPA. It is submitted that the agreement which may ultimately be entered into between MPC and KEB being a commercial agreement depending upon negotiations cannot be permitted to be subjected to judicial scrutiny in exercise of the writ jurisdiction. The State of Karnataka is stated to be starving on account of acute shortage of power with the result that the State economy was suffering. Increasing the generation of electricity has become imperative. KEB has supplied electricity to various categories of consumers numbering around 75

lakhs which is multiplied everyday. Because of the resource crunch neither the State nor the Board was in a position to set up the generation. Any amount of resource mobilisation was not held either by the Board or the State to set up any new power generating plant. Any increase in tariff, the only source of the finance of the Board was not enough to meet day to day affairs of the Board which made it impossible for both the aforesaid respondents to mobilise the finances for setting up new power plant. Keeping in view of the enormous increase in demand for electricity and non-availability of resources, the Government of India in tune with its liberalisation policy threw open the power sector to the private entrepreneurs. In furtherance of the aforesaid policy the State Government initiated process of consultation with various companies including the Cogentrix of the USA. It is submitted that every clause which is likely to form part of the PPA was being scrutinised not only by the experts in the Board but also by various authorities of the State Government including the highest level officers of the State, the CEA, Department of Power, Ministry of Finance and the Central Government in general. No class of commercial contract can be considered in isolation and all the documents have to be read as a whole. Cogentrix is claimed to have not been unduly favoured by permitting it to put up a power plant at Mangalore. Before signing the MOU, the financial credibility and technical capability of M/s. Cogentrix is stated to have been assessed by a high level team which visited USA, as noted earlier. The sale of power only to the Board has been necessitated in view of the shortage of power and accepted load growth. The shifting of the project from Bangalore to Mangalore has been attributed to the non-availability of adequate water at Bangalore. The project is stated to be a non-resource project for which the Cogentrix is not obliged to invest entire capital and has the right to raise equity and loan from international financial institutions to fund the project. The board is also relying upon the statement of objections filed by and on behalf of the respondents.

23. The allegations of the petitioner have been termed to be wholly incorrect and unsubstantial by respondent 3 in the objections filed on its behalf. In the garb of public interest litigations the petitioners were alleged to be seeking to undertake a roving and fishing inquiry in an attempt to thwart a much needed infrastructure project with the oblique motive to attract international publicity. Respondent 3 has claimed to be a private company with unlimited liability which was incorporated on 3-1-1994 under the Companies Act. The authorised share capital of the Company is Rs. 1 crore divided into 1 lakh equity shares of Rs. 100/-each. As stipulated in the approval granted, M/s. Cogentrix Energy Inc. and General Electric Corporation were the original sponsors of the power project. Subsequently, China Light Limited became the co-sponsors along with the Cogentrix. Presenting the history of the project it is submitted that Cogentrix entered into a MOU with the Government of Karnataka on 30-7-1992 which was ratified by the Government Order dated 18-3-1993. After extensive negotiations, the respondent 3 entered into a PPA with the respondent-Board on 30-9-1994 for the sale and purchase of all power generated by the power project. The PPA is

claimed to have been tabled before the Karnataka State Legislature in 1995 which showed its transparency. The PPA of 30-6-1994 was only a draft and the PPA entered into with the KEB on 30-9-1994 is also stated to have undergone various modifications and amendments till date including issuance such as FDG to meet environmental requirements. The power plant is claimed to be always intended to be a base load plant enabling dispatch into the KEB grid with potential curtailment and dispatch during the four month monsoon period. It is contended that the Electricity Act, 1948 does not permit independent power producers to directly supply power to industries via the grid. All dispatch able power from the proposed power project has to be sold into the KEB grid for dispatch by the Board. The CEA has stipulated a heat rate of 2,449 K. Cal./KWH for the power project which is in conformity with the Government of India tariff notification. The counter guarantee is in terms of the Government of India guidelines which stipulate that the sponsors must own a share capital equity in the power project equivalent or greater than 50% for the first year of the counter guarantee and 33 1/3% for the term of the counter guarantee. The cost of the project is stated to have been carefully scrutinised by the CEA. The company claims to have not obliged any person or authority by payment of bribes, commissions and unethical business factors as alleged by the petitioners. Respondent 3 is stated to have never falsely represented its project sponsors. The Government of India has been fully apprised of the potential equity holding of the project. Anticipated expenses on monthly basis are identified by respondent 3 which are subsequently reviewed and approved by its sponsors who either place funds at the disposal of respondent 3 or settle expenses incurred in the country and settle the other expenses directly. For this purpose, the respondent-Company is duly capitalised following the approved procedure. The expenses incurred included salaries for Cogentrix and China Light personnel working on the power project, their air fares, hotel costs, etc. while travelling to India. It also includes the funds paid to several legal, technical and financial consultants based abroad who are advising the sponsors on the power project. None of the respondents has violated any provision of the FERA nor violated any other law or regulation covering the finances or foreign exchange. During the year 1994-95, the foreign expenses, Director's fee and management expenses of respondent 3 are paid by Cogentrix or companies of the Cogentrix group and not incurred by respondent 3. The Balance Sheet of this respondent is stated to have been certified by M/s. Arthur Anderson and Associates. The construction of 1000 MW power project near Mangalore is stated to have been approved by the Government of Karnataka to enable reliable access of delivery of coal as well access to sufficient water supply from the Arabian sea. Counter guarantee is provided by the Government of India to enhance the credit worthiness of KEB and not the credit worthiness of the project sponsors. Such guarantees are reported to have been provided with respect to various other power projects in the country. The cost of the power project at Mangalore is stated to be last effort cleared by the CEA for granting full thermal power facility of the scope and size of 2000 MWs. Regarding the financing of the power project, it is submitted that

the financial plan furnished is well within the guidelines of Government of India laid down for such projects. The project resulting from the venture is to be in total consonance with the Government of India policy. Allegations regarding cost padding of fixed costs, fuel costs, operation and management have vehemently been denied. It has been vehemently urged that the PPA has been negotiated in good faith which is in total conformity with the Government of India Tariff Notification. The project heat rate is stated to be well below the stipulated scheme of the Government of India policy. The respondent-Company has claimed to have been transparent from the beginning in identifying project sponsors as envisaged by its SIA approved and subsequent revision thereto. The writ petition is alleged to be based upon the allegations arising out of surmises and conjectures and mere speculation. The petition is alleged to have been filed with ulterior motives in the garb of public interest litigation. It is submitted that as all the actions of the respondents are claimed to be transparent, in accordance with the law and the result of prolonged deliberations and negotiations, no interference is called for.

24. Mr. Roland Somers, respondent 4 who is the Director of respondent 3 in his separate counter affidavit has submitted that the sum of Rs. 191 million HK\$ shown in the books of account of respondent 7 as having been incurred towards development cost is not confined to Man-galore Power Project but is reported to have been incurred with respect to respondent 7's projects outside Hong Kong located in Taiwan, Thai- land and People's Republic of China and Indonesia. He has, however, clarified that only a sum of Rs. 71.8 million HK\$ has been incurred as the development cost in respect of Mangalore Power Project for the years ending on 30-9-1995 and 30-9-1996. He has relied upon the statement of objections submitted on behalf of respondent 3 and respondent 5 and contended that he has no knowledge of any alleged kickbacks and pay offs. He contends that he has been in India since 1993 and managing the affairs of respondent 3 since March 1995. In the course of discharging his functions, he has frequently been travelling not only within India but also outside the country. He has submitted that though he resides in Bangalore for long periods of time attending to the work of respondent 3, yet his family stays in USA.

25. Denying the allegations made by the petitioner, respondent 5 in its statement of objections have submitted that Cogentrix Energy Inc. is a corporation duly organised under the laws of North Carolina, USA in 1993. It has claimed to be the legal successor of Cogentrix Inc. which was founded in 1983. It has developed, financed, constructed and owns and operates 10 cogeneration facilities in the USA with a total installed capacity of over 900 MW. It has claimed to be a recognised pioneer in the development, financing, construction, ownership and operation of private power facilities in the USA. Its business is claimed to be to respond to the opportunities identified by its marketing staff or announced by those seeking an alternative to traditional means of meeting energy needs. It investigates the opportunities, researches the fundamental components of an independent power producer, approaches and submits its

proposal to meet the energy requirement at hand. If chosen to proceed, the developer enters into a preliminary agreement with the party who agrees to purchase the power and thereupon goes forward to go for "green field" to a state-of-the-art power generation facility. To share the financial expenses and risk involvement in the process of developing a project, it engages with one or more equity participants who add to it some combination of financial and technical support. In case of respondent 3, the Cogentrix has claimed to be the initial/principal developer. Respondent 8 was a co-sponsor in the project at the earlier stage and upon its departure, respondent 7 joined it as a co-sponsor of the project. It is reiterated that the Cogentrix has never and will never pay any bribe to any person or public official. The granting of the sovereign guarantees by the Union of India was to back stop the financial obligations of the SEB to purchase and pay for the power, It is denied that the project was changed from a dispatch project to a base load project. The approval granted by the Secretariat for Industrial Approvals (SIA Approval) on 11th May, 1993 reflected the then anticipated equity providers and subsequent approvals were sought and received as those matters have evolved overtime. Cogentrix claims to have set up respondent 3-Company as the project company. It is claimed that it is not unusual for the project company at the development stage to have little functional importance and subsequently until financial closing nears, the Director and Share holders of the project company are often representatives of the initial developer, respondent 5. PPA dated 30-9-1994 is claimed to have preceded by numerous working drafts, the latest PPA dated 8-6-1994 being a working document moving towards a final agreement. Allegations of the petitioners regarding kickbacks have been termed to be reckless and unfounded. It is contended that the Indian Electricity Laws prohibited direct supply of energy to industries, a fact which was not known to the parties when the MOU was signed. The terms of the PPA are stated to be entirely consistent with the common industry practice regarding financing parties in an IPP transaction regarding foreign shareholders, necessary to facilitate the 16% return on equity provided for under the "Electricity Notification Tariff". It is admitted that numerical values in the definition of Tariff Heat Rate have been reduced from 30-9-1994 to the present, but the same is stated to be as a function of the benefits of a rigorous international competitive tender by respondent 3 for the best engineering, procurement and construction agreement achieved for the project. The respondents 2 and 3 are claimed to have understood that the Government of India Counter Guarantee to be issued to the project was to impose additional ownership requirements on project sponsors. Such requirement inserted in the current PPA requires sponsors to hold minimum of 50% ownership of respondent 3 through the first anniversary of the commercial operation and 33 1/3% ownership for the entire term of the counter guarantee. The Cogentrix and General Electric are claimed to be working in consort in the early development of the project. Respondent 8 was never associated for the purposes of procuring the project as alleged by the petitioners. The authenticity and validity of the Review Report referred by the petitioners has been challenged. The financial strength of

the said answering respondent is claimed to be not a relevant fact. The strength of respondent 3 has to be itself paid in equity and cash flow from the project which shall come from its shareholders comprising of the Cogentrix, China Light and others to be added by close of the financing. The private understanding between Cogentrix and China Light and Power is stated to be of no consequence to respondent 2 or respondent 3 or the rate payer of the KEB. Full public scrutiny is claimed to have been given to all aspects of those project costs and the KEB, the CEA and the Ministry of Power have fully analysed the same. The respondent 3 is stated to be incurring operating costs in India by receiving funds from Cogentrix. The allegation of the petitioner that the MPC Balance Sheet for 31-1-1994 to 3-1-1995 was fraudulent has been denied. The costs to create Project Company are stated to have been paid by the Cogentrix in return as any other development cost which could not and should not have been reflected in the Balance Sheet of the MPC of 31-3-1995. The initial costs of securing the lease by the MPC are stated to have been paid by the Cogentrix as development expenses. The averments made in sub-paras of paras 38, 39 and 42 of the petition have vehemently been denied. It is prayed that the present litigation being frivolous, vexatious, scandalous, mala fide, unsubstantiated and based upon hypothetical allegations be dismissed with exemplary costs.

