

(2010) 09 DEL CK 0435

In the Delhi High Court

Case No : Writ Petition (C) No. 1315, CM No"s. 2389/2391/12725 of 2007 and 14253 of 2008 and WP (C) No. 1327 of 2007, CM No"s. 2411/2413/ and 12866 of 2007

Prism Cements Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Mineral Concession Rules, 1960 — Rule 26
Mines and Minerals (Development and Regulation) Act, 1957 — Section 11, 11(1), 11(2), 11(3), 11(4)

Citation : (2010) 09 DEL CK 0435

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Dushyant Dave, Rishi Agarwal, R. Hameed, Shikha Sareen and Akshay Ringe, for the Appellant; Maneesha Dhir, Geeta Sharma for Union of India, Naveen Sharma, for Respondent No. 2, S.B. Upadhyay, Kailash Vasudev, Anisha Upadhyay and Pawan Upadhyay for Resp. No. 3, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—In these two writ proceedings under Article 226 of the Constitution of India, the common petitioner (hereafter referred to as "PRISM") challenges two orders of the Tribunal constituted u/s 30 of the Mines and Minerals (Development and Regulation) Act, 1957 (hereafter referred to as "the Act") read with Section 55 of the Mineral Concession Rules, 1960 (hereafter referred to as "the Rules"). The impugned orders rejected PRISM's Revision Petitions, being R.P. 16(32) of 2005 and R.P. 16(31) of 2005.

2. The facts necessary for deciding the two petitions are that PRISM set-up a cement plant in Satna (M.P.) in 1997. Originally the plant had a capacity of producing 6000 Metric Tons (MT) Clinker per day, which worked-out to 2 million MT Clinker per annum. It is submitted that the capacity were subsequently

enhanced to 7000 MT Clinker per day, which in turn resulted in enhancement of the annual production to 2.31 million MT clinker. PRISM contends that the areas allotted to it contained mining reserves to the extent of 44.75 million MT which were sufficient for 13 years, having regard to the original capacity and the conditions imposed for operation of the cement plant. It is submitted that on 31.12.1996 and 14.02.2000, the Central Government, acting through the Ministry of Environment and Forests granted clearances under the relevant laws for extracting minerals, primarily sandstones, subject to certain conditions. It is also stated that the Director of Mines, Central Government, by an order dated 19.08.2000 granted relaxation in regard to the Safety Zone - for the purpose of mining from 500 metres and reduced it to 300 metres. Further by another order dated 05.03.2004, again issued by the Director of Mines, additional relaxation was granted.

3. PRISM contends that the net-result of the relaxation, together with the clearances earlier obtained was such that 16.810 million MT reserves of limestone stood released for the purpose of mining; yet it is contended that it was impracticable to mine those reserves in entirety, due to various facts, such as existence of stray buildings and structures within those areas and other such obstructions. PRISM states that it took steps to increase its daily production to 7500 MT clinker per day.

4. PRISM submits that two applications were made to the Government of Madhya Pradesh (hereafter referred to as "the State Government"), for grant mining leases on 11.09.2000 and 17.02.2003. These were in respect of 196.053 hectares at Ram Nagar and 153.972 hectares at Janardanpur for a total extent of 350.025 hectares (in the application dated 11.09.2000); and an extent of 346.629 hectares in the said 346.629 hectares in the same two places - Ram Nagar and Janardanpur. It is further submitted that another application also dated 17.02.2003, seeking Prospecting License at Janardanpur was made. PRISM alleges - a fact not in dispute that common contesting respondent, M/s. Jaypee Associates Limited (hereafter called "Jaypee Associates") had subsequently lodged rival applications on 06.12.2001 and 09.06.2003 for grant of mining leases in areas overlapping those where mining leases had been sought for by the petitioner. Jaypee Associates" also filed application for Prospecting License on 09.06.2003 for a similar overlapping area. By a series of orders dated 02.06.2003, 08.09.2003 and 09.09.2003, the State granted Jaypee Associates" application preferring its claim over the Prism"s prior applications. The State Government rejected the prior claim by invoking its powers u/s 11(5) of the Act. The State was of the opinion that the proposed increase in production capacity of Jaypee Associates" plant from 4.2 million MT to 5.5 million MT per annum and its proposed expenditure of Rs. 125 crores, on expansion as well as insufficient deposits it held in mining leases that the State had granted, as opposed to PRISM, not disclosing any plans to enhance its production capacity of the existing cement plant and absence of any Project Report to such effect, were good enough reasons. The PRISM appealed to the Mines Tribunal which, after hearing

the parties and also considering the State's view-point, issued orders on 02.05.2005, allowing the revisions. The Tribunal was of the view that even though each of the State's orders contained reasons, yet, the basis or terms thereof had not been disclosed. The Tribunal concluded that in order to ignore a prior claim of an applicant for a mining or Prospecting Lease like Prism's, the requirement of special reasons mandated by Section 11(5) had not been complied with. Therefore, the matter was remitted for reconsideration by the State.

