(2011) 12 DEL CK 0396

In the Delhi High Court

Case No : Writ Petition (C) 4121 of 2010

Bhushan Steel Ltd. APPELLANT

Vs

UOI and Others RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Coal Mines (Nationalisation) Act, 1973 — Section 3(3)
Constitution of India, 1950 — Article 226
Specific Relief Act, 1963 — Section 20

Citation : (2011) 2 AD 61

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Mukul Rohatgi, Mr. Sandeep Sethi and Mr. S. Ganesh, with Mr. Akhil Sibal, Ms. Ranjana Roy Gawai, Mr. S.N. Bundela and Mr. Abhishek K. Rao, for the Appellant; Jatan Singh, CGSC with Mr. Prashant Ghai, Advocate for R-1, Mr. Ruchir Mishra and Mr. Mukesh Kumar, Advocates for R-2, Mr. Dushyant Dave with Mr. Kunal Verma and Mr. Sameer Shrivastava, Advocate for R-3, Mr. C.S. Vaidyanathan with Mr. Pradeep Misra and Mr. Daleep Dhayani, Advocates for R-4 and R-5, None for R-6, Dr. (Mr.) A.M. Singhvi and Mr. Jayant Bhushan with Mr. Tarun Gulati, Neil Hildreth and Ms. Shruti Sabarwal, Advocates for R-7, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner claims to be India''s third largest company in the secondary steel sector and India''s foremost cold rolled, galvanized and special steel producer having high-scale production plants located at Sahibabad, Uttar Pradesh and Khapoli, Maharashtra with the annual turnover of more than Rs.6,000 crores and net profit of Rs.829 crores.

2. The present writ petition under Article 226 of the Constitution of India arises out of a grievance of the petitioner qua the issue of allocation of 500 Million tons (MT) of coal claimed to be allotted by R-1/UOI through R-3/Chhattisgarh Mineral Development Corporation (CMDC) by a Letter of Allotment dated 25.07.2007.

3. It is the say of the petitioner that this 500 MT of coal is exclusively for the use of the petitioner''s power plant in Orissa (2600 MW) and the power plant in Maharashtra (300 MW). By the impugned letter/communication dated 01.01.2010, R-3/CMDC had informed the petitioner that it will be supplied ''washed coal'' instead of 500 MT of raw coal which would result in drastically reducing the quantity supplied on account of washing as the process of washing reduces the ash content from 46% to 30%.

4. The second limb of the grievance of the petitioner is that a joint venture company by the name and style of UCM Coal Company Ltd./R-4 has been formed by three entities i.e. R-5/Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd, R-3/ CMDC and R-6/Maharashtra State Power Generation Corporation Ltd., which has issued the bid documents for selection of a Mine Development Operator (MDO) and as per the terms and conditions of the bid documents dated 27.09.2009, the residue from washing of coal is being retained as the exclusive property of R-4/ UCMCCL with the right to MDO to set up a thermal power plant for generation of electricity from the said residue to the exclusion of the petitioner. We may note at this stage that M/s Adani Enterprises Limited was appointed as the MDO as per the letter of award dated 27.10.2010 and thus the said respondent was impleaded as a party in pursuance to the order dated 16.11.2010.

5. The petitioner thus pleads that the retention of the residue to be utilized by the MDO is contrary to the letter of allotment dated 25.07.2007, which residue is under the ownership of the petitioner. The petitioner thus seeks direction from this Court to R-1 to implement the letter of allotment and to quash the communication dated 01.01.2010 and the bid documents dated 27.09.2009, the writ petition having been filed on 01.06.2010.

6. The scheme of such allocation has been set out in the writ petition. The petitioner pleads that mines and minerals appear under Entry 54 of List I of the Schedule 7 to the Constitution of India thus forming part of the Union List which has resulted in various enactments qua the mines and minerals. The Mines and Minerals (Development and Regulation) Act, 1957 inter alia provides that Central Government may make rules for regulating the grant of permits/licences/leases in respect of minerals and for purposes connected therewith. Insofar as coal is concerned, The Coal Mines (Nationalization)Act, 1973 provides for the coal mines to absolutely vest in Government of India. R-1 is thus the owner and custodian of coal. In that capacity, R-1 has allotted combined coal blocks of Chendipada and Chendipada II for the specified end use projects of power generation as mentioned in the letter of allotment dated 25.07.2007, 500 MT of coal in the said coal block being allotted exclusively to the petitioner''s proposed power plants. The petitioner claims to have made huge investments in pursuance to this allotment letter to the tune of Rs.1200 crores in setting up the power plants. In order to fully appreciate the facts of this crucial letter dated 25.07.2007, we consider it necessary to reproduce the relevant portions of that letter:

"F.No.13016/8/2007-CA-I

Government of India

Ministry of Coal

New Delhi, the 25th July, 2007

To,

i) The Principal Secretary and Chairman Uttar Pradesh Rajy Vidyut Utpadan Nigam Ltd., 201, BapuBhawan, Lucknow 226 001

ii) The Managing Direcotr, Chhattisgarh Mineral Development Corporation, Sona Khan Bhawan, Ring Road No.1, Village: Purena, Raipur.

iii) Managing Director, Maharashtra State Power Generation Corporation Ltd., Prakashgad, Plot No.G-9, Bandra (E), Mumbai ? 400 051

Subject : Allocation of Chendipada and Chendipada II coal blocks to the Uttar Pradesh Rajy Vidyut Utpadan Nigam Ltd (UPRVUNL), the Chattisgarh Mineral Development Corporation (CMDC) and the Maharashtra Power Generation Corporation Ltd. (MAHAGENCO).

Sir,

I am directed to refer to the letters as mentioned below from UPRVUNL, CMDC and MAHAGENCO on the above subject and to convey the ''in principle'' consent of the Government of India to the working of Chendipada and Chendipada II (1588.99 MT) coal blocks as under:

Sl.No.

Name of the applicant company

Reference No.

End use Project Name

Share of reserves (MT)

1.

Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. (UPRVUNL)

1173 UNL/CE(E)/CMU (G)/Coal block dated 05.12.2006

Obra Extn "C"; additional capacity of 3000 MW

794.5

2.

Chhattisgarh Mineral Development Corporation (CMDC)

2113/Coal/2006-07 dated 16.01.2007

For supply of coal to 2900 MW power plant in Orissa and Maharashtra specified in the proposal.

500

3.

Maharashtra Power Generation Corporation (MAHAGENCO)

MAHAGENCO/CGM/RMC/1881 dated 13.02.2007

For 500 MW + 2000 MW power projects of MAHAGENCO at Sinnar, Distt. Nasik and Dhule, Distt. Dhule.

294.5

2. The above allocation has been made under the Government Company dispensation in pursuance of the provisions of Section 3(3)(a)(i) of the Coal Mines (Nationalization) Act, 1973 and the Revised Policy on Coal Mining by State Government (copy enclosed), subject to further following conditions:

i) Prospecting/Detailed exploration and coal mining shall be carried out by Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. (UPRVUNL), Chattisgarh Mineral Development Corporation (CMDC) and Maharashtra Power Generation Corporation Ltd.(MAHAGENCO) or a separate company to be created with participation of allocatee companies provided that the separate created company is a Government company eligible to do coal mining as per the provisions of the Coal Mines (Nationalization) Act, 1973.

ii) The mining lease will be executed between the State Government and the allocatees as per the provisions of the MMDR Act, 1957 and the rules framed thereunder.

iii) The allocatees will do exploration and coal mining in accordance with the provisions of the Coal Mines (Nationalization)Act, 1973, the Mines and Minerals (Development and Regulation) Act, 1957, the Contract Labour (Regulation & Abolition) Act, 1970, all the minerals, environmental and labour laws along with other regulations governing coal industry.

iv) Detailed exploration shall be carried out on their own, subject to guidelines laid down in consultation with the CMPDIL.

v) Mining of coal from the allocated coal block shall be carried out in accordance with the applicable Statutes/Rules/Orders/Directions governing the mining of coal in the country so as to extract the reserve to the minimum extent possible. ....

xiii) Any violation of the conditions imposed above in mining of coal from the Chendipada and Chendipada II coal blocks will render the mining lease liable for cancellation and withdrawal of allocation.