26. The partner of M/s. Arthur Anderson and Associates, Mr. Vijay Sahni, respondent 6 in his statement of objections has reiterated about the non-maintainability of the writ petition and denied allegations relating to him with respect to the transaction which allegedly facilitated the grant of project to M/s. Cogentrix. It is claimed that M/s. Arthur Anderson and Associates is a well known firm of Chartered Accountants engaged in providing professional service in the field of accountancy to various clients including the respondent 3. Respondent 3 which is stated to have been incorporated as a private company on 3-1-1994 by two Indian shareholders namely, Mr. Anil S. Khanna and Mr. B.S. Bhalerao. Respondent 3 is stated to have issued 20 equity shares of Rs. 100/- each to the two subscribers of the MOU aggregating Rs. 2,000/- for cash. Upto 31-3-1995 the respondent 3 is stated to have not entered into any other transactions and did not even have any funds in its bank accounts. The allegations of the 6th respondent having allegedly colluded, to violate and to defy the provisions of Sections 8 and 9 of the FERA and other provisions of Sections 209, 219, 224 and 227 of the Companies Act have been vehemently denied. The Balance Sheet of respondent 3 is claimed to have been certified by respondent 6 on the basis of the information and explanations obtained from the said concern which are claimed to be true and fair reflecting the state of affairs of respondent 3 as on 31st of March; 1995. The Balance Sheet submitted by the said respondent is stated to be in agreement with its books of accounts regarding expenses of Rs. 37,480/- incurred for formation of respondent 3. It is submitted that the same were within the knowledge of the answering respondent which were borne by promoters of respondent 3. As the said amounts had not been claimed by the promoters of respondent 3, the same could not be shown in the Balance Sheet of

the said respondents. As regards the expenses towards employees costs, transfer, legal charges, etc. it is submitted that such expenditure had not been incurred by respondent 3 nor did they appear in its books of accounts, nor were such expenses claimed from respondent 3 by the entity which incurred them. Under such circumstances the aforesaid expenses could not be recorded in the Balance Sheet of respondent 3. It is contended that in the absence of any claim against respondent 3, such expenses could not become its liabilities and consequently were not required to be recorded in the books of accounts of the said respondent. It is contended that respondent 3 had neither an obligation nor an agreement to reimburse the expenses incurred by the promoters. The aforesaid expenses are claimed to be not falling within the definition of "liability". They could not be recognised as an expense. It is admitted that the accounts have been prepared under the historical cost convention on accrual basis in terms of the provisions of Section 209 of the Companies Act, and it is reiterated that the answering respondent had complied with the provisions of law applicable in the case. It is further submitted that as no case is made out against the answering respondent, the petition required dismissal with costs.

27. Respondent 7 in its statement of objections has submitted that the petitioners have not made out any justifiable grounds for invoking writ jurisdiction against it as they have failed to make out any valid grounds to substantiate their statements justifying the filing of the petition in public interests. It is submitted that following negotiations with the Cogentrix, Malconna Company Limited, a company incorporated in Hong Kong, entered into a Joint Development Agreement with Cogentrix Mauritius Company in July 1995 relating to the development of the project. Malconna Company Limited, was the intermediate holding company in relation to the Project at the date of the Joint Development Agreement. As part of the group reorganisation, China Light (Mauritius) Limited directly assumed the rights and obligations of Malconna Company Limited, under the Joint Development Agreement, pursuant to an Assignment and Assumption Agreement. China Light and Power Company Limited, was originally incorporated in Hong Kong in 1901 and is a public company listed on the Stock Exchange of Hong Kong. Its shares are a constituent part of the Hang Seng Index. As a public company it claims to have large number of shareholders in Hong Kong and overseas. The largest single grouping of shareholders are interests connected with Kadoorie family which has been associated with the said respondents since 1928. Placement of shares is stated to have been made with CITIC Pacific Limited in January 1997. CITIC is also a public company incorporated in Hong Kong and listed as such on the Hong Kong Stock Exchange having target diversified business specialising in infrastructure, trading and distribution consumer credit, property and industrial manufacturing. This respondent and its group have claimed to have a core business in Hong Kong with a long term plan to participate in overseas projects in which it believes its expertise would be a use. After referring to this historical evolution, the respondent has submitted that the allegations of the petitioners regarding

bribery are fallacious and devoid of any substance. The attention of the Court has been drawn to the Price Water house Report to justify their participation in the adventure of establishing the Project at Mangalore. The functioning of the respondents and its group companies is claimed to be completely transparent. It claims to have a paid up capital of 5 million HK\$. It has referred to various projects undertaken by it outside Hong Kong. The Cogentrix Mauritius Company is stated to be making payment of development expenses in connection with the Project and CLP Limited on behalf of China Light (Mauritius) Limited, reimbursing Cogentrix Mauritius Company one-half of those costs. The allegations made in the petition are stated to be based upon surmises and conjectures, being only sweeping statements, wholly devoid of any cogent substance and allegedly made with the intention to create prejudice which have been denied.

28. In its additional affidavit, respondent 7 has submitted that despite allegations of bribe and kickbacks the petitioners have not identified any person in India as recipient thereof. The allegations regarding payment of bribe to the extent of 191 million HK\$ have been denied and it is submitted that allegations of bribery is required to be accompanied by complete particulars of the nature of bribe, including the names of the recipients and the period of time when the bribe was allegedly paid. In the absence of the particulars, the allegations regarding alleged bribe being the nature of fraud cannot be investigated. Such allegations are required to be proved beyond reasonable doubt and the burden cannot be shifted to the aforesaid respondent. Despite this objection, it is submitted:--

"Having received the show cause notice in the matter, this respondent thought it appropriate, irrespective of the fact that the burden was on the petitioner to prove that the respondent paid a bribe, to call upon its auditors to address themselves to this specific issue and to submit their report. This report was filed along with the reply of the respondent. After the reply was filed, instead of the petitioners seeking to discharge the burden of substantiating the allegations of bribery, the petitioner in his rejoinder has sought to turn round and attack the auditors themselves. Obviously, finding himself placed in a position where he is unable to give a single particular of a bribe having been paid by specifying the recipient of the bribe, the amount of the bribe, the time and period when the bribe was paid, the petitioner has resorted to utilising the writ jurisdiction of this Hon"ble Court to compel a corporate entity to produce its entire accounts as part of a roving and fishing enquiry".

29. Without filing formal reply or statement of objections, respondent 8 has filed an application under Order 1, Rule 10 read with Section 151 of the CPC with a prayer to delete its name from the array of respondents and drop the proceedings. In this application it is submitted that respondent 5 approached the Power System Division of the General Electric Company during November 1992 in order to enquire whether respondent 8 was interested in joining respondent 5 in order to sponsor and to develop a project for the construction and operation of 1000 MW base load thermal power plant to be established near Mangalore in the

State of Karnataka. The company in early January 1993 agreed in principle to co-operate with the project. At that time the intention of the aforesaid two respondents was that respondent 8 was to be a co-sponsor of the project along with respondent 5 as an active partner in the development of the project. The respondent 8 agreed to supply Turbine Generators and the Air Clean-up system to be employed in the power generation system. It had to play a major role supporting respondent 5 in the area of project development regarding its management of the process of selecting a Turnkey Contractor for the construction of the proposed power station and the supply of equipments to be installed in the proposed power station. It had also to take steps for structuring and arranging the debt/loan finance required from banks and other financial institutions in order to finance the implementation of the project. General Electric Company was to invest equity either directly or through its various affiliated or subsidiary companies and to take a stake up to 50% of the issued share capital of the company to be incorporated in order to implement the project. The role envisaged for the GEC, as a co-sponsor of the project reflected with the intention of the company and respondent 5 as of early January 1993. However, no contract or agreement was entered into the aforesaid two parties confronting the development of the project or their respective roles, as co-sponsors of the project. As in early January 1993 it was envisaged that both the aforesaid respondents would subsequently negotiate and enter into a development agreement providing, inter alia, for a precise definition of their respective roles as co-sponsors of the project, setting out their respective financial commitments with respect to investment in the project jointly and specifying their respective entitlement to subscribe for shares in the project company to be incorporated in order to implement the project. Notwithstanding the absence of a concluded and executed development agreement with respondent 5, the GEC considered itself to be the co-sponsor of the project as from the early January 1993 and conducted itself accordingly till it withdrew from its role as co-sponsor with effect from 30-8-1995. The representatives of the GEC participated in a number of meetings with respondent 2 in connection with the drafting and negotiating of a PPA for the purpose of sorting out commercial terms for the sale of the electricity to be generated by the proposed power station by respondent 3. The said negotiations culminated in the execution of a PPA on 30-9-1994. Representatives of the GEC also attended and participated in various meetings with officers of the executive Government of the respondent-State and the CEA following upon the incorporation of respondent 3 on or around 3-1-1994. The GEC did not subscribe for share in the newly incorporated company, respondent 3. It is stated to be not unusual for not having subscribed for such shares because (1) as is the case with many other sponsors of thermal power projects, the practice of the applicant is that it frequently does not subscribe for shares in the project companies concerned with projects sponsored or co-sponsored by it until the arrangements for the financing of the project are complete or almost complete; and (2) unless and until the applicant had finalised terms for a development agreement with respondent 5 (Cogentrix Energy Inc.) providing for it to have a right to subscribe

for shares in respondent 3 (the Mangalore Power Company), and executed the same, it would, in any event, have been premature for the Applicant to have subscribed for, or to have been issued, shares in respondent 3 (the Mangalore Power Company). During the period from early January 1993 until the GEC decided to withdraw from its role as a co-sponsor of the project with effect from 30-8-1995, it was at all times envisaged that the said company and/or another affiliated or subsidiary company ultimately controlled by GEC would eventually subscribe for up to 50% of the share capital of respondent 3 and would continue to be involved in the sponsorship of the project. The GEC had decided to withdraw from the project because ultimately, after many months of negotiations, it was unable to agree definitive and final commercial terms with respondent 5 which was necessary to it for continued participation and by around mid May 1995, it had concluded that the financial return likely to accrue to it through participation and investment in the project were not sufficiently commercially attractive. The reason for the decision on the part of the GEC to withdraw from the project are claimed to be only commercial. The allegation of the petitioners that the said company had decided to withdraw from the project allegedly on the ground of it acquiring the knowledge of respondent 5 having paid pay offs, bribes and kickbacks have been termed to be mischievous and utterly false in every particular. During the period the said company remained involved in the project, it had no knowledge which would have even suggested that respondent 5 or any of its officers or employees had ever been a party to the giving of any bribe or indulging in any improper practice in connection with the project. It is reiterated that no decision, undertaking or agreement ever took place or was arrived at as between the company on the one hand and respondent 7 on the other, in or connection with the decision of the GEC withdrawing from its role as co-sponsor of the project. There were no pay offs involved in the trading of the power project at the development stage as alleged by the petitioner. After withdrawing from the project as co-sponsor the aforesaid respondent did not play any further role and has no involvement in the project or its development. It is further stated that when it withdrew from its role as a co-sponsor of the project, respondent 5 granted it an option to acquire a 10% stake in respondent 3, regarding which the answering respondent-States to have not decided its option till the date of the filing of the aforesaid application. It had at no point of time held any of the share capital of respondent 3. It did not enter into any agreement regarding the project with any of respondent 1, respondent 2, respondent 3 or respondent 7 with respect to the project. It also did not enter into any development agreement with respondent 5. No cause of action is reported to have been disclosed by the petitioners against the aforesaid respondent which entails the dismissal of the petition.

30. In the rejoinders filed on 18-9-1997 and 27-1-1998, the petitioners have contradicted the pleas of the respondents taken in defence. They have submitted that the alleged brochures were actually not circulated to the concerned as is evident from the non-response of the Indian Companies like Tata Electric,

Siemens, Asian Brown Boveri, GE Alsthom, General Electric and its subsidiaries in India. It is submitted that the Cabinet decision as notified through G.O. No. 108 dated 24-7-1992 itself contemplated the participation of the foreign companies only and that the designated Government official was authorised to sign the MOU with Cogentrix for a maximum of 500 MW either by themselves or in the Joint Sector. It is alleged that the respondents have deliberately not mentioned the timing of the visit of the Chief Minister to the foreign countries. Even the month has not been mentioned, with the result that it is not possible to ascertain as to whether the visit took place before or after the publication of the above mentioned Government Order. The first respondent is alleged to have not assessed the financial or technical capacity of the 5th respondent. The total capacity spread over different locations is stated to be 900 MW and not 1000 MW. The selection of respondent 5 for the 1000 MW project at Mangalore is alleged to be interacting and in violation of Government Order No. 108 dated 24-7-1992, The issue of sovereign guarantee is alleged to be a political decision to oblige the eight power producers. In the case of Cogentrix, the sovereign guarantee proved to be the life blood of the project, as without the guarantee it would not have been able to either raise its own equity or trade in the power project. It is alleged that a project developer for trading purposes would be willing to provide higher kickbacks if the project was backed by sovereign guarantee as he can recover significant higher value in trading of the project. No sovereign guarantee was envisaged at the stage of signing of the MOU. The plea of the respondents 2 and 5, regarding changing the status of the project from dispatch load plant to base load plant are stated to be contradictory. Such a change was made to accommodate respondent 5 by making its power project economically viable by shifting the burden of the usurious rate of return to the 75 million consumers. According to the petitioner, the power to be generated by MFC, due to cost padding is likely to cost upwards of Rs. 4.50 per unit without subsidisation. The industrial demand for power is stated to have been static in the past 5 years because of captive generation of power, theft and direct purchase from NTPC. As there is no market and never was a market for expensive Cogentrix power, the Government is alleged to have stepped into bail out respondent 5, unmindful of the fact that the ultimate burden of the cost would be borne out by the common and helpless power consumer. The decision to purchase the entire power was taken so that the sovereign guarantee on the purchase of power could be given in order to help respondent 5 to raise funds by borrowing for equity and also to enable it to realise higher value in the trading of the power project. The report of M/s. TERI is stated to be an indictment of respondents 3 and 5. The cost padding of 20% in capital cost and 10% in fuel cost in the report clearly showed that respondent 1 was not dealing with bona fide power developers but with profiteers who according to the petitioners are bucanears or robber barons in the capitalist world.