5. The State Government by its order dated 06.07.2005, noted that PRISM had access to mining leases to the extent of 1271.99 hectares, out of which the available mineable reserves worked-out to 6.68 million Metric Tonnes. The State Government noted that PRISM had disclosed inability to mine 16.81 million MT pointing to shortcomings in the planning of management to preserve the mineable reserves for future. The State Government also noted that PRISM had basically installed a 2 million MT per annum plant and showed no proposal for capacity augmentation and that it had invested around Rs. 675 crores. It was lastly noticed that PRISM did not, apart from this cement plant install another facility, such as power plant etc. So far as the Jaypee Cement's application was concerned, the State noted that its access to leases in its favor were to the tune of 2071.263 hectares of which 6173.9 million MT were mineable reserves. Jaypee Associates, according to the State, had installed 4 million MT per annum plant after which its capacity did had been enhanced and at the time of the order, the annual production capacity was 6 million MT. The company had also invested Rs. 1690 crores and in addition to the cement plant, had installed 2 power plants; Jaypee Associates had indicated that it was planning to install a third power plant.

6. The State thus went on to record the consumption pattern; as against PRISM's production capability of 2 million MT per annum, its consumption required was 2.7 million MT per annum of mineral; the Jaypee Associates' production capacity was 6 million MT per annum for which consumption required was 8.5 million MT per annum. The State Government also formed an opinion that PRISM had reserves for around 25 years on the basis of its existing plant capacity whereas Jaypee Associates had reserves for about 20 years on assessment of its existing plant capacity. The State, therefore, reiterated its decision to recommend the grant of mining and Prospecting Licenses applied for by M/s. Jaypee Associates to the Central Government and sought its prior approval inter alia in the following terms:

XXXX XXXX XXXX MINING AND PROSPECTING LEASES

6. From the facts available, it is evident that these two prime industries of the State do not have adequate level of reserves with them in view of the estimated life of their industries but on comparative analysis this fact is strengthened that the order of the State Government, consenting to grant mining lease, which was set aside by the order of the Government of India in revision petition, was correct.

7. On inspection of records, it is evident that the area in question is closer, and adjoining, to the approved mining lease areas of M/s. Jay Prakash Associates as compared to the approved mining lease areas of M/s Prem Cement.

Based on complete analysis, available facts, available records, it has been found that the requirement of the higher capacity cement plant installed in the State would naturally be higher and industrial strengthening of State, supply of optimum raw materials to the industries, security of employment to the employees of the industries, increase in the availability of employment and enhancement of revenue to the State by optimum exploitation, in scientific manner, of mineral resources available in the State should be kept in consideration.

XXXX XXXX XXXX

7. Apparently, the Central Government had sought information from the Indian Bureau of Mines (IBM) and written to the office of the Chief Controller (Mines) for this purpose, seeking comments and eliciting its opinion as to whether relaxation u/s 6(1)(b) of the Act could be given. In response to this letter dated 28.10.2005, the Indian Bureau of Mines (IBM) forwarded its report through a letter dated 15.12.2005 to the Union Government. That letter enclosed the report sought for. The relevant part of the report reads as follows:

XXXX XXXX XXXX COMMENTS ON RELAXATION OF Sec 6(1)(b) OF THE MMDR ACT, 1957 TO THE GRANT OF FIRST RENEWAL OF MINING LEASE FOR LIMESTONE OVER AN AREA OF 772.067 HECT AND FRESH GRANT OF MINING LEASE OVER AN AREA OF 99.416 HECT IN VILL HINAUTI AND SIJATHJA AND 40.236 HECT IN VILL BADRAKHA IN DIST. SATNA M.P. IN FAVOUR OF MS/. PRISM CEMENT LTD.