(V.S.Rana)

Under Secretary to Government of India.

(emphasis supplied)

7. A perusal of the aforesaid letter of allotment thus shows ''in principle'' consent of the Government of India to the working of the two coal blocks where R-3/ CMDC has been allocated 500MT with the end use project stated to be for supply of coal to 2900 MW power plants in Orissa and Maharashtra specified in the proposal (of the petitioner). Clause 2 of this letter states that the allocation was being made as per a revised policy of coal mining by the State Government and the prospecting/detailed exploration would be carried out by R-3/CMDC, R-5 and R-6 or a separate company to be created with participation of the allocatee companies. R-4/UCM Coal Company Ltd. is the said company which has accordingly been created. The mining lease is to be executed between the State Government and the allocatees as per the provisions of the MMDR Act, 1957 and the rules framed thereunder. It is these three allocatees or the separate company formed for the purpose which is to do exploration and coal mining and violation of the conditions imposed would render the mining lease liable for cancellation and withdrawal of allocation.

8. The petitioner states that the revised policy came into being vide notification dated 12.12.2001 of the Government of India and a Policy Letter dated 07.11.2006 was issued enclosing list of 27 coal blocks out of which 10 coal blocks were earmarked for generation of power. The revised policy dated 12.12.2001 provided for the State Government companies or undertakings to do mining of coking or non-coking coal or lignite reserves either by opencast or underground method as per the terms and conditions specified in the letter. The policy letter dated 07.11.2006 reads as under:

ADDITIONAL SECRETARY

GOVERNMENT OF INDIA

MINISTRY OF COAL

SHASTRI BHAWAN, NEW DELHI

D.O.No.13016/66/2006-CA-I New Delhi, 7th Nov.,2006

The Chief Secretaries

All State governments

1. I would like to inform you that the Central Government is considering allocation of suitable coal blocks to Central/State Government Undertakings / companies through Government dispensation route provided the Central/ State Undertakings / companies i.e. Mineral Development Corporation/ power utilities etc., are authorized to undertake coal mining in terms of the provisions of their Memorandum and Articles of Association. This allocation would be as per the relevant provisions of the Coal Mines (Nationalization) Act, 1973 and the revised

mining policy of Government of India enunciated in December, 2001 (copy of which is enclosed)

2. There has been reports from the State governments and public representatives about the problems faced by the non-core sector industries, smaller industrial units/ consumers etc. in obtaining coal. While CIL has made concerted efforts to meet the requirements of such consumers (through e-auction, allotment of NCCF/State agencies etc), the State Governments would be in a position to redress the problems to a great extent, if they take up a few coal blocks for mining through their agencies and supply the coal so mined to the industrial units/ smaller consumers in their respective States.

3. I am enclosing herewith a list of 27 coal blocks proposed for allocation under this dispensation. Out of 27 coal blocks, 10 coal blocks are earmarked for power generation. Some of these coal blocks are not explored in detail, and only regional prospecting has been done. Detailed prospecting will have to be done by your agencies only.

4. In case the State Government is interested, you may like to instruct the Departments / Organizations concerned to submit their application along with adequate justification. In respect of application for coal blocks earmarked for power generation, inter-alia, the following information may be furnished:-

i) Location of the power plant.

ii) Capacity of the power plant. I

ii) Present status of installation/ construction.

iv) Infrastructure available.

v) Financial status/capabilities of the end user / corporation / institution.

vi) Agency to be engaged for exploration(in case of unexplored blocks) vii) Agency to be engaged for mining, and

viii) Total requirements of coal (ROM).

5. In respect of application for non-power coal blocks, inter-alia, the following information should be furnished:-

i) Financial status/capabilities of the applicant company.

ii) Agency to be engaged for exploration/mining.

iii) Broad indication of how coal would be used/distributed/disposed of.

6. Application addressed to Director (CA-I), Ministry of Coal, may reach latest by 19th January, 2007.

Yours sincerely,

(S.P.Sethi)

(emphasis supplied)

We may add at this stage that prior to making the bid, R-3/CMDC issued a tender notice inviting tenders from experienced financially sound agencies who are establishing or have established power projects or interested to establish power projects based on mineral coal for empanelment as an agency to get allocation of coal blocks under the Government Dispensation Route. As per the tender notice, the selected agency was to work with R-3/CMDC for development and exploitation of coal and the coal from the coal block was to be supplied to the power plants of the agency so selected under the long term fuel supply agreement. The terms and conditions for identification, allocation, exploration and development of coal blocks and exploitation of coal were set out, the salient ones being reproduced herein as under:

1. BACKGROUND:-

(1.1) Chhattisgarh Mineral Development Corporation Limited (CMDC) a public sector company wholly owned by govt. of Chhattisgarh was incorporated on 07th June, 2001 under the provisions of Company''s Act, 1956 for the development and exploitation of the mineral resources of Chhattisgarh and elsewhere in the country.

(1.2) At present CMDC is operating mines for Bauxite, Corundum and Tin through contract as well as joint venture arrangements. CMDC is also entering into a joint venture agreement with NMDC for the exploitation of iron ore from the deposit no.13 of the Bailadilla range. CMDC has got the allotment of two blocks in the state of Chhattisgarh, the development of which is going on.

(1.3) Govt. of India, Ministry of Coal and Mines, Department of Coal vide its circular no. 38035/2/97-CA, New Delhi, dated 12th Dec, 2001 has allowed the state govt. company or its undertaking (refer to as the company hereafter) to do coal or lignite mining under certain terms and conditions as stipulated in the said circular.

Some of the major terms and conditions for allocation of coal block to govt. companies are as under:

(i) Coal mining shall be carried out by the govt. company or a separate company to be created with participation of such govt. company provided that the separate created company is a govt. company eligible to do coal mining as per the provisions of the Coal mines (nationalization) Act, 1973.

ii) The allocatee company would do mining of coal from the allocated block in accordance with the mining plan approved by the Central Govt.

iii) The allocatee company will do coal mining in accordance with the provisions of the Coal Mines (Nationalization) Act, 1973, the Mines and Minerals (Development and Regulation) Act, 1957, the Contract Labour (Regulation and Ablution) Act, 1970, all the mineral, environment and labour laws along with other regulations governing coal industries.

iv) The mining lease shall be executed between the state government and the allocatee as per the provisions of MM(D&R) Act, 1957 and the rules framed thereunder.

v) The existing coal linkages of the Coal India should not be disturbed by such allocation.

vi) Additional Secretary, Govt. of India, Ministry of Coal vide his letter no.13016/66/2006-CA-I, New Delhi, dated -07th Nov, 2006 has intimated to the Chief Secretaries of all the states about the intention of govt. of India to allocate coal block of govt. companies under the govt. dispensation route and have enclosed the list of identified coal blocks for such allocation. In the said list, seventeen coal blocks are identified for allocation to non-power sector and ten coal blocks for allocation to power sectors (Projects). Letter no.13016/66/2006-CA-I, New Delhi, dated -07th Nov, 2006 and list of such coal blocks are annexed to this tender form as Annexure "C".

2. SCOPE OF WORK AND OBJECTIVES :-

2.1 CMDC is willing to get the allocation of such coal blocks under the govt. dispensation route. For this purpose, CMDC hereby invites tenders from those experienced and financially sound agencies who are establishing or have established power projects or interested to establish power projects for the empanelment of the agency for identification, exploration, development and exploitation of coal.

a) The power company should have own mining experience or tie up/ Joint Venture / association with a mining company.