31. Increase from 500 MW to 1000 MW is alleged to be the largess to respondent 3 to which it was not entitled and the same is claimed to be against public

interest for which the petitioner has referred to a number of documents. The shifting of the project from Bangalore to Mangalore is termed to be a dishonest action for the ostensible reason of conferring favour to the power generating company. The capital costs is also stated to have been brought down with the ulterior motives. Unaccounted sums of money allegedly for development costs are stated to have not been properly explained. According to the petitioner a case of offences within the meaning of Prevention of Corruption Act and other Penal laws is established which require further probe, enquiry and investigation.

32. We have heard petitioners and their Counsel. We have also heard a number of senior Advocates who appeared for the respondents. We have also examined the dozens of documents produced by both the parties and have critically examined the pronouncements of the Apex Court and various High Courts as cited at the Bar during the course of the arguments.

33. Even though all the respondents had stated in their objections that the present petition was not maintainable in public interest at the instance of the petitioner, yet during the course of the arguments, no serious effort was made to persuade us to agree with such a plea. We are otherwise satisfied that the present petition filed in public interest cannot be rejected on the ground of locus standi. It cannot be disputed that the action complained of and the issue raised before us is a matter of public importance. The petitioners apparently appear to have approached the Court in public interest for the redressal of the public injury arising from the breach of public duty cast upon various authorities and officers of the respondent-State. There is nothing on record to suggest that the petitioners were a busy-bodies or meddlesome interlopers or that they have approached the Court with mala fide intention of vindicating their personal vengeance or grievance. We have no doubt that the process of public interest litigation is not being abused by the petitioners for ulterior motives or their personal gains. We are also satisfied that if the pleas raised by the petitioners are prima facie found to be substantive and not based upon hypothesis, conjectures or the result of imaginative mind of the petitioners, immediate action would be required for the purposes of strengthening the faith of the common man in the institution of judiciary, the democratic set up of the country and the rule of law. The circumstances brought to the notice of the Court warrant us to find out as to whether State action was fair and proper and that nothing was being pushed under the carpet. The petitioners are shown to have not approached this Court for any political purpose or were trying to blackmail any of the respondents. Applying the tests laid down by the Supreme Court in.-

1. S.P. Gupta and Others v President of India and Others.
2. K.R. Shenoy v Chief Officer, Town Municipal Council, Udupi.
3. Fertilizer Corporation Kamagar Union (Regd.), Sindri and Others v Union of India and Others,
4. Sheela Barse v State of maharashtra

5. Miss Veena Sethi v State of Bihar and Others .
6. Chaitanya Kumar v State of Karnataka and Others.
7. Bandhua Mukti Morcha v Union of India.
8. Janata Dal v U.S. Chowdhary.
9. KM. Srinivas v R.M. Premchand and Others.
10. Lawyers' initiative through R.S. Bains, Advocate and Another v State of Punjab through its Chief Secretary and Others .
11. Mis. Chamundi Hotel (Private) Limited and Others v State of Karnataka and Others.
12. K.V. Amarnath and Another v State of Karnataka and Others .

We are of the opinion that the present petition which raises substantial questions of public importance is maintainable in public interest requiring interference, if otherwise required on merits, by the Court in accordance with the provisions of law as established and prevalent in this country.

34. In view of the Division Bench judgment of this Court in Indian Council for Environ-Legal Action and Another v Union of India and Others, we had directed the learned Counsel for the parties to restrict arguments with respect to prayer (a) made in this petition, whereby the petitioner seeks the issuance of appropriate directions for joint enquiry or investigation either by the constitutional or by legal authorities. The prayer for getting the joint enquiry conducted by the Comptroller and Auditor General, Enforcement Directorate and the Central Bureau of Investigation was not seriously insisted by the petitioners. It was conceded by all the learned Counsel appearing in the case that if a prima facie case is made out and there did not exist any legal bar in invoking the jurisdiction, this Court could direct the registration of the criminal case to be investigated by such of the agency which may be deemed appropriate under the circumstances. In that connection the petitioners submitted that investigation, if ultimately directed, must be conducted by the renowned internationally prestigious agency like the CBI with directions to complete the process within the time frame prescribed by the Court.

35. The maintainability of the writ petition seeking the issuance of mandamus to the authorities was resisted on the ground of the petitioners not having approached the appropriate authorities before filing the present petition. Mandamus is a command issued by the Court to any person or authority requiring him or them to do a particular thing or perform a particular act which appertains to his or their office and is in the nature of a public duty. Before invoking the jurisdiction of this Court to seek a writ of mandamus, the petitioners are called upon to show that they had a legal right to the performance of a legal duty and that such right was subsisting at the time of the filing of the petition. It has also to be shown that there existed a corresponding obligation for/against

whom such right is claimed. No such writ can be issued to enforce departmental guidelines or instructions not having any statutory force but an administrative order may be directed to be enforced when it confers rights or creates obligations. The writ is issued to compel performance of duties of a public nature. It cannot be issued in the negative form. The petitioners must be shown to have filed the petition in good faith and not for an intricate purpose. The petition must be preceded by a distinct demand for performance of a duty to the satisfaction of the Court that the party complained of, despite demand made, opportunity granted and the statutory obligation existed, have failed to perform its duty. Such a demand seeking compliance has to be construed and understood under the circumstances of each case. Such a demand for justice may not be insisted upon where it is found that it was just a ritual and a ceremony as the respondent was determined or committed not to do anything positive in the matter. Refusal may be inferred from conduct. Representations may be deemed to be demand for justice under the circumstances of a particular case. Generally, the Court would decline to grant the relief to a petitioner where it is not satisfied that before approaching the Court the petitioner had made a demand and the relief was refused. However, exceptions to this general rule cannot be ruled out.

36. In the instant case, the petitioners have prayed for issuance of directions, to order joint enquiry by the Comptroller and Auditor-General, Enforcement Directorate, the Central Bureau of Investigation and such other agencies as the Court may deem fit to conduct a comprehensive investigation into various documents based allegations made by the petitioners. Admittedly, there is no definite authority in existence who could direct such an enquiry. The prayer made is comprehensive in nature, apparently made to ward off all prejudicial influences in the conduct of the enquiry with respect to the alleged case of kickbacks and bribery. Merely for not approaching a statutory authority, the petitioners cannot be thrown out of the Court and the matter closed on hyper-technical pleas raised. However, the petitioners in this case have submitted that demand for an enquiry had been made at the highest level of public life from 1995 onwards. They have referred to a letter of Sri George Fernandes, Member of Parliament, addressed to the then Prime Minister and enclosed with their rejoinder as Annexure-R-2A. The matter is also stated to have been extensively reported in the Press. As the demand for enquiry at the highest level of the executive did not elicit any response, the petitioners approached this Court by way of writ petition. In his letter dated 22-10-1996, Mr. George Fernandes, M.P., has pointed out that there was evidence of kickbacks in the project entrusted to Managalore Power Company Limited which were allegedly paid during the tenure of the then Prime Minister as Chief Minister of Karnataka. He relied upon the Balance Sheet of the China Light Company in support of his contention and referred to the statement of Chief Minister of Karnataka dated 14-10-1996 in support of his prayer for seeking investigation by a joint committee of parliamentarians or by a sitting Judge of the Supreme Court to find out who was the recipient of those alleged kickbacks. Needle of suspicion was pointed towards the Prime Minister himself.

Admittedly no action was taken upon the basis of the aforesaid letter, with result that the present petition was filed in the Court having jurisdiction where the controversial project was proposed to be commissioned and installed. The objection regarding non-maintainability of the writ petition on the ground of having not approached the authorities before filing the petition is therefore without any substance and hence rejected.

37. In order to determine the desirability of a probe, enquiry or investigation, it is necessary to keep in mind the basic principles of criminal jurisprudence. It is well-settled that any person can set the criminal law into motion except in case where the statute enacting or creating an offence provides to the contrary, locus standi of the complainant is a concept foreign to criminal jurisprudence. Dealing with the recognised principles of criminal jurisprudence, the scope of enquiry and the question of locus standi, the Supreme Court in *A.R. Antulay v Ratndas Srinivas Nayak*, held:

"It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. The scheme of the Criminal PC envisages two parallel and independent agencies for taking criminal offences to Court. Even for the most serious offence of murder, it was not in dispute that a private complaint can, not only be filed but can be entertained and proceeded with according to law. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provisions. Numerous statutory provisions, can be referred to in support of this legal position such as (a) Section 187-A of Sea Customs Act, 1878, (b) Section 97 of Gold Control Act, 1968, (c) Section 6 of Import and Export Control Act, 1947, (d) Section 271 and Section 279 of the Income Tax Act, 1961, (e) Section 61 of the Foreign Regulation Act, 1973, (f) Section 621 of the Companies Act, 1956 and (g) Section 77 of the Electricity Supply Act. This list is only illustrative and not exhaustive. While Section 190 of the Criminal PC permits anyone to approach the magistrate with a complaint, it does not prescribe any qualification, the complainant is required to fulfil to be eligible to file a complaint. But where an eligibility criterion for a complainant is contemplated specific provisions have been made such as to be found in Sections 195 to 199 of the Cr.P.C. These specific provisions clearly indicate that in the absence of any such statutory provision, a locus standi of a complainant is a concept foreign to criminal jurisprudence. In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i.e., an act or omission made punishable by any law for the time being in force (See Section 2(n), Cr.P.C.) is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore,

prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceeding cannot be whittled down, circumscribed or fettered by putting it into a straight-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. To hold that such an exception exists that a private complaint for offences of corruption committed by public servant is not maintainable, the Court would require an unambiguous statutory provision and a tangled web of argument for drawing statute for an express statutory provision. In the matter of initiation of proceeding before a special Judge u/s 8(1), the legislature while conferring power to take cognizance had three opportunities to unambiguously state its mind whether the cognizance can be taken on a private complaint or not. The first one was an opportunity to provide in Section 8(1) itself by merely stating that the special Judge, may take cognizance of an offence on a police report submitted to it by an Investigating Officer conducting investigation as contemplated by Section 5-A. While providing for investigation by designated Police Officers of superior rank, the legislature did not fetter the power of special Judge to take cognizance in a manner otherwise than on police report. The second opportunity was when by Section 8(3) a status of a deemed Public Prosecutor was conferred on a private complainant if he chooses to conduct the prosecution. The legislature being aware of a provision like the one contained in Section 225 of the Criminal Procedure Code could have as well provided that in every trial before a special Judge the prosecution shall be conducted by a Public Prosecutor, though that itself would not have been decisive of the matter. And the third opportunity was when the legislature while prescribing the procedure prescribed for warrant cases to be followed by special Judge did not exclude by a specific provision that the only procedure which the special Judge can follow is the one prescribed for trial of warrant cases on a police report. The disinclination of the legislature to so provide points to the contrary and no canon of construction permits the Court to go in search of a hidden or implied limitation on the power of the special Judge to take cognizance unfettered by such requirement of its being done on a police report alone. In our opinion, it is no answer to this fairly well-established legal position that for the last 32 years no case has come to the notice of the Court in which cognizance was taken by a special Judge in a private complaint for offences punishable under the 1947 Act. If something that did not happen in the past is to be the sole reliable guide so as to deny any such thing happening in the future, law would be rendered static and slowly whither away."

38. It is equally established that FIR can be filed by any person. Such a report can be registered even on the basis of anonymous sources. It can be registered

against persons known or unknown. Section 154 of the Criminal Procedure Code refers to an information relating to the commission of a cognizable offence given to an Officer-in-charge of a police station. It is not the requirement of the section that the report should necessarily be given by a person who has personal knowledge of the incident. Criminal charge or the allegations of the commission of an offence is a charge with respect to offence against the society as a whole and not against a specific person or authority. Dealing with crime and speaking for the Supreme Court, Justice Krishna Iyer, Judge in *Mohammad Giasuddin v State of Andhra Pradesh*, observed:--

"Crime is a pathological aberration, the criminal can ordinarily be redeemed. The State has to rehabilitate rather than avenge. The sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual, and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence. Therefore, a therapeutic, rather than an "in terrorism" outlook, should prevail in our criminal Courts, since brutal incarceration of the person merely produces laceration of his mind".

39. In a recent case, *Vineet Narain and Others v Union of India and Others*, popularly known as Hawala case, the Supreme Court had the opportunity to consider the circumstances under which investigation, enquiry or probe could be directed and monitored. In that case, a public interest litigation under Article 32 of the Constitution of India was filed in the Apex Court alleging that the Government Agencies like the CBI and the Revenue Authorities had failed to perform their duties and legal obligation inasmuch as they had failed to investigate matters arising out of the seizure of the Jain Dairies. In that case it was brought to the notice of the Court that on 25-3-1991, one Ashfak Hussain, alleged to be an activist of the terrorist organisation Hizbul Mujahideen was arrested in Delhi and consequent upon his interrogation, raids were conducted by the Central Bureau of Investigation on the premises of Surender Kumar Jain, his brothers, relations and businesses. Along with the Indian and foreign currency, the CEI seized two diaries and two note books which contained detailed accounts of vast payments made to persons who were identified only by initials. The initials allegedly corresponded to the names of various high ranking politicians in power and out of power besides bureaucrats. As the Government Agencies were alleged to have failed to perform their duties, the petitioners prayed, inter alia, for the following reliefs:--

"(a) that the above said offences disclosed by the facts mentioned in the petition be directed to be investigated in accordance with law;

(b) that this Hon''ble Court may be pleased to appoint officers of the police or others in whose integrity, independence and competence this Hon''ble Court has

confidence for conducting and/or supervising the said investigation;

(c) that suitable directions be given by this Hon"ble Court and orders issued to ensure that the culprits are dealt with according to law;

(d) xx xx xx;

(e) xx xx xx;

(f) that directions be given so that such evil actions on the part of the investigating agencies and their political superiors are not repeated in future".