XXXX XXXX XXXX Now the Ministry vide its letter No. 4/35-M IV dated 28-10-2005 sought information on the status of reserves in the lease areas already held by the applicant company, M/s Prism Cement Ltd. enclosing therewith, the submission of applicant company. On examination of the document, it is found that the applicant presently holds 3 mining leases over the area of 772.067 hect., 253.326 hect and 66.434 hect. The first lease of 772.067 hect has expired on 24-3-2005 and is presently under renewal. The later two leases were granted in the year 1996 and 2001 and valid upto 2016 and 2021. The company has applied for grant of two new mining leases over areas of 99.416 hect and 80.766 hect. Subsequent to decision of the state govt. to grant these two new leases and renewal of lease of 772.06 hectare the total lease area held by the applicant company in M.P. state will be 1272.009 hect. In the context of above situation, the company has submitted their justification for allowing them to hold more than 10 sq. km. area on the plea that out of 120.97 million tonnes of proved reserves in the already held mining leases, 59.74 million tonnes is blocked in safety zone of villages situated in the lease areas and also due to restriction imposed by MoEF not to carry out mining operations within 500m of

Satna-Rewa railway line in the lease area of 66.434 hect.

The matter and submissions of the applicant company has been examined and reserves position has been re-assessed based on present physical condition existing in the area. On examination, it is found that the mineral blocked in the village safety zone is 56.44 million tones as against the claim of 59.74 million tonnes by the applicant. The extent of area covered under safety zone and amount of ore reserves blocked in the leases already held by the company is given in the following table:

Sr. No.

Lease area in Hectare

Area of safety zone in hectares

Ore blocked in million tones

1.

772.067

220.48

46.75

2.

253.326

18.24

4.78

3.

66.434

16.64

4.91

Total

1091.827

255.36

56.44

As desired by the Ministry, status of reserves presently available vis-?-vis blocked in the safety zone in the leases held by the company is given below:

S. No.

Name of leases

Lease Area (Ha)

Reserves as on 1-12-2005 (In Million tonnes)

Blocked reserves

Balance available for mining

1.

Prism Cement Limestone

772.067

46.75

11.689

2.

Prism Cement Limestone

253.326

4.78

26.62

3.

Prism Cement Limestone

66.434

4.91

6.56

Total

1091.827

56.44

44.869

? The reserves of lease area of 99.416 hect. has been taken into account in the already held lease of 772.067 hectare as the said area is in the form of scattered islands within this lease.

From the above tables, it is observed that 44.869 million tonnes of reserves is presently available for mining. In this regard, it is to mention here that the leases presently held by the company are captive to a 2 million tones per annum cement plant, which was commissioned in 1997. Subsequently, the capacity of plant has been increased to 2.3 million tones per annum thereby increasing the requirement of limestone from 3 to 3.4 million tones. At the present rate of

limestone demand by the cement plant, available reserves in the already held leases will meet the requirement of the plant for another 13-14 out of its remaining life of 40 years.

XXXX XXXX XXXX

8. Prism, feeling itself aggrieved by the State Government's order, preferring Jaypee Cement's latter claim over its previous applications, filed revision petitions. By three separate orders dated 04.01.2007 - two in respect of mining lease applications and one in respect of Prospecting Lease application, the Tribunal noticed in detail all the contentions raised and urged by the respective parties. It recorded its conclusions in the following terms in Revision Petition No. F.16/31/05-RC-II. The orders in respect of other two cases are also in identical terms:

XXXX XXXX XXXX 9. In the instant case the date of application of the petitioner is 17.2.2003 and the date of application of the impleaded party is 8.6.2003. Clearly, the petitioner has a preferential right u/s 11(2) of the MMDR Act, 1957. However, since the State Government has invoked Section 11(5) of the Act for granting ML to the respondent No. 2 which is a latter applicant, it has to be seen whether the special reasons recorded by the State Government to justify grant to a latter applicant are as per law. In the impugned order the State Government has recorded that as per the information given by the mining officer the petitioner does not have any plan to increase the capacity of his plant, neither the project report has been furnished nor any relevant technical and financial information has been made available. The Mining Officer has also not reported that the petitioner has insufficient reserves of limestone to justify grant of ML to him. The State Government has recorded that since the respondent No. 2 had plan (XXXX not legible) its plant capacity and also proposed to spend out of Rs. 215 crores for the purpose and had insufficient reserves for its plant etc. he has been being considered and granted ML. In our view the State Government has followed the provision of Rule 26 of MCR, and has given opportunity of hearing to the petitioner also and recorded reasons in the impugned order while rejecting the...application of the petitioner.