OR

The mining company should be willing to put up the power plant, or, should have tie up/Joint Venture/ Association with a power company.

b) In both the above alternatives, eligibility will be governed first on the criteria established for power plant. Parties meeting with the power plant as well as mining criteria will only be considered for qualifying part I of the tender.

2.2) The main objective of this tender is to prepare a panel of agencies to mine and supply coal to the E.U.P. of the agency. The empanelment of the agency will be based on the offer of the consideration amount to CMDC.

....

....

2.4) (A)......

(B) After completion of the tender process an MOU will be signed between the successful bidder and the CMDC. In which details will be mentioned for :-

a) The definitive arrangement for the appointment of the agency as a Mine Developer/Operator (MDO) for the development and operation of coal mine.

b) Fuel supply agreement between the CMDC and the agency.

(C) Termination of MOU : - The MoU to be signed between the agency and CMDC shall be deemed to be terminated upon the first occurrence of any one of the following, unless the parties agree in writing to an extension.

i) The parties mutually agree in writing to terminate this MoU.

ii) Govt of India does not allocate coal block to CMDC within a period of 24 months from the date of MoU.

iii) Upon execution of detailed agreements as outlined in clause B (a) & (b).

In the event of termination under this clause CMDC will not be responsible for any losses/damages suffered by the agency/bidder. Further the agency/ successful bidder shall indemnify CMDC from any claims whatsoever made by any third party in this regard.

2.5) Based on the MOU for supplying coal to the power plant of the agency, CMDC will apply for a co al block to the govt. of India and will get allocation of such coal block. The agency will assist the CMDC on the allocation of coal block to CMDC.

2.6) After allocation of the block CMDC will appoint the agency as a Mine Developer/Operator (MDO) for the development and mining of the coal block with separate agreement which will be executed between the agency and CMDC. And coal will be supplied to the power plant of the agency/ MDO with separate long-term fuel supply agreement to be executed between CMDC and the agency. The appointment of MDO will be for a fair long preferably for the period of Mine life.

2.7) Surplus coal beyond the requirement of power plant will be given to the CMDC for supplying to miscellaneous users. For this cost of production will be reimbursed to MDO.

It is in pursuance thereto that the petitioner was selected and a Memorandum of Understanding dated 16.01.2007 was executed between the petitioner and R-3/ CMDC for establishment of power plants of 2900 MW. The petitioner, thus, made a bid for the coal blocks accordingly.

9. The writ petition has been resisted by all the respondents who have filed their counter affidavits. There were certain subsequent developments which along with the grounds of challenge were brought on record by the petitioner vide CM No.20699/2010 which was allowed on 30.11.2010.

10. On the matter being taken up for hearing on 25.04.2011, learned senior

counsel appearing for the petitioner submitted that the grievance of the petitioner about washed coal sought to be supplied instead of raw coal was addressed to the Ministry of Coal, Government of India which asked for comments from different departments resulting in a letter dated 15.02.2011. The said letter referred to the application of R-3/CMDC dated 15/16.01.2007 and the allocation by the Ministry vide letter dated 25.07.2007 allocating the respective quantities. It is useful to reproduce the contents of this letter:

2. In the application of CMDC for Chendipada coal block, it is mentioned that CMDC, a public sector company wholly owned by Govt. of Chhattisgarh has signed an MoU with M/s Bhushan Steel and Strips Ltd. for supply of coal to its existing and proposal power plants by getting an allocation of coal block through Govt. dispensation route. M/s Bhushan Steel Ltd. (formerly M/s Bhushan Steel and Strips Ltd.) has made a representation to the Ministry of Coal stating that M/s CMDC is not following the terms and conditions of the allocation letter of the said coal block. Accordingly, the representation of the company was sent to the Chief Secretary, Govt. of Chhattisgarh and to CMDC vide their letter No.911/Coal/CMDC/2010 dated 13.10.2010 furnished their comments to the Ministry of Coal

3. The matter has been examined in detail in the Ministry of Coal in terms of the existing guidelines for allocation of coal block under Government Company Dispensation, the terms and conditions of the allocation letter and the details given by M/s CMDC in their application letter dated 15/16th January,2007 and the latest comments of CMDC furnished vide letter dated 13.10.2010.

4. M/s CMDC and other joint allocatees are informed that the basic policy underlying allocation of coal block under Government company dispensation is that the State Government Corporation in favour of whom the block is allocated should have proprietary rights over the block in the matter of mining, wining and selling the coal. Further, the coal and coal products, extracted from the said coal block shall be exclusively used in the proportionate ratio of the share of geological reserves mentioned in the allocation letter in the proposed/existing power plants of the allocatee companies. In case of power project to be set up by CMDC, in the allocation letter it is mentioned that "500 MT (Share of coal reserves of the blocks) for supply of coal to 2990 MW power plant in Orissa and Maharashtra as specified in the proposal". As per para 2(i) of the allocation letter, prospecting/detailed exploration and coal mining shall be carried out by the three allocatee companies or a separate company to be created with participation of the allocatee companies.

5. Further, the State Government Undertakings are free to outsource various operations including the mining operations with respect to the allotted coal block which is allowed under the law. It was for the State Governments and M/s Uttar Pradesh Rajya Vidyut Nigam Ltd, M/s Chhattisgarh Mineral Development Corporation and M/s Maharashtra State Power Generation Corporation Ltd. to examine the MOU and ensure that it meets the requirements of the conditions contained in the letter of allocation.

6. It is also informed that the allocations of coal block to Central/State PSUs through the Government Company Dispensation route are made u/s 3(3)(a)(i) of the Coal Mines (Nationalization) Act, 1973. The Union of India has always been adopting a consistent approach in cases where parties have operationalized agreements contrary to conditions to bring their relationships strictly in accordance with conditions as laid down by the Government of India and in other cases to operationlize the agreements or MoUs in accordance with the prescription laid down by the Government of India. In the event of the Government of India finding any violation in the operationalization, appropriate action would be taken including cancellation of the allocation.

7. Further, it is clarified that the Joint Venture Company formed in the name of M/s UCM Coal Company Ltd. for development of coal block shall distribute the share of coal produced in proportion. The JV company has since appointed a Mine Developer-cum-Operator (MDO) through tender process for development of the coal blocks. Accordingly, the MDO is only a facilitator for development of coal blocks and is only mandated to do coal mining and hand over the coal extracted from the said blocks to the JV Company. Hence no MDO shall have any right on the use of coal and coal products including the washery rejects/middlings etc. in its own power plant.

8. You are, therefore, requested to strictly adhere to the existing guidelines for allocation of coal blocks and the terms and conditions of the allocation letter.

Yours faithfully

(V S Rana)

Under Secretary to the Government of India

(emphasis supplied)

11. In view of what has been stated in para 7 of the aforesaid letter, learned senior counsel for the appellant submitted that no MDO has a right on the use of coal and coal products including the washery rejects/middlings etc. in its own power plant. It was thus submitted that the grievance of the petitioner stood redressed by this letter which was required to be followed by the respondents. Since allocation had to be done by the JV company and the MDO/R-7 had been appointed by the said JV company/R-4, learned counsel for JV company/R-4 took time to obtain instructions.