The Apex Court issued a writ of mandamus, leaving it to the authorities to comply with the directions, but kept the matter pending before it while the investigations were being carried on ensuring that the same was done by monitoring the investigation from time to time and issuing orders in that behalf. It was found that mere issuance of a mandamus directing the agencies to perform their task would be futile and that necessitated issuance of directions from time to time.

40. The Supreme Court in *Union of India and Others v Sushil Kumar Modi and Others*, took note of and held about the nature of duty and functions of the police officer in the investigation of an offence as under:

"4. At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in *Vineet Narain and Others v Union of India and Another* and *Anukul Chandra Pradkan v Union of India and Others* and therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other Government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other Government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent Court in which the charge sheet is filed and the accused have to face trial. It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice the accused at the trial. The nature of these proceedings may be described as that of "continuing mandamus" to require performance of its duty by the CBI and the other Government agencies concerned. The agencies concerned must bear in mind and, if need, be reminded of the caution administered by Lord Denning in this behalf in *R. v Metropolitan Police Commissioner*, indicating the duty of the Commissioner of Police, Lord Denning stated thus: (All ER page 769):

"I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of the State. ...I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility to the law and to the law alone" ".

41. Pointing out to the extent of powers in exercise of the writ jurisdiction, the Court in Vineet Narain's case, *supra*, held:--

"In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erach Sam Kanga v Union of India and Another*, the Constitution Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey v Union of India*, guidelines for adoption of minor children by foreigners were laid down. Similarly in *State of West Bengal and Others v Sampat Lal and Others*, *K. Veeraswami v Union of India and Others*, *Union Carbide Corporation and Others v Union of India and Others*, *Delhi Judicial Service Association v State of Gujarat and Others*, *Delhi Development Authority v Skipper Construction Company (Private) Limited and Another and Dinesh Trivedi, M.P. and Others v Union of India and Others*, guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates on Record Association and Others v Union of India* (II Judges case), a 9-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in *Vishaka and Others v State of Rajasthan and Others*, elaborate guidelines have been laid down for observance in work places relating to sexual harassment of working women. In *Vishaka's* case, it was said:

"The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the independence of the judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (As amended at Manila, 28th August, 1997) as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

"Objectives of the Judiciary:

The objectives and functions of the judiciary include the following:

- (a) to ensure that all persons are able to live securely under the Rule of Law.
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State".

Thus, an exercise of this kind by the Court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field" .

42. On the basis of various pronouncements, the Apex Court issued appropriate directions to the Investigating Agency on being satisfied that the facts narrated, revealed distressing situation which required to be cured, if the Rule of Law was to prevail.

43. Upon analysis of various pronouncements of the Apex Court, it can safely be held that the authorities or the agencies appointed, established and constituted for the purpose of investigation are under a statutory obligation to investigate the crime, if reported or otherwise comes to their knowledge. In this case, it cannot be said, that information has not been received by the respondents with respect to the commission of alleged offences. Such an information can be taken note of on the basis of the letter written by Mr. George Fernandes to the Prime Minister of India or the news items published in various newspapers or on the basis of the allegations made in the present petition provided such allegations, accusations and averments made and published were found to be not frivolous, baseless, concocted or mala fide. If the allegations, prima facie, pointed out the commission of some cognizable offence, the authorities of the respondent-State should have taken note of the same and investigated it in accordance with the law applicable to ensure the majesty of Rule of Law and for preservation of the confidence of the people in the institutions and authorities entrusted with the statutory obligation of probing, investigating and enquiring into the alleged crimes.

44. Section 154 of the Criminal Procedure Code refers to the informations relating to the commission of cognizable offences which are required to be reduced into writing before commencing the investigation. The words, "relating to" do not and cannot mean that the information with respect to the commission of cognizable offence must be detailed or authentic or beyond doubt, It only requires that the facts stated must relate to a cognizable offence on the face of it and not merely in the light of subsequent events. The expression "relating to" has been interpreted to mean, to have bearing or concern, to burden, to refer, to bring into association with or in connection with. According to Chambers Dictionary the word "relate" means to recount, narrate, tell; to give an account of; to bring back; to refer, bring into connection or relation; to date back in

application; to have reference or relation; to connect; to get on well; to discourse. According to Oxford Dictionary the word "relate" means narrate; recount; bring into relation, establish relation between; connected, allied, akin by blood or marriage; have reference to; stand in some relation to. It follows therefore that if the facts stated have any bearing or concern or burden or refer to such circumstances which may amount to commission of cognizable offence, the investigating agency is under a statutory obligation to register the FIR and commence the investigation. The Supreme Court in *State of Haryana v Bhajan Lal*, dealt with the scope of Section 154 of the Criminal Procedure Code and held:--

"31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned Police Officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the Officer-in-charge of a Police Station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered u/s 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context). In case, an Officer-in-charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any Police Officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the Police Officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely

thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an Officer-in-charge of a police station should be reduced into writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence".

It was further held that the commencement of the investigation in a cognizable offence was subject to two conditions, namely, (a) Police Officer should have reason to suspect the commission of a cognizable offence as required u/s 157(1) and (b) such officer should subjectively satisfy himself as to whether there was sufficient ground for entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated under clause (b) of the proviso to Section 157(1). To arrive at such decision the Police Officer has to draw his decision only on the materials which are placed before him at that stage, namely, the FIR together with the documents, if any, enclosed. In other words, the Police Officer has to satisfy himself only on the allegations made in the FIR before he enters on an investigation as to whether those allegations do constitute a cognizable offence warranting investigation.

45. In view of this position of law it has to be ascertained as to whether the facts alleged, documents produced and the circumstances brought to the notice of the Court are prima facie sufficient to warrant a further probe, enquiry or investigation. However, before advertent to the exercise of finding out the existence of circumstances justifying further action, it is necessary to take note of some important dates and almost admitted or proved facts.

The dates are:--

- (1) Before 1991:--Power sector was exclusively within the domain of the Government and its generation, distribution etc., was in the public sector.
- (2) Prior to 1991:-- The Government of India had proposed to establish a 2240 MW plant at Mangalore to be set up by M/s. NTPC with aid from the Soviet Union.
- (3) After 1991:--The Government of India adopted a liberalised policy permitting private investors and entrepreneurs in the said sector. Such liberalised policy also envisaged the establishing of power projects by the foreign companies exclusively or in collaboration with each other.
- (4) In 1991:--The Government of India decided to provide sovereign guarantee and permission to use the imported coal in pursuance of the Liberalised Policy.
- (5) June 1992:--A seminar on the power sector was held in India where M/s.

Cogentrix were invited to attend. During the seminar the Cogentrix Company was introduced to the Government of Karnataka.

(6) 2-7-1992:--Draft MOU was submitted by the Cogentrix.

(7) 15-7-1992:--The State Cabinet approved entering into the MOU for generation of power with various private companies in order to set up power plants in different parts of the State.

(8) 19-7-1992 to 8-8-1992:--A delegation led by the Chief Minister visited USA, UK and Italy and allegedly contacted various international companies for the purposes of setting up of power projects in the State of Karnataka.

(9) 30-7-1992:--MOU was entered with the Cogentrix.

(10) 19-11-1992:--A new Government assumed office in the State of Karnataka.

(11) November 1992:--Cogentrix Company approached GEC to enquire as to whether respondent 8 was interested in joining respondent 5 in order to sponsor and develop project for the construction and operation of 1000 MW power plant at Man-galore.

(12) 21-12-1992:--The new Government assumed office in the State of Karnataka.

(13) In 1993:--Cogentrix Energy Inc. respondent 5 was organised under the laws of North Carolina, USA.

(14) 18-1-1993 to 27-2-1993:--The Chief Secretary conducted meetings to review all MOUs.

(15) 29-1-1993:--Cogentrix raised the issue regarding shifting of site of the power plant from Bangalore to Mangalore.

(16) 3-3-1993;--The MOU was discussed in the Cabinet and it was recommended to permit the Cogentrix to put up 1000 MW thermal plant at Mangalore, and to sell power to local industries to meet their demand at mutually negotiated rates between them.

(17) 11-5-1993:--Government of India's approval regarding setting up of project by the Cogentrix and the General Electric.

(18) 23-11-1993:--Cogentrix requested the State Government for putting up 1000 MW plant at Mangalore enabling the said company to find finances in USA who were otherwise reluctant to invest.

(19) 3-1-1994:--MFC incorporated without any bank account.

(20) 23-3-1994:--Committee constituted to examine the draft PPA.

(21) 31-5-1994:--A Committee of Government of Karnataka entrusted the work of setting up of PPA to TERI before signing the technical aspect of the PPA.

(22) 30-6-1994:--Draft PPA prepared.

(23) 30-9-1994:--PPA entered into with KEB.

(24) January 1995:--Techno-economic Feasibility Report submitted to the effect that M/s. Cogentrix and M/s. General Electric to hold equity holdings in the proposed project.

(25) 30-8-1995.--Respondent 8 withdrew as co-sponsor from the power project.

46. Most of such facts have been noticed while referring to the important dates. Some other necessary admitted or proved facts are:--

(1) That after the power sector was opened for private investors and entrepreneurs, no effort was made to involve the local investors and entrepreneurs having interest in the establishment of power plants in the country.

(2) Cogentrix was not a premier concern internationally renowned in the field of power generation.

(3) Trading of "negotiated settlements", the "MOUs", "no objection" certificates or other trading offers accepted is internationally recognised mode of entering into partnerships or arrangements.

(4) The Cogentrix had not undertaken any huge power projects with capacity of 1000 MW anywhere in the world when they are reported to have been approached for setting up of the power plants in Karnataka.

(5) But for the sponsorship of the General Electrics or the China Light Limited, it would not have been possible for the Cogentrix to have procured the disputed power project.

(6) Before negotiating with the Cogentrix and other companies, the respondent-State is not shown to have issued the tenders internationally or nationally inviting the interested persons or parties for the establishment of the project.

(7) Initially the power projects were proposed to be of 250 each MW which was raised to 500 MW at Bangalore and Mangalore.

(8) The State Cabinet appears to have not decided itself the putting up of 1000 MW plant at one place which is shown to have been decided at the request of the Cogentrix.

(9) That the power project as was agreed to be established by the Cogentrix appeared to be not feasible in view of the report of the TERI.

(10) That initially the power was agreed to be sold by the generating company to the industries directly which was changed thereafter agreeing to sell the whole of the generated power to the Karnataka Electricity Board.

(11) That the Cogentrix had no infrastructure or feasibility of transmitting the generated power to the areas outside Man-galore.

(12) Expenditures are shown to have been incurred by China Light and Power Company for projects outside Hong Kong equivalent to the amounts alleged to have been paid as bribery and kickbacks.

(13) That after the agreement was finalised by the State Government with Cogentrix, the General Electrics withdrew from the project as co-sponsor and China Light and Power Company have stepped into the project.

(14) That Mangalore Power Project is the Indian company concern of respondent 5, Cogentrix. It had no amount or bank account when it was incorporated on 3-1-1994.

(15) That the sovereign guarantee and permission to use the imported coal were intended to facilitate the cheap power generation.

47. Alleging that the bribery was a princely kind of thieving, it has been submitted on behalf of the petitioners that the circumstances brought to the notice of the Court are suggestive of the only conclusion that various persons and authorities, at the helm of affairs had taken the bribes by sabotaging the national economy and its interests. In cases decided by the English Courts, bribe was termed to be noble theft of princess. For the commission of such theft, it is not necessary that the master be put to actual loss. The servant may find out ways or means to enrich himself by mere misused or non-user of the property or the prudence to achieve his objectives. Lord Denning in *Reading v R.*, dealt with such a situation and held:

"Take the case of the master who tells his servant to exercise his horses, and whilst the master is away, the servant lets them out, and makes a profit by so doing. There is no loss to the master, the horses have been exercised, but the servant must account for the profits he makes. The Attorney General for the Crown put in argument the case of a uniformed policeman who at the request of thieves in return for a bribe, directs traffic away from the site of the crime. Is he to be allowed to keep the money? So also here the use of the facilities provided by the Crown in the shape of the uniform, and the use of his position in the Army were the sole reason why the suppliant was able to get this money. It was solely on that account that he was able to sit in the front of these lorries, and give them a safe conduct through Cairo. There was no loss of profit to the Crown. The Crown would have been certainly violating his duty, and it is money which he ought not to be allowed to keep. The law says in those circumstances it must be paid over to the master, in this case, the Crown".