After going through the record of the case carefully, and in the light of the above we note that the petitioner had no plan and did not take any concrete steps in increasing the plant capacity before passing the impugned order, whereas the impleaded party had definite plan to make efforts in this regard and also ready to spend a substantial amount for setting up of a plant. We do not find any parent legal infirmity in the action of the State Government in granting the mining lease in favour of the respondent No. 2 u/s 11(5) of MMDR, Act, 1957. In the premises, the order of the State Government is up held and revision application is rejected.

XXXX XXXX XXXX

Prism challenges the above decisions of the Tribunal, contending that relevant

factors were ignored, and irrelevant aspects were taken into consideration by it. It is argued that Prism's statutory right as a prior applicant had to be shown due deference by the State, which could not have ignored it, except for good reasons, deemed relevant under the statute, having regard to its objects and purposes.

9. Prism argues that the tribunal ignored the fact that the state and its order, had most arbitrarily, increased Jaypee Associates' capacity on the one hand and reduced its mineable reserves on the other hand, even while baselessly reducing the petitioner's capacity and equally erroneously increasing its assessment of the existing mineral concessions, on the other hand. This, complains Prism, betrays non-application of mind to the materials available on the record which this Court should correct by intervening in exercising judicial review powers. It is argued that the tribunal baselessly endorsed the states view that Prism's mining reserves amounted to 64.686 million MT whereas all available indications pointed to actual mining reserves aggregating to 44.869 million MT. This fundamental error, says Prism, renders the tribunal's order arbitrary and therefore liable to be interfered with. It is submitted in this context that IBM's report endorsed Prism's stand about 56.44 MT reserves being blocked and further that 44.869 million MT of mining reserves were actually available for exploitation. If these had been properly taken into consideration, the tribunal would have concluded that the available mining reserves could have sustained Prism's plant only for about 13 years.

10. It is next contended that the tribunal also committed an error in overlooking that Prism had undertaken capacity enhancements in respect of its plant; so much so that its annual production capacity was enhanced from 2 million MT to 2.3 million MT or 7000 million MT with a planned further increase to 7500 million MT each year. Here, too, Prism relies on the IBM report in support of the submission. If these material aspects had been fairly considered, says Prism, the tribunal would have concluded that its (Prism's) mining reserves were not at the level perceived by the state (i.e., for 25 years), but realistically not more than 13 years. It is submitted further that the tribunal as well as the state ignored that the capacity augmentation of Prism's plant was based on a project report by Larsen and Turbo Ltd. It is contended that the inclusion of 12 million MT as an available mineral resource, for mining purposes, was unjustified, since that clearly was sub-grade limestone, which could not be used by Prism.

11. Prism argues that the state authorities and the tribunal fell into error, in accepting Jaypee Associates' exaggerated projections of its capacity, on the one hand, and its under estimating the mineral reserves available with it, on the other. It is submitted, in this respect, that the finding about JAYPEEAssociates's capacity being 8.5 million MT annually ignores the Cement Manufacturing Association's document, which clearly demonstrates that such annual capacity was only 7.425 million MT. Prism also argues that Jaypee's reserves were understated, and erroneously accepted as such by the Tribunal, and was contrary to the records.

12. It is submitted that the grant of rights to Jaypee Associates, overriding the statutory rights of Prism, are not only contrary to the record, but an abuse of power, and thus indefensible in law. Prism relies on the decision of the Supreme Court, on this aspect, reported as Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, where it was held that:

...It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is, however, quite different. Viscount Haldane described it as follows in *Shearer v. Shields* (1914) AC 808, 813

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard. C.J. in *Pilling v. Abergele Urban District Council* (1950) 1 KB 636 : (1950) 1 All ER 76 where a duty to determine a question is conferred on an authority which state their reasons for the decision,

and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

XXXX XXXX XXXX

13. Prism relies on the decision of the Andhra Pradesh High Court, in *T. Nandagopal Vs. State of Andhra Pradesh and Others*, for the argument that the State and the Union are bound to see - while considering whether or not to overlook the claim of a prior applicant for a mining or prospecting lease, under the Act - only relevant materials, and act rationally, and not arbitrarily. It was held by the High Court, in that judgment, as follows:

XXXX XXXX XXXX 19. It is true that the minerals vest in the State Government; but, it goes without saying that the State Government cannot act arbitrarily. Now, take the facts of this case. More than one person applied for mining lease in respect of the lands concerned herein. The State Government wants to grant a lease. It has been changing its mind from time to time. Now it wants to grant the

entire 500 Acres to the 2nd respondent. That is not possible because the Central Government has not accorded, its prior approval for overlooking the petitioner's priority claim for the entire extent. The Central Government has agreed to overlook the petitioner's priority claim only in respect of 350 Acres. While doing so, it has directed that the remaining 150 Acres should be granted to the petitioner. The State Government has, in pursuance of the said proceedings of the Central Government, already, granted 350 Acres to the 2nd respondent. But, so far as 150 Acres is concerned, since it is stultified by the Central Government in its proposed move, it now wants to take the stand that it does not propose to grant the said 150 Acres to any one. This is nothing but an arbitrary stand. So far as the argument of binding nature of the terms of prior approval accorded by the Central Government u/s 11(4) is concerned, the very contention is rather misplaced. There is no question of the Central Government's prior approval being binding upon the State Government. One must keep in mind the context of Section 11(4). According to Section 11 of the Act, the person who applies first is entitled to a preference, and if that preference is proposed to be overlooked by the State Government, it has to obtain the prior approval of the Central Government, besides recording special reasons for such overlooking. Unless the Central Government accords its prior approval for such overlooking, the State Government is not competent to overlook the priority claim of the earlier applicant. In other words, the prior approval of the Central Government is one of the conditions precedent for overlooking the priority claim of the earlier applicant. In such a situation, the argument of the learned Advocate-General that the terms of the prior approval accorded by the Central Government are not binding upon the State Government, and similarly the converse argument of the learned Additional Standing Counsel for the Central Government that the terms of such prior approval are binding upon the State Government, must both be held to be misplaced.

XXXX XXXX XXXX

Prism also relies on the judgment of the Supreme Court, in Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., where it was held that:

XXXX XXXX XXXX ...The captive requirement of an industry is a factor that has to be kept in mind while granting leases but, it is to be done on a comparative scale. While the Central Government exercises its discretion in granting or renewing a lease, it is clear that the capacity of an industry to effectively exploit the ore, will be a predominant consideration. The submission of the Learned Counsel that none of the other parties before this Court required the mineral ore for captive consumption cannot be accepted. This aspect has been specifically examined by the Committee at pages 260-263 of its report. In order to properly appreciate the issue of captive consumption, the Committee examined the needs of the other parties before it. It stated that each of these parties had manufacturing industries which produce value-added products and earn

considerable foreign exchange for the country, and it was therefore of the view that an analysis of their total requirement was necessary in the interests of mineral development as also that of the nation. Based on the information supplied to it, the Committee thereafter made an assessment, for a total period of 50 years, of the captive and net requirements of ICCL, IMFA, FACOR and JSL. At page 349 of its report, the Committee has also taken note of the projected captive and net requirements of Ispat Alloys. This being a finding of fact that has been recorded by the Committee, we have to accept that the argument of captive consumption does have a basis in the facts of the present case. On the issue of the application of the principle of equitable distribution, we are of the view that the Committee had, after having taken note of the prevailing situation and the problems faced by needy manufacturers, taken the correct view in recommending its implementation.

XXXX XXXX XXXX

14. JAYPEE Associates contests the writ petitions, arguing that the conclusions arrived at by the State and endorsed by the tribunal are correct. It is submitted that Prism never disclosed when its production capacity had been increased, and also that the materials on the record clearly revealed that its capacity was 2 million MT. It is further submitted that Prism's complaint that it has mining reserves of only 44 odd million MT is incorrect. Here, it is stated that the state authorities correctly concluded that the mining reserves available were to the extent of 64.80 MT. JAYPEE Associates relies on Prism's report, submitted to the state, which states that 111.69 million MT of limestone was available with it, in its existing leases, of which 53.96 million MT was given as net mineable and available reserves, whereas 57.73 million MT of limestone was shown as locked up in safety areas. JAYPEE Associates also relies on Prism's letter written to the State, on 18th June, 2005, a copy of which has been produced as Annexure R-2. The said letter, inter alia, states that:

At the time of commencement of production, we were having one mining lease which was granted and executed in the year 1985 (791.004 hectare). The mineable reserves, as then expected, of limestone, were to the tune of 53.95 million MT (total proved reserve 111.69 million MT less blocked reserve of 57.74 million MT). The project of cement plant with an installed capacity of 1 million MT per annum, was initially conceived by M/s Raasi Cement Limited and, for this purpose, they had formed a separate company named as Karan Cement Limited. However, they could not commence the project. Subsequently in 1992, Rajan Raheja Group took over Karan Cement Limited which was later renamed as Prism Cement Limited in the year 1994 and enhanced the plant capacity to 2 MTPA....

xxxx xxxx 8) We are in the process of increasing the capacity of the plant, which is designed for 6000 MT per day of clinker, and have successfully achieved the level of 7000 MT per day of clinker. The further modification are on and we would increase the clinkerisation capacity to 7500 MT per day. This would result in reduction of reserves" life by 3 odd years.

xxxx xxxx The above constraints limit us to not to mine beyond 300 m safety zone in such areas. Hence, enhancement of reserves of 5.6 years is effectively not available and only 1.6 years should be considered as enhanced reserve life. In this manner, the total mineable reserve available was 66.74 million MT which is sufficient for operation of 2 MTPA cement plant for 22 years only.

xxxx xxxx We are enclosing various details as per list of annexures detailed hereunder and especially the details of the reserves available to us as on 1st June, 2005, in Annexure 4....

Annexure 4 to the letter stated that the Mining lease for 772. 067 hectares at Hinauti and Sihhatta had balance mineable reserve of 10.645 million MT; that for 253.326 hectares, again at Hinauti and Sihhatta had balance mineable reserve of 27.390 million MT, whereas the mining reserve for the lease at Mankari (measuring 66.434 hectares) had a reserve of 6.730 million MT, adding to a total of 44.765 million MT. The same document mentioned, in addition against the head "Reserves released due to reduction in safety zone" as "16.810 million MT".

15. JAYPEE Associates supports the tribunal's conclusions, arguing that the materials furnished by it were correctly interpreted and assessed, and that there is nothing on record that Prism had any plans for capacity enhancement. It is argued here that Prism has mentioned about some project report, or plans, but not placed any concrete materials on record, to support its submission. JAYPEE Associates concedes that u/s 11, normally the prior claimant's application has to be granted; yet, it says that the State can for good and valid reasons, overlook that application, which, according to it, has happened in its case. It argues that not only does it have a larger capacity cement plant, and employ a larger workforce, it also has a power plant, and has a greater investment, in the state, all of which are relevant considerations, which resulted in Prism's prior claim being overridden.

16. Jaypee Associates further argues that all relevant factors mentioned in Section 11(5) were duly considered by the State while accepting its application. It is argued that prominent among these aspects were the level and quantum of investments proposed by it in comparison with the investment by PRISM, existing rival capacities for production as well as mining capabilities having regard to the leases available to both the concerns; the possibility of additional employment availability within the State and the further aspect that Jaypee proposed captive consumption for its power plant are relevant and germane, and received due consideration which this Court cannot delve into under Article 226 of the Constitution of India. It is argued that even though Section 11 creates a preferential right in respect of the first applicant (for a mining or prospective lease, as the case may be), the same can be overridden for good and valid reasons. Jaypee Cements argues in this context that no applicant has a right to say that he alone should be preferred over the others, merely because his application was filed earlier. It is submitted that the preference enacted by seniority of the application can and necessarily yield to public interest

considerations which are precisely what the State Government records as "special reasons". According to the submission, such special reasons were recorded in this case and correctly upheld by the Tribunal. Jaypee's submission also is that the higher level of investment, among other criteria, is a relevant consideration, as it enables overall economic development in the state.

17. From the above narrative, it is apparent that PRISM had applied for the prospecting license and mining licenses in the areas earlier in point of time to Jaypee Associates. Its application was however, cast aside by the State Government which overrode the first preference and granted the concessions to Jaypee Associates. The State Government's orders were impugned in revisional proceedings; the Tribunal, in 2005, set-aside the grants and required the State Government to consider the matter afresh. PRISM argues that the reconsideration by the State Government merely paid lip-service since it did not take into account all the relevant facts. It further submits that the Indian Bureau of Mines (IBM) report also ought to have been seen by the authorities; according to it, the report clearly indicates that the mining leases and reserves available with it (PRISM) could supply optimally for upto 13 years whereas its production capacity had been enhanced and there was greater need for grant to it than Jaypee Cements. It is submitted that the State Government and later the Tribunal, in the impugned orders have overlooked certain material factors which vitiate their orders and that the materials, if considered, in the correct perspective, clearly point to the grants made through the impugned orders, resulting in far-greater mining reserves to Jaypee Associates than it needs. Jaypee Associates submits that PRISM has suppressed the fact that the Directorate General of Mines and Safety had, at its request, though letters dated 17.04.2000, 04.08.2000, 09.02.2004 and 17.05.2004, granted relaxation twice-over to the Safety Zones, which resulted in its (PRISM's) availability of mineral reserves upto 18.08 MT. As far as the IBM report is concerned, it is argued that the same was supposed for the first time in revisional proceedings after one year of its being filed and much after the lease deed was executed with it (Jaypee Associates) on 31.12.2004. Jaypee urges that there is absolutely no material on the record to establish that any prior approval was ever granted by any Government or public agency, increasing or enhancing PRISM's production capacity, as is being contended before the Court.