12. R-4 thereafter filed an affidavit affirmed on 01.04.2011 enclosing a copy of the letter dated 14.03.2011 addressed by it to R-1/Ministry of Coal. The affidavit states that the said R-4 had not allowed the MDO to use washery rejects/middlings in the MDO''s power plant (which is what was stated to be prohibited as per what was stated in para 7 of letter dated 15.02.2011 of R-1), but the washery rejects/middlings were to be utilized for generation of power by JV Company to be formed between R-4 and MDO at the power plant to be set up at the pit head only. The affidavit also makes a reference to other communications

dated 31.03.2009 and 28.04.2009 relating to Mahaguj Collieries Ltd which was a joint venture company of Maharashtra Power Generation Company Limited and Gujarat State Electricity Corporation Ltd. These communications were related to the utilization/disposal of washery rejects from the Machhakata coal block in Talcher, Orissa. The letter dated 31.03.2009 specifically stated that the allocatee companies would consider a pithead power plant either on their own or through a joint venture arrangement with MDO for purposes of using washery rejects/ middlings for power generation. The endeavour made in this direction by the allocatees was approved vide the subsequent letter dated 28.04.2009. It is in this context that a decision was taken to set up the power plant to utilize the washery rejects/middlings in relation to the present allocation.

13. The aforesaid stand having been set out in the letter of R-4 dated 14.03.2011, we called upon R-1 and R-2 vide order dated 09.05.2011 to file an affidavit. We may note that both R-1 and R-2 are UOI, but Ministry of Coal and Ministry of Power respectively. R-1 filed an affidavit affirmed on 08.07.2011. We reproduce para 4 & 5 of the said affidavit as under:

4. It has already been submitted in the Counter affidavit of the Respondent No.1 that the basic policy underlying allocation of coal block under Government Company dispensation is that the State Government Corporation in favour of whom the block is allocated should have proprietary rights over the block in the matter of mining, winning and selling the coal. Further, the coal and coal products, extracted from the said coal block shall be exclusively used in the proportionate ratio of the share of geological reserves mentioned in the allocation letter in the proposed/existing power plants of the allocatee companies. As per para 2(i) of the allocation letter prospecting/detailed exploration and coal mining shall be carried out by the three allocatee companies provided that the separate created company is a Government Company eligible to do coal mining as per the provisions of the Coal Mines (Nationalization) Act, 1973. It is further stated State Government Undertakings are, however, free to outsource various operations including the mining operations with respect to the allotted coal block.

5. It is stated that the joint venture company will do mining and give the respective share to the allocatee company. It is up to allocatee companies to decide whether they will use mined coal after washing or without washing. The company(ies) is/are free to use washery rejects to generate power subject to the terms and conditions of the allocation letter.

(emphasis supplied)

14. A communication in the aforesaid terms has been addressed to all concerned vide letter dated 24.06.2011. A more detailed additional counter affidavit was also affirmed and filed on 25.07.2011. This affidavit further goes on to explain that Machhakata and Mahanadi coal blocks located in north central part of Talcher were allocated jointly to M/s Gujarat State Electricity Corporation and M/s Maharashtra State Electricity Board on 06.02.2005 and the mining had to be

carried out by a joint venture company of these two entities which was formed under the name and style of Mahaguj Collieries Limited. M/s Mahaguj Collieries Ltd vide a letter dated 12.03.2008 had forwarded a copy of the tender bid documents for appraisals/suggestions/comments which was examined by R-1 vide letter dated 05.06.2008. The said R-1 vide letter dated 05.06.2008 had informed M/s Mahaguj Collieries Ltd that the washery rejects/middlings must be the sole property of the joint allocatees in proportionate ratio for captive use and cannot be assigned to anyone, in whatsoever capacity and thus the MDO cannot have the right over the washery rejects/middlings. M/s Mahaguj Collieries Limited vide letter dated 26.08.2008 raised the issue of disposal of middlings/ washery rejects especially on account of the fact that the power stations were situated more than 1000 KM away from the mine source and cannot use coal having ash greater than 34%. The washing of coal before transportation was thus a necessity for captive use of the power plants. This request was again examined by R-1 and vide letter dated 31.03.2009 it was opined that the washery rejects/middlings may be used by any qualified third party (including MDO) to generate power at the pithead. In para 9 of the affidavit, it has been explained that the basic policy underlying the allocation of a coal block under the Government company dispensation is that the State Government Corporation in favour of whom the block is allocated should have proprietary rights over the block in the matter of mining, winning and selling the coal. Thus, the State Government undertakings were free to outsource various operations including the mining operations with respect to the allotted coal block which is allowed under the law. Thus, they had to examine the MOU and ensure that it meets the requirements of the conditions contained in the letter of allocation. Thereafter, it is clarified and re-affirmed that M/s UCM Coal Company Ltd. was free to use the washery rejects/middlings subject to the terms and conditions of the allocation letter. The relevant paras are as under:

12. It is further stated that the rejects and middlings generated from washing of coal are the exclusive property of the Allocatee Companies. In respect of development of reject based thermal power plant, the decision in this regard is to be taken by the allocatee companies. The allocatee companies may consider and decide on the arrangement for utilization of middlings and rejects through qualified parties for generation of power provided the power so generated should be used by the allocate companies in the same proportion.

13. Regarding the use of washery rejects and middlings by the Mine Developer-cum-Operator (MDO) appointed by the JV Company, it is stated that MDO has no right on the use of coal and coal products in its own power plant unless the allocate company (ies) so decide on the arrangement for utilization of middlings and rejects through qualified parties for generation of power provided the power so generated should be used by the allocate companies, in the same proportion.

14. The representation of M/s UCM Coal Company Ltd. dated 14.03.2011 was disposed of by the Government vide letter no.13016/20/2010-CA-I(Pt.) dated

24.06.2011 wherein it was stated that the joint venture company will do mining and give the respective share to the allocate company. It is up to the respective share to the allocate company. It is up to the allocate companies to decide whether they will use mined coal after washing or without washing. The allocate company(ies) is/are free to use washery rejects to generate power subject to the terms and conditions of the allocation letter. Accordingly, it is upto the allocate company i.e. M/s Chhatisgarh Mineral Development Corporation to decide regarding supply of washed or unwashed coal to the petitioner. A copy of the letter dated 24.06.2011 is at Annexure-R-VII.

15. The affidavit affirmed by R-2 states that said Ministry is not really concerned with the matter in issue and that it had not issued any directions to the petitioner for signing the Fuel Supply Agreement (FSA) which could reduce the petitioner''s claim of coal. This matter is stated to be one between the petitioner and R-3/R-4.

16. It is in the conspectus of the aforesaid facts that Mr.Mukul Rohatgi, learned senior counsel for the petitioner, confined his submission made on 15.11.2011 within a narrow compass.

i) Instead of raw coal, washed coal was being supplied which had a cost implication on the petitioner.

ii) R-7 had been appointed as MDO who would utilize the washery rejects/ middlings after washing of the coal for setting up of a parallel power plant and would thus become a competitor.

17. Learned senior counsel for the petitioner laid emphasis on the letter dated 25.07.2007 to contend that the allocation of coal was meant to be supplied to the petitioner as against the allegation it was specifically stated "specified in the proposal". This proposal was made as per the arrangement between the petitioner and R-3. In this behalf, learned counsel referred to the tender notice of R-3/CMDC at page 87 for empanelment of an agency to get the allocation of coal blocks under the government dispensation route. On allocation of coal blocks, the agency so selected was to work for R-3/CMDC for development and exploitation of the coal and coal from the coal block was to be supplied to the power plant or the agency so selected under the long term fuel supply agreement. Despite this, R-4 invited bids on 27.09.2009 and as per the bid documents the scope of work of MDO was specified in clause 5.1, the said clause (f) reads as under:

The residues from washing of coal rejects and middlings shall be the exclusive property of UCMCCL. For utilization of the coal rejects and middlings the MDO shall set up a Thermal Power Plant for generation of Electricity from the washery rejects/middling of the Chendipada Coal Block. A separate Joint Venture Company shall be formed between UCMCCL would have 11% equity stake in the Joint Venture Company for the Thermal Power Plant and the balance 89% equity shares shall be held by the MDO. UCMCCL shall have the right to nominate three directors on the Board of Directors of the Joint Venture Company.