48. In the instant case, some of the circumstances relied upon by the petitioners in support of their submissions which have vehemently been opposed are referred to as under, for the purposes of ascertaining as to whether any case is made out for the purposes of further probe, enquiry or not:--

(1) Inception of the idea of foreign collaboration under suspicious circumstances:

It has been contended on behalf of the petitioners that the venture of having

foreign collaboration in power sector is not explainable on any hypothesis, much less reasonable grounds. Upto the year 1991, the Government of India had decided to establish a 2240 MW plant at Mangalore to be set up by M/s. NTPC with aid from Soviet Union. Why such a mega, project was abandoned is a circumstance which has not been explained and is shrouded with doubts and suspicions. Merely because the Government of India had decided to adopt a liberalised policy permitting private entrepreneurs and investors to establish power projects could not be made a ground for immediately rushing to the foreign companies without exhausting the means and avenues available at the national level. It is contended that in the absence of any effort being made to involve the local entrepreneurs, the respondent-State had rushed for the foreign investment allegedly with the oblique motive of getting a part of the booty out of the exorbitant profits which were likely to be exploited and extracted by the foreign investors from out of the national economy. In support of their contention the petitioners submitted that even the so called brochures issued by the respondent-State for the purposes of luring the private entrepreneurs in the power sectors were not circulated to various renowned Indian companies both in the private and public sectors. The respondents in their reply have submitted that as local investors were not available, they had decided to approach the foreign investors for the proclaimed object of augmenting the power sector by involvement of the foreign entrepreneurs. It is further submitted that no Indian company or individual had come forward for the purposes of establishing various power projects in the State of Karnataka including the one at Mangalore. The conception of the idea of having collaboration with foreign companies has been also tried to be explained on the basis of the exigencies of prevailing conditions and the alleged crisis which the country was reportedly facing in foreign exchange. It is contended that as the foreign exchange reserves had fallen to the lowest levels, the Government of India decided to throw open investment in power generation to the private sector. Any of the rival contentions of the parties regarding the circumstances noted herein above cannot be rejected summarily at this stage. However, we have decided to exercise restraint in commenting upon the validity of the contentions, lest it may not ultimately prejudice the case of any of the parties.

(2) Cabinet decision to approve the MOU:

According to the petitioners the Molls were hurriedly approved by the State Government by passing the national interests and the avowed object of liberalised policy envisaging the establishment of power projects in the private sector. Even though the State Cabinet is shown to have approved entering into the MOU for generation of power with various companies on 15-7-1992, yet it is contended that such decision was a mere ritual and eye-wash because according to the petitioners an understanding had already been arrived at between the State Government and Cogentrix with respect to the establishing of the power projects in the State of Karnataka. Reference is made to the statement of objections of the respondents wherein it is specifically stated that in the seminar

stated to be held somewhere in June 1992 in India, the Cogentrix had participated in it presumably upon invitation. Who invited Cogentrix and why, it is stated to have not been explained. It is contended that once the Cogentrix was allegedly introduced to the Government of Karnataka, it is admitted to have sent a draft MOU on 2-7-1992. What necessitated the submission of a draft MOU by the Cogentrix within a week or so is reportedly not explained. Reference is also made to the draft MOU of the Cogentrix in which they had proposed for setting up two power plants of 2x250 MW each. Before getting the draft MOU examined the State Cabinet is alleged to have approved the entering into the MOU on 15-7-1992, admittedly within two weeks. It is alleged that if the bona fides of the State were clear and not suspicious, the MOU submitted by the Cogentrix should have been got examined by the experts on the subject and thereafter taken up for consideration by the State Cabinet. When the State Government itself had not decided for establishing the power project through a private company and had not even decided to contact various private companies in the world for the purpose, how a draft MOU of the Cogentrix was submitted 13 days in advance, is a circumstance alleged to have not been explained by the respondents. The facts preceding and following the approval of the MOU are stated to be such which are claimed sufficient to be leading to the conclusion that everything was not well in arriving at a settlement regarding setting up of the power project by Cogentrix and that all efforts were made to confer undue largess upon the said company at the altar of the national interests. Various discrepancies regarding the submission of the MOU, its approval and ratification have also been referred to by the petitioners. Can it be said that in a project involving thousands of crores of rupees the action would have been expedited and concluded within a period of one month? Apparently not. Circumstances show that a seminar on the power sector was held in the country in June 1992 when the Cogentrix was allegedly introduced to the Government of Karnataka. The date of seminar has not been mentioned but it is conceded that the Cogentrix had on 2-7-1992 submitted a draft MOU. Why and under what circumstances such draft MOU was submitted is a fact which has been allegedly concealed and kept under the carpet. What necessitated and permitted the State Cabinet to hurriedly deal with such a prestigious mega project involving about Rs. 4,000 crores is also a secret allegedly under the same carpet. The petitioners have only prayed for dragging the carpet away to find out the reality regarding the alleged hurry of the Cabinet in approving the MOU with respect to the project, the subject matter of controversy.

(3) Foreign tour of a team led by the Chief Minister:

Immediately after the approval of entering into the MOU for generation of power allegedly with various companies for setting up power plants in different parts of the State, a delegation led by the Chief Minister is reported to have left for a foreign sojourn on 19-7-1992. Is it possible to commence a tour within 3 days from the date of the approval regarding entering into the MOU for generation of power with various private companies, particularly when the delegation going

abroad comprises of the Chief Minister, the Secretary, Energy Department, the Principal Secretary to the Chief Minister, Director, Industries and Commerce Department, the resident Commissioner, Karnataka and some other officials? Apparently not, but equally not impossible. However, the allegations made do require a probe, particularly when it is stated in reply that visit of the delegation abroad was preceded by the issuance of brochures which were allegedly published and sent to the reputed concerns outside the country. When the brochures were published and sent is another aspect which requires consideration and investigation. Whether issuance of the brochures and their despatch had actually preceded the commencement of the tour of the Chief Minister and its delegation, is another circumstance which requires to be examined. When the Cabinet had approved entering into the MOUs with foreign companies only on 15-7-1992 and foreign tour commenced on 19-7-1992, how and when the brochures could be published and despatched is a million dollar question required to be answered by the concerned individuals and the authorities. It has further to be ascertained as to what was the necessity of sending a delegation abroad when the foreign companies had allegedly been approached by despatch of brochures issued in furtherance of the liberalised policy seeking their involvement in the establishment of the power projects in the State of Karnataka. Who had authorised the visit of such a delegation and how much expenses were incurred is a related question requiring a reply. Was any offer made to seek the assistance and involvement of the local investors and entrepreneurs for the establishment of the power projects before making adventure of foreign trade involvement is also required to be explained by the concerned. The involvement of the local entrepreneurs could not have been ignored because at that stage the power projects envisaged had the capacity ranging from 165-250 MW only. Is there anything on record to show that no entrepreneur or investor was interested or available in the country for the setting up of the power plants of the capacity up to 250 MW. What was the necessity for a mega project of 1000 MW is also a circumstance requiring explanation. The visit of the delegation to the foreign countries at the cost of nation's economy and resources, particularly at a time when according to the respondents the country was facing crisis in the foreign exchange which are stated to have fallen to precariously low levels has not been satisfactorily explained. Neither the respondent-State nor any other respondent have tried to submit any justification for the visit of the foreign delegation abroad under the circumstances noted hereinabove or for the purpose contemplated by the Government at that time. It is also not explainable as to what prompted the delegation to choose USA, UK and Italy for the purpose of their visit, particularly when investors and entrepreneurs like China Light and Power Company was in existence and available for the project in Hong Kong, in the vicinity of India. The petitioners have alleged that the foreign tour was only a pleasure trip at the instance of M/s. Cogentrix and not for the proclaimed object of contacting other companies for their alleged proposals and offers to construct, to own and operate power plants in Karnataka. The extent of the amounts spent and the necessity of the persons

associated with the delegation is also alleged to be tainted with mala fides and not connected with the attainment of the object proclaimed to have been achieved. We have only referred to the circumstances and rival contentions of the parties in this regard and again have refrained from commenting upon their rival contentions.

(4) Entering into the MOU with Cogentrix:

In its reply respondent 3 has submitted that Cogentrix entered into a MOU with the Government of Karnataka on 30-7-1992, presumably at a time when the foreign delegation was abroad. How this MOU could have been entered on 30-7-1992 when the efforts for selecting a company were reportedly in progress and the delegation led by the Chief Minister was allegedly contacting 14 foreign companies and discussing with them their proposals and offers to construct, own and operate power plants in Karnataka, is a matter which requires to be explained either by orally or by documentary evidence. In the additional statement of objections filed by respondent 1 it is submitted that the draft MOU of the Cogentrix dated 2-7-1992 proposing for setting up of two power plants of 2 x 250 MW each was forwarded by the Ministry of Power, Government of India to the Government of Karnataka on 16-7-1992. The Government of Karnataka is stated to have considered the modalities of inviting private sector participation in the power generation sector, presumably a "green field" area. Relevant excerpts of the Cabinet note dated 15-7-1992 has been referred to justifying the signing of the MOU. The said note reads as:

"16. As explained above, in order to bring in additional resources and to expedite the implementation of power projects, the State Government has identified a number of major Hydro and Thermal Power Projects, that could be implemented by foreign companies, either fully owned by them or under joint sector participation. The following foreign companies have shown keen interest in the project development in our State. The senior representatives of those companies have held detailed discussions with the various departments and some of them have visited the proposed sites.

Sl. no.

Name of the foreign company

Projects in which interested

Installed capacity (MW)

Remarks

1

2

3

4

5

Thermal Projects

2

Cogentrix Inc.(USA)

(a) Mangalore Thermal Power Station (new proposal)

Initial = 165MW 250 MW

This is in addition to Thermal Project proposed by NTPC

(b) Bangalore Thermal Power Station (new proposal)

Initial = 165 MW 250 MW

Suitable site depending on availability of water to be identified outside Bangalore city

17. State Government had earlier invited applications for setting up Thermal Power Plants at Mysore, Hospet and Raichur sites by private parties. In the case of Mangalore and Bangalore Thermal Units suitable land near water source and railway line will be identified. The State Industries Department has undertaken to provide suitable land for setting up the Thermal Units in these two locations".

A perusal of the aforesaid note shows that so far as Cogentrix is concerned the Government had proposed to permit it to set up two plants each of 165 and 250 MW without specifically fixing any upper limit. The proposed plant at Mangalore was to be in addition to the thermal project proposed by NTPC and for Bangalore, a suitable area was to be identified outside Bangalore City. The cabinet decision is stated to have been followed by G.O. No. DE 108 PPC 92, dated 24-7-1992, again admittedly at a time when the delegation led by the Chief Minister was abroad purportedly negotiating with various companies for setting up of power plants in the State of Karnataka including the projects at Mangalore and Bangalore. On 10-8-1992 the Cabinet is stated to have been informed that two MOUs had been signed with Cogentrix for thermal power projects at Mangalore and Bangalore of 250 MW each. The extract of the Cabinet note relied upon by the respondents is to the effect:--

"TOWER PROJECTS:

The delegation held extensive discussions with the several foreign companies and associations of NRI's regarding their proposals for investment in power sector and explained to them the various policy initiatives taken by the Government of India and the State Government to encourage private sector participation in generation and distribution of power. The delegation also explained the salient features of the mini hydel and thermal projects identified in the State on for which project profiles have been prepared.

The very important companies with which the delegation held discussions on power projects are as follows: viz.,

(1) Watinghouse Power Corporation, USA (2) M/s. Bechtel, San Francisco, USA (3) M/s. Fluour Daniel Corporation, Los Angeles, USA (4) The Asia Power Corporation, New York (5) Northland Power, Canada (6) M/s. Caitness, New York (7) M/s. Cogentrix, INC, USA (8) M/s. Hellmuth, Obata and Kassabaum (HOK) Intercontinental, USA (9) M/s, North East Energy, Boston (10) M/s. Public Service Enterprise Group Inc. New York, New Jersey (11) M/s, DLJ, New York (12) M/s, Rolls Royce, London (13) M/s, Chalais Holdings, UK (14) The Societa Italiana Per Condotte D'Acqua SPA Italy.

As a result of these visits and discussions memoranda of understanding were signed in regard to specific power projects in the State with the following companies on their proposal for investment in power generation, viz.,

(1) Almatti Dam Power Project 270 MW: The Asia Power Company Limited, USA in joint sector with Karnataka Power Corporation Limited (KPCL). (2) Raichur Thermal Power Station-Units (2 x 250 MW): North East Energy of USA, in joint sector with Karnataka Power Corporation. (3) Mysore Thermal Power Project near Chamalapura 2X250 MW. Expandable to 1000 MW: North East Energy, USA. (4) Thermal Power Projects at Mangalore and Bangalore 250 MW each expandable to 500 MW each: Cogentrix Inc., USA. (5) Hospet Thermal Power Project (500 MW): M/s. HOK Intercontinental Limited. (6) Dharwad Thermal Power Project (300 MW): M/s. Chalais Holding Limited, UK. (7) Shivasamudram Hydel Project (268 MW): M/s. Condotte, Italy in joint sector with KPCL.