18. Before discussing the merits of the rival contentions, it would be essential to recollect the relevant provisions of the Act, i.e. Section 11, which reads as follows:

XXXX XXXX XXXX 11. Preferential right of certain persons (1) Where a reconnaissance permit or prospecting licence has been granted in respect of any land, the permit holder or the licensee shall have a preferential right for obtaining a prospecting licence or mining lease, as the case may be, in respect of that land over any other person:

Provided that the State Government is satisfied that the permit holder or the

licensee, as the case may be,-

- (a) has undertaken reconnaissance operations or prospecting operations, as the case may be, to establish mineral resources in such land;
- (b) has not committed any breach of the terms and conditions of the reconnaissance permit or the prospecting licence;
- (c) has not become ineligible under the provisions of the Act; and
- (d) has not failed to apply for grant of prospecting licence or mining lease, as the case may be, within three months after the expiry of reconnaissance permit or prospecting licence, as the case may be, or within such further period, as may be extended by the said Government.

(2) Subject to the provisions of Sub-section (1) where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospecting licence or mining lease, as the case may be, and two or more persons have applied for a reconnaissance permit, prospecting licence or a mining lease in respect of any land in such area, the applicant whose application was received earlier, shall have the preferential right to be considered for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, over the applicant whose application was received later:

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day for the purposes of assigning priority under this Sub-section:

Provided further that where any such applications are received on the same day, the State Government, after taking into consideration the matter specified in Sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(3) The matters referred to in Sub-section (2) are the following:

- (a) any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;
- (b) the financial resources of the applicant;
- (c) the nature and quality of the technical staff employed or to be employed by the applicant;
- (d) the investment which the applicant proposes to make in the mines and in the industry based on the minerals; (d) such other matters as may be prescribed.

(4) Subject to the provisions of Sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in Sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(5) Notwithstanding anything contained in Sub-section (2) but subject to the provisions of Sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier:

Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this Sub-section.]

XXXX XXXX XXXX

19. In the decision reported as Lakshmanasami Gounder Vs. Commissioner of Income Tax , Selvamani and Others, the Supreme Court emphasized the paramount consideration which has to weigh with the decision maker while considering whether to grant, or refuse a prospecting, or mining license:

It is manifest, therefore, that the S.G. is not bound to dispose of applications only on a "first come, first served" basis. It will be easily appreciated that this should indeed be so for the interests of national mineral development clearly require in the case of major minerals, that the mining lease should be given to that applicant who can exploit it most efficiently. A grant of ML, in order of time, will not achieve this result.

The nature of discretion vested in the State and Union authorities, vis-?-vis the preferential right of a previous applicant, was again emphasized by the Supreme Court, in Dharambir Singh Vs. Union of India (UOI) and Others, in the following manner:

3. Sub-section (1) of Section 11 envisages grant of a prospecting licence in respect of a land and a prospecting licensee has a preferential right for obtaining a mining lease in respect of the land over any other person; provided, however, that the conditions enumerated in Clauses (a) to (c) in proviso thereto are satisfied. Further, Sub-section (2) states that subject to the provisions of Sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier, shall have a preferential right for the grant of the licence or lease, as the case may be, over an applicant whose application was received

later. It is also, again, subject to the conditions enumerated in the proviso. Sub-section (3) is not material for the purposes of this case. Sub-section (4) further provides that notwithstanding anything contained in Sub-section (2), but subject to the provisions of Sub-section (1), the State Government, may for any special reasons to be recorded and with the previous approval of the Central Government grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier.