18. Learned counsel submitted that the rub lay here in the incorporation of this clause as it was contrary to the allocation made by R-1. Learned senior counsel submitted that the MOU between the petitioner and R-3 was entered into prior to the seeking allocation from R-1 as is apparent from the application made by R-3 dated 15/16.01.2007 to R-1 for allocation of the coal block. Such an application incorporated the credentials of the selected end user which was the petitioner detailing the positive aspects of the petitioner. Learned counsel submitted that initially R-1 clarified the aspect vide its letter dated 15.02.2011 in favour of the petitioner but when subsequently the affidavits were filed, a contra position was sought to be taken on the basis of the inter se discussion between the respondents. Not only that, there is stated to be inter se conflicts between the affidavits affirmed on 08.07.2011 and 25.07.2011 inasmuch as the first affidavit stated that utilization of washery rejects to generate power was subject to the terms and conditions of the allocation letter while the subsequent affidavit while stating so went on to further add that R-3 may decide regarding supply of washed or unwashed coal to the petitioner. We may also note another aspect that the Fuel Supply Agreement as on date has not been executed.

19. Learned senior counsel for R-3, Mr.Dushyant Dave, on the other hand, inter alia, raised the preliminary issue whether all this controversy could at all be decided in exercise of writ jurisdiction under Article 226 of the Constitution of India especially when there was no Fuel Supply Agreement entered into between the parties. He emphasized that the earlier policy was revised vide a notification dated 12.12.2001 permitting the State Government companies to do mining of coal anywhere in the country but the subsequent letter dated 07.11.2006 was issued with the intention to allocate coal block to Government run companies under Government dispensation route. It was also emphasized that the conflict, if any, between the stand of R-3 & R-4 and R-1 stood reconciled in view of the aforesaid communications which gave rights to R-4 to decide what it wants with the washery rejects/middlings. Learned senior counsel referred to the minutes of the meeting dated 05.10.2007 between the petitioner and R-3/CMDC which referred to the R-4/Company to be formed and for a draft Fuel Supply Agreement to be prepared at the earliest to be signed and executed by consent of parties. The minutes also record that it is not possible to appoint petitioner as the MDO for the development of the mines in view of the joint allocation of the blocks where R-3, R-5 & R-6 had to form R-4 and the supplies had to be made not only to the petitioner but to other companies. Learned counsel submitted that a revised draft of Fuel Supply Agreement was sent by R-3 on 07.07.2009 but the petitioner raised objections to it on 18.07.2009. The issue of appointment of MDO arose thereafter on 27.09.2009 when the bid was floated by R-4 for utilization of the residue from washery of the coal like coal rejects and middlings. This was followed up with a letter dated 03.10.2009 of R-3 to the petitioner asking them to sign the Fuel Supply Agreement as approved by the Board of R-3. The petitioner raised the issue of the unwashed coal to be supplied vide its letter dated 04.12.2009, but vide letter dated 01.01.2010, R-3 had informed the

petitioner that the washed coal will be supplied and once again requested for a Fuel Supply Agreement as provided vide letter dated 03.12.2009 to be signed. The petitioner thereafter made a representation to the Chief Minister of Chhatisgarh on 23.01.2010.

20. The effect of the aforesaid communication is stated to be that there is no formal agreement which has come into existence by signing of the Fuel Supply Agreement as even the terms and conditions thereof are in dispute.

21. The second limb of the submission is that the joint venture being formed as per R-4, R-3, R-5 & R-6 to jointly exploit the coal reserves not only for the benefit of the power plants of the petitioner but also other power plants for which agreement was entered into by R-5 and R-6. One of the power plants of petitioner was in Maharashtra and thus the same reasoning for supply of washed coal would apply, the same being situated at a distance as applicable in the case of Machhakata and Mahanadi. R-4 is a Joint Venture Company formed on 16.10.2008 in which the shareholding of the three entities are - R-4/Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd (50%), R-3/CMDC (31.47%) and Maharashtra State Power Generation Corporation Ltd/R-6 (18.53%). The decision was taken by the Board of Directors of R-4 to do the mining operations through the MDO for which consent was given by the petitioner. The decision of taking washed coal was of the Joint Venture Company/R-4 and this is the reason that R-3 has stuck to its earlier decision to supply washed coal to the power projects instead of raw coal and called upon the petitioner to sign the Fuel Supply Agreement as per its letter dated 03.10.2009.

22. The third limb of the submission was that the delay on the part of the petitioner in approaching the Court as the petitioner knew as far back as in 2007 that it was not to be appointed as the MDO as per the minutes dated 05.10.2007 and the tender was floated with bid documents being issued on 27.09.2009 for appointment of a MDO to utilize the residue from washing of coal while the writ petition was filed on 01.06.2010.

23. The last aspect has also been emphasized by Dr.A.M.Singhvi, learned senior counsel for R-7, who stated that the said respondent has set up the power plant in collaboration with R-4 and made huge investments. If these middlings are not to be supplied, the complete investment would go waste as the power plant has been set up only with the objective of utilizing these middlings, the power station having been set up at the main pit head with that sole objective.

24. The rejoinder arguments were addressed by Mr.S.Ganesh, Senior Advocate and if one may say so, much beyond even the opening arguments by Mr.Mukul Rohatgi, Senior Advocate. We had emphasized on Mr.S.Ganesh, Sr.Advocate that the scope of the rejoinder arguments should be restricted to meet any plea which may be arising from the submissions of the learned counsel for the respondents, but the manner of addressing the rejoinder arguments amounted to almost re-arguing the whole matter in much greater details despite caution.

25. Learned senior counsel referred to the Memorandum of Understanding dated 16.01.2007 between R-3 and the petitioner. The most important clause in the recital is clause (G) which reads as under:

g) The parties hereto wish to further define and set out the terms and conditions of obtaining coal blocks for mining and securing coal exclusively for the power projects established or to be established by M/s BSSL and its associate companied herein.

(emphasis supplied)

The said recital is immediately thereafter succeeded by the terms of the agreement. The relevant portion of which is reproduced hereinbelow:

NOW THEREFORE in consideration of the mutual covenants and understandings herein contained, the parties hereby agree as follows: 1.1 CMDC will submit an application to the Govt. of India, Ministry of Coal, New Delhi for the allocation of the said coal block under govt. dispensation route.

1.2 After allocation of the coal block, CMDC will take all the necessary steps for the development, exploration and mining of coal from the block so allocated.

1.3 After sanction/approval of the prospecting license (PL)/mining lease (ML) as the case may be, CMDC will execute lease agreement with the state govt. as per the provision of M.M.(D&R) Act, 1957 and rules framed thereunder and the lease so executed will remain in the name of CMDC throughout the period of PL/ML and thereafter subsequently during its renewal period.

1.4 After allocation of the coal block, CMDC will enter into a detailed Fuel Supply Agreement with M/s BSSL and its associate company M/s Bhushan Energy Limited for supplying coal to its proposed power project in the state of Orissa and Maharashtra.

1.5 Such Fuel supply agreement will be for a period till the coal exhausts in the coal block. The sale price of the coal at the pithead for supplying coal to the power plant of M/s BSSL and its associate company M/s Bhushan Energy Limited will be mutually decided as per the offer submitted by M/s BSSL and its associate company M/s Bhushan Energy Limited.

1.6 M/s BSSL and its associate company M/s Bhushan Energy Limited shall be solely responsible for setting up and operating the power project and make necessary arrangements to transport the coal from the Mine to its power project.

2.0 JOINT OBLIGATIONS OF CMDC & M/S BSSL

2.1 As the allocation of the coal block to CMDC is in the interest of both the parties, CMDC and M/s BSSL and its associate company M/s Bhushan Energy Limited will approach to Govt. of India, Ministry of Coal jointly for allocation of coal blocks in favour of CMDC under the Govt. Dispensation Route so that after an allocation coal can be supplied to the power plant of M/s BSSL and its associate company M/s Bhushan Energy Limited.