These Power Projects would have an overall capacity of 2838 MW, estimated open cycle cost about Rs. 6,000 crores.

These Memoranda of Understanding provide for major areas of possible agreement on investments, rate of return, tariff structure etc., in accordance with the policy guidelines laid down by the Government of India and on the utilisation of existing transmission and distribution network of Karnataka Electricity Board based on the policy decisions of the State Government".

The MOU signed with the Cogentrix did not contain any commercial terms or commitments beyond granting them the right to exclusively negotiate with the Karnataka for 180 days after undertaking a feasibility study. Such a MOU is reported to have facilitated the Cogentrix to enter into agreement with the sponsors for the purpose of investment. A new Government is reported to have assumed office in the State of Karnataka on 19-11-1992 and resolved to review all MOUs signed by the previous Government. The Chief Secretary thereafter had a series of meetings for reviewing all the MOUs and ultimately on 3-3-1993 another MOU for 1000 MW thermal plant at Mangalore was approved and permitted. The circumstances under which the MOU was initiated, negotiated, settled and concluded are allegedly not free from doubt. On the one hand the petitioners have alleged that the course adopted by the respondents was to

extract kickbacks and bribes and on the other hand the respondents have referred to various circumstances to justify their bona fides claiming that as a number of individuals and authorities were involved in the transaction regarding entering into negotiation and conclusion of the MOU, there could not be any question of the kickbacks or bribery. In the context of the circumstances, the allegations made by the petitioners cannot be termed to be mala fide, vexatious, motivated, extraneous or without any substance.

(5) Selection of Cogentrix:

The Cogentrix is alleged to be not a premier company involved in the sector of power generation. It is alleged to be not having any international recognition before the signing of the MOU in its favour. It is not in dispute that at the relevant time it had allegedly developed, financed, constructed and operated several power projects in USA of capacities ranging from 15 to 300 MW only. It had a total installed capacity of 900 MW only. In its objections respondent 5 has claimed to be a legal successor of Cogentrix Inc. which was founded in 1983 but have claimed its incorporation only in 1993 under the Laws of North Carolina. In other words, respondent 5 in its present form did not legally exist prior to 1993. If it did not legally exist at the time of submission of the MOU, how it submitted the draft MOU which was approved and financed by the Government in the year 1992, is a mystery shrouded with doubt required to be pierced by invoking the Court's assistance to find out the reality. It is also to be determined as to what prompted the respondent-authorities and the State Government of Karnataka and the Union of India to have negotiated with a company which in law did not exist. Respondent 5 cannot be equated with predecessor namely, Cogentrix Inc. particularly when no negotiations are claimed to have been held with the so called predecessor of respondent 5. How respondent 5 is claimed to be the legal successor of Cogentrix Inc. is also not clear. A company with a proclaimed capability of installing power plants of the capacity ranging from 15 to 300 MW with a total installed capacity of 900 MW could obviously be not recognised a pioneer in the development, construction, ownership and operations in the private power sector to whom a project with a capacity of 1000 MW could be entrusted. The petitioners further contend that the selection of respondent 5 was only with the oblique motive of finding out a party for the ulterior purpose of creating circumstances to facilitate the receipt of undue pecuniary gains at the cost of the national interests and its economy. The selection of the Cogentrix and the signing of the MOU with it provided respondent 5 an opportunity of making further deals with the so called sponsors and investors for the purpose of establishing the power projects in the State of Karnataka. It is alleged that it was to the knowledge of the authorities at the helm of the affairs that respondent 5 was not in a position to undertake the venture of establishing the mega project of 1000 MW capacity at Mangalore. Respondent 5 is stated to have traded in the documents in the form of MOU to persuade firstly to respondent 8 and subsequently, respondent 7 to become co-sponsors with it for the purpose of establishing the power project. If respondent 7 and respondent 8 who are

admittedly the pioneers in the field of power generation were interested to become the co-sponsors with respondent 5, what prevented the authorities concerned to negotiate with the aforesaid respondents themselves for the purpose of establishing the power projects in the State of Karnataka? Respondent 5 has itself claimed to be involved only in the investigation of the opportunities, connected with the research for establishment of independent power projects and if chosen entering into preliminary agreement getting facilities for persuading others to join it as co-sponsors for the development of the project assigned to it. The petitioners have further alleged that the project was changed from dispatch project to base load project only for the purpose of providing facilities to respondent 5. Cogentrix have further claimed to set up respondent 3 as a project company which admittedly did not have any bank accounts till 3-3-1994. Respondent 5 have submitted that:

"It is not unusual for the project company at the development stage to have limited functional importance and subsequently until financial closing years, the Director and shareholders of the project company are often representatives of the initial developers".

The MOU dated 30-7-1992 is shown to be between Cogentrix Inc. (Cogentrix) and the Government of Karnataka (State). Respondent 5 apparently appears to be non-existing at that time and no MOU appears to have been signed with it as it has claimed to be the successor of Cogentrix Inc. It is also not clear as to where the aforesaid MOU was executed and signed by the parties. The signatories to the MOU include persons who were admittedly on tour with the Chief Minister at the relevant time. If it is assumed that the MOU was signed abroad then the question raised is that who had authorised the persons signing the MOU on behalf of the Government of Karnataka to agree for 2 x 250 MW Steam Turbine Generators along with coal fed boilers when the Cabinet vide its decision referred to herein above had authorised the establishment of 165-250 MW only? It appears that two MOUs were signed on 30-7-1992 agreeing to have thermal power stations at Bangalore and Mangalore of 2 x 250 MW capacities totalling 500 MW thermal projects at each site. Even though the case of the respondents is that the project from Bangalore was shifted to Mangalore presumably on account of the non-availability of sufficient water, yet it appears from the letter of the Cogentrix dated 29-1-1993 (Annexure-5) that the Bangalore Project was deferred and the capacity of Mangalore Project was increased. While incorporating respondent 3, the Cogentrix Inc. is not shown to have made any investment, which according to the petitioners means that the whole of the transaction was an eye-wash and initiated and processed with the purpose and object of facilitating respondent 5 to seek investors and sponsors who could be instrumental in payment of the bribe and kickbacks. Specific reference has been made to the Balance Sheets of respondent 7 to highlight that the amounts worth more than 200 million HK\$ were paid as kickbacks to persons or authorities not known to the petitioners but are required to be identified by holding a thorough probe, enquiry and investigation. The establishment of Rs.

4,200 crores 1000 MW coal based power plant in favour of Cogentrix Inc. is stated to be the conferment of a largess upon respondent 5 in negation of all settled principles of law, commercial ethics and values. According to the petitioners respondent 5 is not a listed company even in USA and had no Balance Sheet till the year 1994. The consolidated Balance Sheet of the Cogentrix Energy Inc. and subsidiary companies shows the paid up capital at 1,30,000 US\$ with total current liabilities upto 1995 as 85,795 US\$ and with long term and other liabilities totalling 8,67,115 US\$. According to the petitioners the debt equity ratio of the company was 19.2:1 (897:46.5) which is alleged to be nearing total bankruptcy. Under the normal circumstances such companies are stated to be not in a position to raise financial resources on their own strength to meet the requirement of a mega project. It is contended that respondent 5 did not even have the money to fund its equity commitment in the MPC project. Trading in the development project is also reflected in the Balance Sheet. The company is stated to be indulging in buying and selling of the power projects and abandoning them at mid way at the development stage before the projects became operational. The sale price at the development stage is stated to be depending upon the future profitability of the PPA entered into with the buyer. The complicated controversial amounts of respondent 5 are claimed to be indicative of the fact that the said Company did not in fact exist and was selected for the deal with mala fide intentions of procuring undue benefits in connection with the establishment of the power project at Mangalore. In this regard the observation of Lord Denning as noted earlier can be spelt out. The allegations made by the petitioners in this regard cannot be held to be either imaginary or concocted or motivated or devoid of any substance. The relevant record approving establishment of its position in the field of power generation and its credibility for grant of international contracts is prayed to be enquired into by affording the concerned an opportunity of proving their position and credibility.

(6) Changes in MOU permitting Cogentrix to set up thermal power plant of 1000 MW at Mangalore instead of 2 x 250 MW:

It is contended on behalf of the petitioners that the condition regarding capacity in the MOU was changed to facilitate the Cogentrix for the purpose of earning profits and bringing down the prices of the construction of the power project which had been found to be excessive and on higher side. As noted earlier the Cogentrix was contacted for establishment of two power projects of 165 and 250 MW at Bangalore and Mangalore. On 24-7-1992 they were permitted to have projects at Man-galore of 2 x 250 MW (500 MW) and at Bangalore 2 x 250 MW (500 MW). Upon their representation, the Cogentrix was permitted to set up thermal power plant of 1000 MW at Mangalore in three phases of 334 MW (each phase consisting of two units of 164 HVM W) subject to obtaining the approval of the Government of India. The respondents have tried to explain the circumstances of reviewing all the original MOUs by allowing the Cogentrix to raise the generating capacity of the power plant at Mangalore, on account of the shortage of the electricity generated in the State of Karnataka. The plea of the

respondents has been doubted by the petitioners alleging that the requirement of more energy should not be made a basis for allowing the company to generate more electricity at Mangalore and not at any other place in the State of Karnataka. Such a concession has been allegedly conferred for the purposes of facilitating the company to procure by luring other investors and sponsors internationally. It is contended that the respondent-State has not placed any document on record which could show the necessity of permitting the respondent-Company to raise the generating capacity from 500 to 1000 MW. The only document on record shown to the Court was the request of the Cogentrix in that behalf. Even in G.O. No. DE 96 PPC 90, dated 18-3-1993 no reason has been assigned for taking the decision permitting M/s. Cogentrix to establish thermal power plant of 1000 MW at Mangalore along with various other concessions. M/s. Cogentrix vide their letter dated 14-12-1992 are shown to have had discussion in New Delhi with respect to, "combination of Mangalore and Bangalore Projects at Mangalore with 1000 MW pulverized coal project". Vide letter dated 29-1-1993 M/s. Cogentrix intimated the Chief Secretary of the State of Karnataka of their formal presentation to the foreign investment promotion opportunity requesting approval of investment in Mangalore Thermal Project on certain specific terms and conditions. They intimated that, "subsequently due to siteing difficulties in Bangalore, it was agreed that the Bangalore Project would be deferred and that 1000 MW would be developed and constructed in Mangalore. By the terms of memoranda the "inclusive period" will terminate on 31-1-1993. Based upon substantial developmental progress made to date, we hereby request you to extend the inclusive period for an additional of 180 days (one hundred and eighty days only) beginning ng 1-2-1993". The facts connected with the above circumstances are stated to be sufficient requiring further probe and investigation.

(7) Shifting of site from Bangalore to Mangalore:

It is not disputed that the initial proposal was to have constructed power plants by the Cogentrix one being at Bangalore and the other at Mangalore with capacity of 160 and 250 MW. The site is alleged to have been shifted from Bangalore to Mangalore to facilitate the working of M/s. Cogentrix, completely ignoring the benefits and other interests of the people living in and around Bangalore. The action of shifting has been tried to be justified on the grounds of non-availability of water near Bangalore. It is contended that as M/s. Cogentrix had agreed to utilise the sea water for the purpose of the project, the State had felt it reasonable and necessary for permitting the shifting of the site from Bangalore to Mangalore. It is pointed out by the petitioners that such a plea is apparently after-thought and concocted merely to put a defence to facilitate the concession granted and largess conferred upon M/s. Cogentrix. It is submitted that it is highly improbable to accept that at a time when proposal was made for setting up a power project plant at Bangalore, the respondent-State had not seen the feasibility regarding the availability of the water. It is also contended that not much water is needed for a thermal power project which is

distinguishable from the hydel power project. The water needed for cooling the turbines is available near Bangalore which could be utilised by having resort to the modern techniques of recycling of the user of water. It is contended that the plea of non-availability of the water near Bangalore was raised only after the issue was made public and was not really the ground for shifting of the power plant from Bangalore to Mangalore. Reference has been made to the letter of M/s. Cogentrix dated 29-1-1993 wherein it is mentioned that, "it was agreed that the Bangalore project would be deferred and that 1000 MW would be developed and constructed in Mangalore." Shifting and deferring of the projects cannot be equated or deemed to be synonymous terms. It is stated by the petitioners that by deferring the project at Bangalore, the Cogentrix has been only facilitated to build a project at Mangalore for reasons not disclosed and explained. The pleas of defence raised by the respondents are submitted to be contradictory in terms and devoid of any legal force. The respondent-State is alleged to have not applied its mind before sanctioning the shifting and establishment of a thermal power plant at Mangalore with 1000 MW capacity. The State largess is alleged to have been conferred by the respondents and their authorities with a mala fide intention of benefitting M/s. Cogentrix at the cost of the State's interest and its economy. This circumstance can also not be termed either malicious, unfounded, imaginary or without substance requiring no probe regarding the rival contentions raised before us.

(8) Cost of the Project:

The cost of the project and establishing a power plant of 1000 MW capacity at Mangalore is alleged to be Rs. 4,200 crores. The petitioners have referred to Annexure-H, "review of the Power Purchase Agreement for the Mangalore power Project conducted by GOPA, Germany, SAIC, USA and TERI India, the capital cost estimates as referred to in the Review Report are based on historical US plant construction costs with supporting data." It is mentioned in the Review Report that:-

"Based upon engineering judgment, experience, and capacity scaling factors valid for power plants built in the United States within the last few years, SAIC estimates that building a 1000 MW facility consisting of four 250 MW generating units would result in a project cost savings of between 10 and 13 per cent versus the currently planned construction utilising six 167 MW units. This estimate assumes that the four 250 MW units would be built two at a time, with less than a year separating the commercial startup dates of the first two units, and likewise, the final two units. Table I summarises this result as well as supplying an estimate of the savings associated with constructing 300 and 333 W units at the proposed site.

..... Note that the estimated savings of constructing a plant composed of 333 MW units is no greater than of a building with 250 MW units. This is due to the assumption that the 333 MW generating units would be built only one at a time, whereas the 250 MW generating units would be built two at a time.

From Table I it is evident larger size plants yield lower project construction costs. But from an engineering point of view, low capital costs are not the sole determinant of overall system economics. Most importantly, the sizing and scheduling of the construction of power generation units is driven by the load requirement of the distribution system being served. Thus, at this juncture, there is no a priori reason to believe that 167 MW generating units are not appropriate to Karnataka simply due to their relatively sub-optimal size".

At the end it is concluded that.-

"In sum, SAIC finds the estimated project capital cost estimate of \$1,576 per KW for the plant in Karnataka to be approximately 20% higher than a similar plant built in the US. It is important to recognise that this finding is based upon the assumption that the capital cost estimate of the proposed plant conforms to the assumptions listed in Section I.A. herein".

The higher estimated project capital cost has been alleged to be related to the kickbacks and bribes paid to various persons and group of persons. The allegations of the petitioners, based upon the report of reputed experts cannot be termed to be mala fide or concocted not even requiring further probe or enquiry:

(9) Power Purchase Agreement with KEB:

The MOU dated 2-7-1992 (draft MOU) and dated 30-7-1992 did not contemplate the execution of a PPA with the KEB. According to the aforesaid MOU the State had decided to entrust implementation of the Project to Cogentrix for generation of power at Bangalore and Mangalore. The State had agreed to disclose to Cogentrix, assisting in implementation and approval and make available all reasonable requirements of permits, licences or other forms of approvals of the Government as may be found necessary from time to time for the development, construction and operation of the project. The Electricity Board of the State of Karnataka was to transfer to Cogentrix upon request, all permits, licences, consents and approvals previously obtained by the State, the Government of Karnataka and all its appurtenants, agencies, instrumentals and departments with respect to the Project. Upon completion of the envisaged activities, the Cogentrix was to prepare a report covering financial structure and projections, project completion and operational schedule and the proposed tariff agreement. Vide G.O. No. DE 96 PPC 90, dated 18-3-1993 M/s. Cogentrix was permitted to sell power directly to industrial units of the area at the actually negotiated rates between the generating company and the industrial units, subject to the approval by the State Government. The draft PPA is shown to have been drafted on 30-6-1994 and formally entered into between the Cogentrix and KEB on 30-9-1994. In the draft PPA it is mentioned that the generating company was planning to design, construct and operate a new coal-fired power generation station at Mangalore with a nominal gross electrical capacity of 1,050 MW. The company expressed desire to interconnect with the Board System in order to sell

electricity to, and purchase back up power from the Board, in accordance with the terms of the agreement. What necessitated the execution of the PPA has not been explained except relying upon the recitals in the PPA dated 30-9-1994. Such recitals read as under:--

"Whereas, the Company plans to design, construct, own and operate a new coal-fired thermal power generation station located near Mangalore with a nominal gross electrical capacity of approximately 1000 MW (as more specifically defined in Section 1.1, the "Power Station"), and

Whereas, the parties expect the Power Station to be built and financed in the following two phases: (i) the first phase shall consist of two nominal 250 MW (gross)/230 MW (net) generating units with an aggregate electrical capacity of approximately 500 MW (gross)/460 MW (net) with coal-fired boilers and other associated equipment, as more specifically described in Appendix 6 (the "Facility"); and (ii) the second phase shall consist of two nominal 250 MW (gross)/230 MW (net) generating units with an aggregate electrical capacity of approximately 500 MW (gross)/460 MW (net) with coal-fired boilers and other associated equipment, as more specifically described in the Phase Two PPA (the "Phase Two Facility"); and

Whereas, the Company desires to interconnect with the Board System in order to sell electricity to, and purchase back-up power from, the Board in accordance with this Agreement; and

Whereas, the parties currently anticipate that the commercial operation date of the first unit will occur on the date which is 42 months following the financial closing date (such date being the "Scheduled operation date"); and

Whereas, the Company wishes to sell and deliver to the Board, and the Board wishes to accept and purchase from the Company, the facility's electric energy (net of station use), such sale by the Company and purchase by the Board to be pursuant to the terms and conditions of this agreement; and

Whereas, the Company wishes to sell and deliver to the Board, and the Board wishes to accept and purchase from the Company, the Phase Two Facility's Electric Energy (net of station use), such sale by the company and purchase by the Board to be pursuant to the terms and conditions of the Phase Two PPA".

The necessity and justification of the PPA has been seriously disputed by the petitioners who have prayed for investigation alleging it to be disadvantageous insofar as the interests of the State, the Board and the people of Karnataka are concerned and correspondingly more beneficial and advantageous to the foreign Company M/s. Cogentrix.

(10) Change of the mode of sale of generated electricity:

According to the MOU dated 2-7-1992 and 30-7-1992 which culminated in the issuance of Government Order dated 18-3-1993, it was resolved:

"(b) M/s. Cogentrix is permitted to sell power directly to industrial units of the area at the mutually negotiated rates between M/s. Cogentrix and the industrial units, subject to approval by the State Government:

(c).....

(d) The Company has to sell the balance power to KEB at a tariff to be fixed according to the norms laid down by the Government of India vide notification dated 31-3-1992.

(e) KEB will make wheeling and banking arrangements for M/s. Cogentrix on payment of wheeling charges".

However, vide PPA executed on 30-9-1994 it was agreed between the generating Company and the Board that the Company shall sell and deliver and the Board shall accept and purchase, the net electrical output of each unit, subject to the terms and conditions specified therein. The Board agreed to commence the purchase of electricity from the Facility at the rates specified in Article X which were termed to be contingent upon compliance of the conditions specified in the agreement. The company's obligations were made subject to the conditions precedent as enumerated in para 5.4 of the PPA. Regarding project costs and price of electricity it was agreed by the company that combined price of the electricity under the agreement and the Phase 2 PPA shall not exceed those set forth in Appendix 11 as on the dates set forth therein. The purchase price was specifically assigned in the manner vide Section 18.1. The purchase price agreed is stated to be more expensive than the prevalent cost price of the electricity in the State of Karnataka. Justifying the change of mode of sale of purchase of the energy, the respondents have submitted that at the time of the signing of the MOU, the provisions of the Electricity Supply Act, 1948 were not taken note of which according to them prohibited the sale of the electricity by a generating company. It is contended that the justification submitted by the respondents is not only after-thought but in fact a hoax having not any rational or legal sanctity. The petitioners have referred to the provisions of Section 43A of the Electricity Supply Act, 1948, which according to them permits a generating company to enter into a contract for the sale of electricity generated by it with any other person with consent of the competent Government or Governments. The aforesaid section was inserted by Electricity Laws (Amendment Act No. 50 of 1991) with effect from 15-10-1991, admittedly, before the initiation of the process of setting up of the power plants in the State with the aid and assistance of the private investors including the foreign companies. Even before the amendment, sub-section (3) of Section 43 provided that a generating company may, on such terms as may be agreed upon, enter into agreements for the sale of electricity generated by it, with any other person with the consent of the Government or Governments. The Board is not under any obligation to necessarily purchase the electricity from a generating company. Section 43 of the Electricity Supply Act confers a discretion upon the Board to enter into arrangement with any person producing electricity within the State for its

purchase, on such terms as may be agreed, of any surplus electricity which that person may be able to dispose of. The Board is however under an obligation to not enter into any such arrangement with any such Government or person without the consent of the State Government, or into arrangement with any such person without the consent of the Government of the State within which the electricity is to be generated or used. Such a change of mode regarding sale and purchase of electricity is alleged to have been made for reducing the burden and responsibility upon the respondent-Company, which it was likely to incur in arranging the sale of the electricity generated by it. It was further contended that as the purchase price has to be determined in accordance with the PPA entered into between the Company and the Board, the price of the electricity generated is likely to increase resulting heavy burden upon the ordinary consumer in the State of Karnataka. The Board and the Company have tried to explain that the apprehension of the escalated price of the power supply is imaginary and not real. It is contended that a large section of the Society is being supplied electricity at the subsidised rates by the Board and that the electricity generated by the generating Company, even if costlier, would not affect the common man. How the electricity generated by respondent 3 is to be separated from the pool and the grid managed and controlled by the Board is a circumstance allegedly not explained. Once the electricity generated by respondent 3 is to be put on the common grid and the transmission line, there is every likelihood of its value being increased allegedly detrimental to the interests of the common man. The learned Counsel appearing for the Board referred to Electrical Power Tariffs of various areas to impress upon us that the escalated value, if any, of the electricity generated by the respondent-Company was not likely to affect the common man as separate tariff schedule is provided for domestic and non-commercial lighting. They have also referred to tariff schedule LT-4 relating to agriculture and water supply. Reference is also made to the prevalent energy charges to impress the Court that the electricity generated by the respondent-Company shall not be expensive or costlier as apprehended by the petitioners. The submissions made on behalf of the respondent have seriously been disputed by the petitioners. The learned Counsel appearing for the Electricity Board, however, referred to various sections of the Electricity Supply Act, particularly Sections 2, 2(2), 4A, 3, 15A, 18A, 28, 30 and 31 to submit that respondent 2 was performing its statutory obligations and was not in any way connected with the alleged kickbacks or bribe. In exercise of its statutory obligations, the Board cannot be roped into the litigation initiated by the petitioners for the alleged violation of statutory provisions with the project of putting the State Exchequer to loss and corresponding gain to various persons, authorities and the foreign Company. Be it as it may, we cannot go into those niceties because we have already stated hereinabove that this Court cannot by itself make a thorough probe or enquiry into the alleged commission of crime by any person known or unknown or to the extent of his or their involvement.

(11) [Not given]

(12) Utilisation of the transmission lines of the KEB:

As noted earlier there was no provision in the MOU or the Government Order dated 18-3-1993 for providing the transmission line of the KEB to the respondent-generating company. What was referred to in Government Order dated 18-3-1993 was only that the respondent-Board was permitted to enter into an agreement with M/s. Cogentrix regarding power purchase subject to approval by the State Government. Providing the facility of transmission line either by the Board or by the Government is stated to be a burden upon the State Exchequer. The power project in Bangalore was deferred or shifted on account of the alleged non-availability of water and access to the imported coal with the proclaimed object of reducing the burden on generation and sale of electricity to the consumers. It is contended by the petitioners, and perhaps not without basis, that by providing the transmission line to the respondent-generating company, circumstances have been created to reduce the burden of the power generation and its supply only for the benefit and profits of generating company. Benefits conferred upon the aforesaid company are intended to inflate their money bags by ensuring their profit earning capabilities. It is further alleged that the Government of Karnataka vide its latest letter dated 20-1-1998 have decided to incur an expenditure of 750 crores for the aforesaid purpose. The huge expenditure on the State Exchequer is claimed to be without any justification in furtherance of the commitments of the respondents to confer additional benefits and undeserved gains upon the generating company. It appears that the group Secretaries of the Government of Karnataka in their discussions held on 9-1-1998 and 13-1-1998 noted that power generated from projects including the project of MPP Limited, at Mangalore is required to be evacuated to the major load centres of Mysore and Bangalore for which the KEB had conducted the necessary load flow studies and planned a new transmission system necessary for evacuation of the surplus power from Mangalore area. The funds required for the above project have been estimated to be Rs. 750/- crores for which the KEB is stated to have requested M/s. Infrastructure Leasing and Financial Services Limited to suggest methods of financing the aforesaid project. The KEB is stated to have decided to form a separate Joint Venture Company with a joint venture approval for the fund mobilisation, construction, operation and maintenance of the above transmission system required for evacuation of power from the Mangalore Evacuation Project. Consequently, Government Order No. DE 41 EEB 97 dated 20-1-1998 has been passed to the following effect:--

"(1) Permit the KEB to accept M/s. National Grid Company Private Limited, United Kingdom as its Joint Venture Partner (JVP) and to form a Joint Venture Company (JVC) for setting the Mangalore Evacuation Project (MEP) with the following pattern of equity holding:

Equity Holding

% Share Holding

(a) KEB

upto 20%

(b) National Grid Company, UK (NGC)

up to 49% in Foreign minimum of 5% in rupee component, to be disinvested to a partner mutually acceptable to the KEB and the NGC

(c) Domestic Financial Institutions

Balance.