(emphasis supplied)

26. Learned senior counsel, thus, sought to emphasize that an agreement between R-3 and the petitioner in respect of the blocks of Chendipada and part of Chendipada II had been arrived at and R-3/CMDC had agreed to apply for allocation of coal blocks identified by these parties at Chendipada and Chendipada II and thus parties had defined and set out the terms for obtaining the coal blocks for mining ''exclusively'' for the power projects established or to be established by the petitioner and its associate companies herein. We may, however, note that the terms of the MOU also clearly provided that a Fuel Supply Agreement will be entered into by R-3/CMDC with the petitioner after allocation of coal blocks as per clause 1.4. The R-3/CMDC approached the Govt. of India under the Government Dispensation Route accordingly.

27. Learned senior counsel for the petitioner thus submitted that R-3 made an application to R-1 on 16.01.2007 on the basis of the MOU on the same date. The bank guarantee is also stated to have been given at the behest of the petitioner to support the application. Learned counsel emphasized that the minutes of the meeting held on 05.10.2007 only record the consent of the petitioner to appoint the JV company to operate and develop the mines, but no other rights were given up. Insofar as the Fuel Supply Agreement is concerned, it is submitted that the first draft of Fuel Supply Agreement was sent on 18.09.2008 which contained clause 8 as under:

8. Quality :

Coal will be supplied to BSL on ROM basis without any beneficiation. CMDC shall ensure that the Joint Venture Company supplies the coal to BSL of the same specification as being supplied to other Joint Venture partners. The coal so supplied shall conform to the requirement of power plants.

28. The amended draft of Fuel Supply Agreement exchanged in July, 2009 sent by R-3/CMDC contained the following corresponding clause:

Quality :

Coal will be supplied to BSL on ROM basis without any beneficiation.

29. The consent draft sent by the petitioner thereafter on 18.07.2009 only requested for necessary amendments to the draft fuel supply agreement in line with the tender documents, MOU dated 16.01.2007 and minutes of the meeting dated 05.10.2007. The consent draft of the petitioner referred to certain specific clauses but there was no dispute insofar as the aforesaid clause is concerned. It is only the letter thereafter sent by R-3/CMDC dated 03.10.2009 which sought to bring in the concept of washed coal as per the decision taken by R-4. Till that stage, the coal had been supplied on ROM basis.

30. In the letter dated 04.12.2009 of the petitioner, a reference was made to the

issue in the draft Fuel Supply Agreement relating to the washing of coal. The petitioner emphasized that the Ministry of Coal in its allotment letter had not restricted the supply of washed coal only nor in the tender document and MOU anything had been mentioned about the washing of the coal. The petitioner claimed that for manufacturing of power, washing of coal was not required, but there were certain restrictions on the transportation of unwashed coal for long distance. Since the proposed power plants were located in the vicinity of one of the coal block i.e. only 40 km away, unwashed coal could be transported to the power plants. The relevant part of the letter is extracted as under:

One of the major issue in the draft Fuel Supply Agreement is related with the washing of the coal. The Ministry of Coal in its allotment letter has not restricted the supply of washed coal only nor in the tender document and MOU anything has been mentioned about the washing of the coal. For manufacturing of power washing of coal is not at all required. There are certain restrictions on the transportation of unwashed coal for long distance. However, our proposed power plants are in close vicinity of the coal block i.e. only 40 kms away. Therefore, unwashed coal can be transported to our power plants.

We have agreed under the tender that we would pay a royalty of 125% of the royalty rate to Government of Chattisgarh additionally for getting coal from the allotted coal block. If only washed coal is supplied which would only be 50-60% of the unwashed coal, the Chattisgarh State would loose additional royalty approximately Rs.2500 crores.

Additionally, 500 milliontons of coal has been allotted to the power plants of Bhushan Group by Ministry of Coal and if washed coal is supplied which would be 250 to 300 millions only, how the CMDC would supply the shortfall in the coal quantity to meet the coal requirement of power plants for 30 years.

It is in the interest of both of us that unwashed coal is supplied to the power plants of Bhushan Group. This way Bhushan would get the allocated quantity of coal and State would get full additional royalty. In view of above, we request you to kindly consider our submission as stated above and direct the concerned authorities to execute the Fuel Supply Agreement as amended by us at the earliest.

31. Learned senior counsel sought to emphasize that there was a wide implication of the washing of the coal as would be apparent from the letter dated 27.10.2010 sent by R-4 to R-7 which is a letter of award for the MDO. While dealing with the ceiling price calculation, the said letter refers to the revision of this during the term of the contract as and when the components described in the table below vary. The table reads as under:

Ceiling Price as on

23rd July 2010

Description

Value

Unit

Assumptions

Grade of Coal

F

Grade

UHV between 2400 Kcal/kg and 3360 kcal/kg as per CIL price notification

Basic price of F grade coal (1)

480.00

Rs/MT of ROM Coal

As per CIL prices notification for MCL.

Sizing Cost. (Max. size 50 mm) (2)

77.00

Rs/MT of ROM Coal

As per CIL price notification.

Transportation charges for Coal (for distance of 10 to 20 km)(3)

77.00

Rs/MT of ROM Coal

As per CIL price notification.

Washing charges (4)

107.00

Rs/MT of ROM Coal

As approved by UCMCCL

Board.

Cost of ROM Coal including Washing Charges (5)=(1+2+3+4)

741.00

Rs/MT of ROM Coal

Washing yield (6)

72%

%

Assumed (to be changed as per actual Washability Test Report by CMPDIL or any other reputed agency)

Washing yield loss (7)={(5/6)-(5)}

288.17

Cost of Washed Coal (8) = (5 + 7)

1029.17

Rs/MT

The said table, it was submitted, would thus show that the ROM coal had a basic price of Rs.480 per metric ton and the washing charges were of Rs.107 per metric ton. The washing yield loss was specified at Rs.288.17 and the cost of washed coal was Rs.1029.17 per metric ton. This would imply that there is decline in the quantum of coal supplied by 28% and the cost increase by two and a half times arising from washing. These figures are also sought to be referred to substantiate that the washery rejects and middlings formed a substantial part, but they are sought to be transferred to the JV of R-4 and R-7 at Rs.21 per metric ton. This fact is derived from the terms of the bid documents of 27.09.2009. It is also emphasized that in this Joint Venture, R-4 has 11% equity stake while R-7 has 89% equity stake. The relevant clauses read as under:

(f) The residues from washing of coal like coal rejects and middlings shall be exclusive property of UCMCCL. For utilization of the coal rejects and middlings the MDO shall set up a Thermal Power Plant for generationof Electricity from the Washery Rejects/Middlings of the Chendipada Coal Block. A separate Joint Venture Company shall be formed between UCMCCL and the MDO to develop the Thermal Power Plant. UCMCCL would have 11% equity stake in the Joint Venture Company for the Thermal Power Plant and the balance 89% equity shares shall be held by the MDO. UCMCCL shall have the right to nominate three directors on the Board of Directors of the Joint Venture Company.

h) UCMCCL shall transfer the Washery Rejects/Middling to the Joint Venture Company for Thermal Power Plant at the rate of Rs.21/tone. UCMCCL shall also arrange the modalities for sale of power. Tariff for the sale of power shall be determined under the applicable statutory framework.

32. Learned counsel submitted that the bonus is sought to be effectively given to R-7 as the market rate of such washery rejects/middlings is about Rs.900 per metric ton. The obligations of R-4 as per the proposed agreement with the MDO contained the following clause:

10. OPERATIONS STAGE OBLIGATIONS

10.1 Mine Owner''s Obligations ....

Additional coal required for blending with the coal rejects for generation of electricity from the rejects based power project to be set up at the coal block site would also be provided to the selected bidder by UCMCCL. Additional coal shall be supplied to the MDO form the share of coal of UPRVUNL and MAHAGENCO for blending purposes for operation of the power plant. Further, CMDC would compensate UPRVUNL and MAHAGENCO for this extra supply of coal in such a manner as would be acceptable to all the shareholders of UCMCCL. Electricity generated from this project would be supplied to the three joint venture partners of UCMCCL. The price of electricity would be decided by the appropriate Regulatory Commission.

33. Learned counsel emphasized that the requirement of washing was introduced qua the other blocks primarily on account of them being more than 1000 km away which had no application to the blocks in question. In the end, learned counsel sought to summarize his submissions:

i) The allocation in the favour of the petitioner gave a vested right for 500 MT of coal which could not be diverted or appropriated to a third party like R-7 or a Joint Venture of R-4 & R-7.

ii) The doctrine of promissory estoppel would apply as it is on the basis of the memorandum of understanding with R-3 that the petitioner has invested huge funds in the establishment of its power units which are incurring losses and would be economically unviable if the washery rejects and middlings are supplied at a pre-determined price to R-7 or the Joint Venture of R-4 and R-7 at the cost of the petitioner.

iii) The parties were ad idem on the understanding that the coal would be supplied ROM (''Run Of Mine'') till July, 2009 which must be given effect to. In this behalf, learned counsel relied upon the judgment of the Supreme Court in The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, .

Learned counsel referred to the observations in paras 11 to 13 in this behalf. We may, however, note that the conclusion is really contained in para 18, which records that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to the true meaning and the evidence of the acts done under it is a guide to the intention of the parties, particularly when acts are done shortly after the date of the instrument. The ratio of the judgment appears to be that "subsequent actings" can be taken note of to determine the live meaning of ambiguous words and/or expressions used in a contract.

iv) The letter of R-1 dated 15.02.2011 allocating the coal envisaged the role of MDO as only the facilitator for development of coal blocks with the mandate to coal mining and hand over the coal extracted from the said blocks to the Joint Venture Company. It is specifically stipulated that the MDO would not have any right on the use of coal and coal products including washery rejects/middlings in its own power plant. The relevant clause is reproduced as under:

7. Further, it is clarified that the Joint Venture Company formed in the name of M/s UCM Coal Company Ltd. for development of coal block shall distribute the share of coal produced in proportion. The JV company has since appointed a Mine Developer-cum-Operator (MDO) through tender process for development of the coal blocks. Accordingly, the MDO is only a facilitator for development of coal blocks and is only mandated to do coal mining and hand over the coal extracted from the said blocks to the JV Company. Hence no MDO shall have any right on the use of coal and coal products including the washery rejects/middlings etc. in its own power plant.

(emphasis supplied)

v) The washing of the coal has a devastating impact on the petitioner both in terms of the reduction in the quantity of coal

supplied as well as diversion of the washery rejects/middlings which are extremely valuable as is apparent from the chart reproduced above.

vi) In the end without prejudice to the aforesaid pleas, the washery rejects/middlings, in case of washing of coal, have to be sent to the petitioner so that the petitioner can at least utilize them for their economic value/power generation.

34. We have examined the elaborate submissions and come to the following conclusions:

CONCLUSIONS:

35. The right to mine actually vests exclusively with the UOI in view of the Entry 54 of List I of Schedule 7 of the Constitution of India and this has resulted in various legislations for regulating the grant of permits, licences and leases for mining of minerals including coal. The revised mining policy of the Government of India was enunciated in December, 2001 and it is in pursuance thereof that a policy letter dated 07.11.2006 was issued by the Ministry of Coal, Government of India. The objective of this letter was allocation of suitable coal blocks through the Government Dispensation Route as the State Governments were in a position to redress the problems faced by industries and consumers in obtaining the coal. 27 coal blocks were proposed for allocation under the Government Dispensation Route out of which 10 coal blocks were earmarked for power generation. The interested State Governments/Departments/Organizations were informed to make an application with requisite material.

36. R-3/CMDC issued a tender notice inviting tenders from the experienced financially sound agencies who are establishing or have established power projects or were interested to establish power projects based on mineral coal for empanelment as an agency to get allocation of coal block under the Government Dispensation Route. The terms of the tender inter alia provided the allocatee company to do mining of coal from the allocated block in accordance with the mining plan approved by the Central Government for which mining lease would be executed between the State Government and the allocatee. An MOU was to be

signed between the successful bidder and R-3/CMDC in which details would be mentioned inter alia of the Fuel Supply Agreement to be executed between R-3/CMDC and the agency and a distinctive arrangement for appointment of the agency as an MDO for the development and operation of the coal mine. The petitioner was selected in pursuance to this tender and an MOU was executed on 16.01.2007 between the petitioner and R-3/CMDC for establishment of power plants of 2900 MW. In terms of this MOU, R-3 agreed to apply to the Ministry of Coal, Government of India for allocation of coal blocks at Chendipada and part of Chendipada II for geological reserves of 584.36 MT and 1000 MT, which had been identified by R-3/CMDC and the petitioner jointly. On allocation of the coal block, R-3 was to enter into a detailed Fuel Supply Agreement with the petitioner and its associate company and it was the sole responsibility of the petitioner and its associate company to set up and operate the power project and make necessary arrangements to transport the coal from the mine to its power project. The parties agreed to approach the Government of India jointly for allocation of coal blocks in favour of R-3/CMDC under the Government Dispensation Route so that coal can be supplied to the power plant of the petitioner and its associate company.

37. The application was accordingly submitted by R-3/CMDC. R-3/CMDC was successful in its application as per the letter of the Ministry of Coal, Government of India dated 25.07.2007. The said letter dealt with the application of Chendipada and Chendipada II coal blocks to not only R-3/CMDC but to two other State Government entities qua their obligations. The allocation to the R-3/CMDC was of 500 MT for supply of coal to 2900 MW power plants in Orissa and Maharashtra specified in their proposal. The prospecting/detailed exploration and coal mining was to be carried out by the three allocatee companies or a separate company to be created with the participation of allocatee companies i.e. Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd (UPRVUNL), Chhattisgarh Mineral Development Corporation (CMDC) and Maharashtra Power Generation Corporatoin Ltd.(MAHAGENCO). The mining lease was to be executed between the State Government and the allocatee companies as per the provisions of the MMDR Act, 1957 and the Rules made thereunder. The power plants were accordingly established by the petitioner and the petitioner and R-3 proceeded to act in furtherance to their MOU.

38. The logical conclusion of what transpired would have been the execution of the Fuel Supply Agreement to set out the rights and obligations of the parties. The first such draft was sent on 18.09.2008 by the petitioner which inter alia contained a clause for the coal to be supplied to the petitioner on ROM basis. This was followed up with correspondence inter se the parties on account of certain amendments suggested by the petitioner. The amended draft Fuel Supply Agreement exchanged in July, 2009 also contained a clause for supply of coal on ROM basis. However, the petitioner on 18.07.2009 requested for necessary amendments to the draft Fuel Supply Agreement stated to be in line with the tender documents, MOU dated 16.01.2007 and minutes of the meeting dated

05.10.2007. The importance of the minutes of the meeting dated 05.10.2007 may be noted. The minutes record that it was not possible to appoint the petitioner as an MDO for development of the mine on account of changed circumstances of allotment of block jointly. Since the blocks had been allotted jointly, a decision had been taken to form R-4 by R-3/CMDC, R-5/UPRVUNL and R-6/MAHAGENCO. The mining operation was to be carried out by this entity, which is R-4. The subsequent communication sent byR-3/CMDC dated 03.10.2009, however, for the first time raised the issue of the concept of washed coal to be supplied to the petitioner as per the decision taken by R-4 as against the discussion till that stage the coal was to be supplied on ROM basis. It is this issue which has given rise to the disputes as the petitioner insists that they did not need washed coal and the coal should be supplied on ROM basis while R-3/ CMDC has expressed its inability to do so insisting that only washed coal would be supplied.