Karnataka Electricity Board may accept the terms and conditions as negotiated between the Karnataka Electricity Board and M/s. National Grid Corporation and contained in the Karnataka Electricity Board proposal to Government vide their letter Number CE/JVC/907, dated 18-12-1997, subject to the following conditions:

(i) With regard to the deemed commercial operation risk, the JVP shall be asked to bear the full deemed commercial operation risks upto evacuation of 1000 MW. Between 1000 MW to 2000 MW it will be borne by the JVC.

(ii) Prior approval of the Government shall be taken for the Transmission Supply Agreement proposed to be entered into between the JVC and the KEB and for the resultant tariff calculations.

(iii) Any expenditure towards the insurance component of the O and M cost, namely, 0.5% of the project cost will require prior approval of the Government. The essentiality of taking insurance of the whole or a part of the assets will be looked at by the Government and preference will be given not to go in for insurance to the extent possible. This expenditure will also be accounted separately so that if and when there is saving on this account, this money will go back to KEB".

The aforesaid Government Order is alleged to be an expenditure by the Board for the benefit of the generating company which was neither contemplated under the MOU nor agreed to be spent under the PPA executed between the Board and the Company. Such a huge investment could be avoided, according to the petitioners, had the project at Bangalore been not shifted or deferred. The cost of transportation of foreign coal and procurement of water would have been cheaper than the amount spent for the purpose and benefit of the respondent-foreign company.

(13) Increase in the electricity rates:

According to the petitioners the rates of electricity generated by the Company are likely to be higher, adversely affecting the interests of the common consumer. According to them, the power to be generated by the generating company, due to various cost padding is likely to cost upwards by Rs. 4.50 per unit without subsidisation. At the proposed rates, no power intensive industry is

viable. It is alleged that there is no demand from the industry for the cost padded, expensive power. It is contended that the demand for power has been static in the past 5 years because of captive generation of power, theft and direct purchase from NTPC. The current rate of KEB power to industry is alleged to be marginally higher than the captive generation by diesel generating States. The escalated price of the power generated by respondent 5 is alleged to be for helping respondent 5 to raise funds for borrowing of equity and also to enable it to realise higher value in the trading of the power project. The respondents have tried to justify their rates by reference to the Electric Power Tariff as noted earlier. The pleas raised by both the sides cannot be termed to be frivolous either way.

(14) Balance sheet wrongly showing the incurring of expenditure in India:

The petitioners have referred to the Balance Sheets of the respondent-China Light and Power Company who are stated to be shareholders of respondent 3 in support of their contention that about 200 million HK\$ had been paid as kickbacks or bribe which are shown in their Balance Sheets as development costs which was subsequently written off from the profit and loss account of respondent 7. Vide PPA executed between respondents 2 and 3, a duty is allegedly cast upon both the parties to keep proper books of records reflecting full and correct entries of all the dealings and transactions under the agreement. The aforesaid condition is alleged to have been violated in collusion and abetment with respondent 6. The petitioners have referred to the alleged gross deficiencies in the Balance Sheet of MPC as under:--

"(a) The only item that the Balance Sheet for the period 3-01-1994 to 31-03-1995 (Annexure-O) shows is that Rs. 2,000/- has been received as share capital which is kept as cash in hand. The Auditor of MPC, Mr. Vijay Sahani of Arthur Anderson and Associates has certified that they have obtained all information and explanations which were necessary and that the Balance Sheet gives a true and fair view of the state of affairs of MPC as on 31-03-1995. The Auditor has also certified that the Balance Sheet is in agreement with the books of account and is presented in a manner required by Companies Act, 1956. However, the following expenses have not been shown.

(i) Expenses towards formation of the Company amounting to Rs. 37,480 which has been paid to the Registrar of Companies (Annexure-C) towards incorporation.

(ii) The remuneration of the auditors themselves as provided in Section 224(8) of the Companies Act for the fiscal year ending 1995 has not been shown. Probably this payment was made abroad. For the corresponding period for the year 1996, the Auditors have charged Rs. 3.6 lakhs and 1.8 lakhs towards audit and management services respectively (Annexure-N).

(iii) The expenses towards employees cost, travel and conveyance, legal services, office and other expenses, advertising and public relations, rent etc., shown in the subsequent year Balance Sheet has not been shown for the previous year

ending March 1995 (Annexure-N).

(iv) Considerable expenses involved in the preparation of the PPA document signed with the KEB on 30-09-1994 has not been shown.

(v) The accounts for March 1995 have been prepared on historical cost convention on the accrual basis of accounting as provided in Section 209 of the Companies Act, which means all the above mentioned expenses should have been incurred and paid for by someone and the same should have been reflected in the Balance Sheet of the Company as outstanding to the person who has paid for these expenses. These should have also been reflected in the statement of expenses. The fact remains that the expenditure for the 15 months period amounting to 1 crore has not been accounted for".

The allegations have vehemently been denied by respondent 5 who have submitted that the MPC was established to be the Indian Project Company which had no significance in the shareholders on record. It is only the initial funding of incorporation and subsequent funding from the answering respondent which have resulted in share issuance of the MPC. The allegation of the petitioners of the Balance Sheet of the MPC being fraudulent has been contradicted. It is submitted that the amounts referred to by the petitioners are the amounts incurred by respondent 7 for their projects outside Hong Kong but not in India. Specific reference has been made to the Price Water house Report in this regard to explain the extent of the aforesaid amounts. In the said report it is allegedly stated that:

"2. The accounting treatment adopted in the CLP Group accounts in respect of project development costs is to only capitalise costs incurred after an initial feasibility study has been completed successfully. However, given the inherent uncertainty of the development process, prior to the date of financial close of the contract full provision is made for all costs capitalised. When a profitable contract is secured, the provision made against capitalised costs is reversed and an asset is recognized in the accounts. Capitalised costs are written off only when it is known for certain that a contract has not been secured.

3. The capitalised project development costs in relation to ongoing power projects outside Hong Kong by the subsidiaries of CLP in the accounts CLP Group for the year ended 30th September, 1995 was HK\$ 122 million which, as set out in Notes 4 and 12 of the CLP Annual Report for that year, were fully provided for. In addition to the development costs incurred in relation to the Project the CLP Group incurred other projects outside Hong Kong including Taiwan, Thailand, the People's Republic of China and Indonesia.

4. The cumulative capitalised project development costs incurred in relation to ongoing power projects outside Hong Kong by the subsidiaries of CLP for the year ended 30th September, 1996 was HK\$ 191 million. As set out in Notes 12 and 25 of the CLP Annual Report for that year, these costs were fully provided for by way of the HK\$ 122 million provision recorded in the year ended 30th September,

1995 and the HK\$ 69 million provision recorded in the year ended 30th September, 1996. In addition to the development costs incurred in relation to the Project the CLP Group incurred other development costs during the year ended 30th September, 1996 in respect of other projects outside Hong Kong including Taiwan, Thailand, the People's Republic of China and Indonesia.

5. The aggregate capitalised development costs incurred in respect of the Project for the years ended 30th September, 1995 and 30th September, 1996 as set out in the accounting records of the CLP Group totalled HK\$ 71.8 million. These costs are included in the HK\$ 191 million referred to in Paragraph 4 above. These costs were provided against in full in the CLP Group's accounts but have not been written off.

6. The subsidiaries of CLP which incurred expenses in relation to the Project were:

China Light and Power (International) Limited for the year ended 30th September, 1995; and

China Light and Power (International) Limited and CLP (International) Limited for the year ended 30th September, 1996.

11. China Light (Mauritius) Limited is a company incorporated in Mauritius and is a subsidiary of CLP (International) Limited. All costs and payments in relation to the Project are incurred and made by CLP (International) Limited on behalf of China Light (Mauritius) Limited.

12. The accounting records of the CLP Group shows that no development expenses were incurred in relation to the year ending 30th September, 1994.

13. The CLP Group has adopted a Code of Conduct. The Code of Conduct strictly prohibits bribery. A copy of Page 8 of the Code of Conduct is attached.

14. During the course of our investigations and audit we have noted no instances of payment made by the CLP Group which:

(a) were in contravention of the "Bribery, gifts and entertainment" section on page 8 of the Code of Conduct;

(b) did not relate to legitimate business expenses; and

(c) would not be expected to be incurred in a project of this nature".

The allegations and counter allegations with respect to incurring or non-incurring of expenditure cannot be even prima facie adjudicated in these proceedings as the same is referable to the actual account taking based upon the perusal of the record of respondents 3, 5 and 7. It is true that the petitioners have not referred to any individual or group of individuals who could be alleged to be the beneficiary of the aforesaid amount of about 200 million HK\$, but it may be desirable to ascertain as to whether actually any part of that amount was spent in India or not. It has also to be ascertained that even if the aforesaid amount was allegedly incurred with respect to the projects being carried on by

respondent 7 outside Hong Kong but not in India, as to whether actually such amount was incurred in any other country or the entry which was subsequently written off is a camouflaged to hide the alleged kickbacks and bribes paid for the alleged favours shown to M/s. Cogentrix in connection with the setting up of thermal power plant of 1000 MW capacity at Mangalore.

49. The petitioners have referred to various other circumstances in support of their contention which have been refuted and vehemently denied by the respondents. We do not make a venture to refer to all such circumstances and scrutinise them on the basis of the allegations and counter allegations made by the parties. We however feel that the circumstances noted herein above cannot be termed to be frivolous, baseless, concocted or referred to mala fatedly only for the purpose of defaming the respondent-foreign company. The fact that tons of papers and tanks of ink have been utilized in the pleadings of the case which was argued by distinguished Advocates of national eminence for days before us and in the light of rival contentions regarding the circumstances enumerated hereinabove, also persuades us to have a prima facie view that all, many or any of the respondents along with others may on probe and investigation be ultimately found triable for many, any or few of the offences referred to and highlighted by the petitioners. No benefit of doubt can be given to the respondents at this stage. Investigation cannot be shut or facilitated to be closed on technical pleas couched in sweet, attractive and glittering capsules of artful advocacy. Both the sides of the coin are required to be tested by the experts in the field. Judicial caesarean is necessary for diagnosing the disease noticed in the beginning, for protecting, safeguarding and nourishing the developing democracy and the Rule of Law in this great country known as "Bharat". We are satisfied that a prima facie case has been made out requiring further probe and investigation for allaying the apprehensions conceived by the petitioners and other citizens.

50. The learned Counsel appearing for the respondents have also tried to justify the action of their clients and to persuade us to hold that none of them was ever responsible for the commission of cognizable offences which may require any probe or investigation or enquiry. We refrain to comment upon their contentions as we have decided not to venture to ascertain the liability of any of the respondents or the extent of illegalities or the acts of commission and omissions attributable to them. We only feel that a case may be required to be registered and investigated against persons presently not known but are likely to be identified after probe and enquiry by a competent investigating agency. The respondents have further submitted that as the respondents cannot even prima facie be held to be guilty of any of the cognizable offence, no report can be directed to be registered. We do not agree with such submissions made on behalf of the respondents as we find that apparently and prima facie the facts noted herein above may lead to the circumstances relating to the commission of cognizable offence. Upon investigation the real culprits may be found to have committed offences not only under the Prevention of Corruption Act but also

under various provisions of the Penal Code such as offences under Sections 120B, 406, 408, 409, 419, 420, offences under Chapter XVIII of the IPC, offences under the Companies Act, under the FERA and various other statutes. Reference to various offences is only illustrative and neither conclusive nor indicative.

51. On the basis of the position of law noted hereinabove, the facts and circumstances of the case and the observations made by us in relation to the rival contentions of the parties in this judgment, we are of the opinion that this petition can be disposed of by giving the following directions:--

(1) That respondent-State (respondent 1) is directed to get a FIR registered with the CBI under the provisions of Delhi Special Police Establishment Act for various cognizable offences without naming any person or group of persons as accused.

(2) Upon registration of the FIR, the Director-General of the CBI shall direct the investigation to be conducted by an officer under the supervision and control of an official not below the rank of Deputy Director General of the CBI. The investigation shall not be influenced by any of the observation made by us for determining the desirability of the registration of FIR and investigation into the allegations.

(3) Such investigation shall be commenced without any delay and completed within one year from the date of the registration of the FIR. In case the investigation is not completed within the time aforesaid, the CBI shall be under an obligation to seek extension of time from the Court by satisfying the Court regarding the existence of valid reasons.

(4) Monthly progress report of the investigation shall be submitted by the Investigating Officer to the Registry of this Court in a sealed cover.

(5) All the parties herein, the Central Government and the State Government shall furnish all necessary information to the Investigating Agency. It is hoped that the foreign companies and persons shall also render all possible assistance in the completion of the investigation. In case of any difficulty, the Investigating Officer shall be at liberty to pray for and seek such instructions or directions or assistance from the Court as may be needed. The allegations made in the petition and the facts noted by us in this judgment shall be made the basis of recording the FIR.

(6) That the petitioners may be associated with the investigation as and when required.

(7) The petitioners are held entitled to payment of costs of Rs. 20,000/- to be paid by respondent 3 and respondent 5.

A copy of this judgment shall immediately be furnished by the Registry to the Director-General of the CBI for taking cognizance, registering the FIR and for taking such follow up action as may be needed and required in the case.