39. R-4 floated the tender on 27.09.2009 for appointment of MDO and R-7 has been appointed as the MDO. The scope of work of the MOD inter alia, as per clause (f) of clause 5.1 includes a right to residue from the washing of the coal rejects and middlings to be utilized in thermal power plant to be set up for generation of electricity of Chendipada Coal Block. A separate Joint Venture Company was to be formed between R-4 with 11% equity stake in the Joint Venture Company and 89% equity stake to be held by the MDO. The tender was allotted to R-7 vide the letter dated 27.10.2010. The power plant was to be set up at the mine pithead.

40. The grievance of the petitioner is this that though it had agreed not to be appointed as MDO, the coal to be mined was to be exclusively for the benefit of the power plant of the petitioner. The washed coal was being thrust on the petitioner which had unfavourable repercussions both vis-?-vis the price and the quantity as there was reduction of 28% in the quantity to be supplied and price more than doubled. Not only that, the residue and the middlings were valuable which were to be supplied to R-7 who would start the power plant, which is a competitive business. This was despite the fact that the allocation letter dated 25.07.2007 provided for the role of the MDO as only a facilitator for development of coal blocks and was only mandates to do coal mining and hand over the coal extracted from the said blocks to the Joint Venture company.

41. Even during the pendency of the petition, representations were made by the petitioner to the Ministry of Coal which resulted in a letter dated 15.02.2011 where it was clarified that the MDO was only a facilitator for development of coal blocks and was only mandated to do coal mining and hand over the coal extracted from the said blocks to the Joint Venture company. The MDO did not have any right to use the coal and coal products including the washery rejects/ middlings in its own power plant. However, this position was not acceptable to both R-3 and R-4 and there were in communication with the ministry. These communications were based on how the washery rejects and middlings qua the

Machhakata coal block were dealt with and an arrangement was made for the MDO to simultaneously set up a power plant at the mine pithead. This is so as the policy underlying the allocation of coal blocks under the Government Dispensation Route was that the State Government Corporation in whose favour the block is allocated should have proprietary rights over the block in the matter of mining, winning and selling the coal and the State Government was free to outsource various operations including the mining operations. R-1 and R-2 have filed their affidavits and the upshot of these is a final decision according to which it is up to the allocatee company i.e. R-3/CMDC to decide regarding the supply of washed or unwashed coal to the petitioner. It may also be noted that there is a hiatus period of nine months between the floating of the bid documents for appointment of the MDO which contained the clause for setting up the power plant at the mine pithead and the filing of the writ petition and the say of the R-7 is that it has also invested huge amounts for setting up the power plants which would be useless unless it would get the raw material for generation of power.

42. The aforesaid are the relevant facts germane for the decision of the controversy in question. These facts show that though the MOU initially executed between the petitioner and R-3/CMDC sought to reserve the right of the allocated coal to be utilized for the power plants to be setup by the petitioner with the coal being supplied on ROM basis, post the allocation of coal, neither was the Fuel Supply Agreement executed nor was the petitioner appointed the MDO. It is the Fuel Supply Agreement which would have concretized the rights and obligations of the parties. The non appointment of the petitioner as the MDO was stated to be on account of changed circumstances as the coal mining was to be carried out by the Joint Venture formed of three State Corporations i.e.R-4. The important fact is that the petitioner agreed not to be appointed as the MDO as recorded in the minutes of the meeting dated 05.10.2007. Thus, the petitioner certainly cannot make a grievance about non appointment as an MDO.

43. The R-4 in its wisdom floated a tender for appointment of the MDO on 27.09.2009 which had inter alia included the right of the MDO to have a power plant at the mine pithead. The tender for this was allotted to R-7 on 27.10.2010.

44. The petitioner cannot be said to be unaware of the tender floated in this behalf or the terms thereof and thus in September, 2009 had knowledge of what it perceives to be prejudice which would be caused to it by the rights conferred on the MDO. The writ petition was, however, filed much later after 9 months though of course the petitioner claimed that his aspect was receiving the attention of the Government of India on representations made by the petitioner.

45. In our considered view, two aspects are extremely important. The first is that the Fuel Supply Agreement has not been given a final shape. It is not relevant that the clauses which were being debated did not pertain to washed coal being supplied and that the clause for supply of coal on ROM basis remained the same in all the draft agreements. The essence is that the final agreement has not been executed. The petitioner is thus in effect seeking a specific performance whereby

the Fuel Supply Agreement should be executed and that too on certain terms and conditions over which there is now a dispute and even the Government of India has chosen to take the side of the allocatee inasmuch as it has been left to the allocatee to decide as to whether the washed coal should be supplied or the coal should be supplied on ROM basis. It is thus not really even a specific performance of an agreement, but a specific performance of an MOU to enter into an agreement as per certain terms with which the parties should remain bound.

46. Secondly, it is trite to say that where a relief for specific performance is sought, it is the discretion of the civil court as to whether such an equitable relief ought to be granted or whether the remedy may lie by giving adequate compensation by way of damages. The moot point would also arise as to whether the rights conferred on R-7 as MDO are beyond the terms of the allocation and thus need to be struck down and if so on what terms and conditions since R-7 has acted in pursuance to its agreement with R-4.

47. Section 20 of the Specific Relief Act, 1963 makes it clear that the jurisdiction to a decree of specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful do so. It is always open to the Court to award equitable damages rather than relief in species. We may usefully refer to in this behalf to the Judgment of the Supreme Court in Jai Narain Parasrampuria (Dead) and Others Vs. Pushpa Devi Saraf and Others, and Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others, . In fact, insofar as the quantification of damages is concerned, the aspect was referred to a larger Bench which came to be decided in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, . As noticed, the said quantification of damages would of course not be possible without trial in the matter especially keeping in mind the facts in the present case, as stated hereinbefore.

48. The plea of the petitioner is that its business interests are being harmed as it set up the power plant on the basis of the MOU and the Fuel Supply Agreement which is now sought to be entered into is at variance with the MOU. This is stated to be causing financial losses to the petitioner both as a consequence of the lower quantum of actual coal supplied as also the increase in the price of the coal. There is stated to be no redeeming feature for the petitioner since the washery rejects and middlings are also not being handed over to the petitioner to be utilized in a manner deemed proper. Thus the question would arise whether adequate damages in financial terms would be the appropriate remedy or whether such a specific performance should be permitted, the prerequisite of course being that the petitioner establishes its case. It is also relevant to note that the interest of R-7 has now come into the picture the tender having been allotted to it as an MDO and the power plant stated to have been established by R-7 at the mine pithead by investing the monies. The raw material for the same is only the middlings and the rejects. There are thus competing commercial claims of the petitioner and R-7 to be weighed which in turn are dependent upon

the nature of obligations which R-3 and R-4 agree to qua these parties. As to how these commercial claims are to be balanced i.e. by specific performance of an agreement or by adequate compensation, would be the moot point. It need hardly be said that in a writ petition of this nature under Article 226 of the Constitution of India without having the benefit of evidence being led, it is not possible to decide the aforesaid issue nor quantify the damages in case such specific performance is not be granted. We are thus of the considered view that the rights and obligations of the parties cannot be appropriately adjudicated in the present proceedings and in order to claim a right against R-3/CMDC to execute the Fuel Supply Agreement without a clause for supply of washed coal or in the alternative for damages, would have to be tried by taking recourse to an appropriate civil remedy.

49. We thus dismiss the writ petition giving liberty to the petitioner to file appropriate civil proceedings to get its rights adjudicated on a trial being carried out in the matter. In the peculiar facts of the case, we leave the parties to bear their own costs.