4. Thus it would be seen that while granting a prospecting licence or mining lease, the area of discretion has been circumscribed by several factors enumerated in Section 11. In grant of mining lease of a property of the State, the State Government has a discretion to grant or refuse to grant any prospective licence or licence to any applicant. No applicant has a right, much less vested right, to the grant of mining lease for mining operations in any place within the State. But the State Government is required to exercise its discretion, subject to the requirements of the law. Therefore, the Tribunal of the Central Government has rightly held that it being in the area of discretion of the State Government, merely because the applicant had applied for, the State Government was not enjoined to grant the mining lease. The petitioner had taken the plea that since he alone had discovered the mines, he has got a preferential right over any other person. The Tribunal of the Central Government and the High Court rightly rejected that contention of the petitioner....

One has to therefore, consider the application of the prior applicant (i.e. preference of a prior applicant) rule, in its perspective. Normally, the rule of seniority has to be applied; however, the rule is not invariable; if the State Government considers that a later applicant has the ability and capability to subserve the goals of the Act, better than a previous applicant, it can override the rule of preference. However, while doing so, it has to record "special reasons" which are germane to the situation at hand. The question here is whether the reasons, or considerations which weighed with the state are relevant, and are genuine, and also can be considered sufficient, under the .

20. The state government, in its order after remand, mentions inter alia, that Prism's consented or approved areas (of leases and approvals) disclose availability of 64.686 million MT and that it had shown inability to mine 16.810 million MT. Prism alleges that this observation, supporting the State's conclusion is incorrect, because the zones where the approvals were granted, have constructions, and other barriers which prevent mining. The state government had noted, in this regard that Prism's grants included 12.073 million MT reserves of sub-grade limestone, and that further two leases were in respect of a total of 7.856 million MT of limestone. In this connection, it is worth noting that when the leases were originally granted, they were with restrictions about the safety zone, for the purpose of usage (of the mining reserves). PRISM felt that these restrictions impeded its ability to extract limestone; consequently, it applied for

relaxation. It is a matter of record - a fact submitted by PRISM, that on 31.12.1996 and 14.02.2000, the Central Government, acting through the Ministry of Environment and Forests granted clearances under the relevant laws for extracting minerals, primarily sandstones, subject to certain conditions. This was in respect of reserves which worked out to 56.44 million MT. the argument made now, however, is that these are "locked up" and cannot be used for several reasons, such as existence of stray houses, borewells and kutcha roads and paths. Strong reliance is placed on the IBM report, which saw the light of the day, apparently for the first time, a year after the revision petition was filed before the tribunal, in the second round, as it were, leading to the impugned orders.

21. Interestingly, Prism has not placed on record the applications made to the authorities, which led to grant of relaxation of the safety zone; earlier, mining was impermissible within a zone of 500 metres from the site(s); the distance was first relaxed to 300 metres, and later, 150 metres. The respondents' argument that PRISM has not showed any initiative in ensuring its advantage, despite the relaxation, in this regard is an important aspect which cannot be lost sight of. If PRISM wished to dispel that notion, it could easily have disclosed the applications seeking relaxation, to say that it was unaware that despite the benefit, no tangible advantage was to accrue to it. No such thing was ever done in the proceeding. The state, the tribunal and now this Court are asked to accept PRISM's word that the entire area housing reserves of nearly 57 million MT are unusable. In this respect, its sole reliance on the IBM report, is in the opinion of the court, not acceptable. Firstly, IBM's report does not anywhere mention that its report was called for to assist in the proceedings before the tribunal; Prism does not allege that this report was available, or made available to the state government. Secondly - and perhaps more importantly, the report states that PRISM's submissions were considered:

...In the context of above situation, the company has submitted their justification for allowing them to hold more than 10 sq. km. area on the plea that out of 120.97 million tonnes of proved reserves in the already held mining leases, 59.74 million tonnes is blocked in safety zone of villages situated in the lease areas and also due to restriction imposed by MoEF not to carry out mining operations within 500m of Satna-Rewa railway line in the lease area of 66.434 hect.

The matter and submissions of the applicant company has been examined and reserves position has been re-assessed based on present physical condition existing in the area. On examination, it is found that the mineral blocked in the village safety zone is 56.44 million tones as against the claim of 59.74 million tonnes by the applicant....

Thirdly, PRISM facially asserted that the blocked reserves were to the extent of 59.74 million MT, despite its earlier letter of June, 2005, that such reserves were 56.44 million MT; no basis for such figures are disclosed. Lastly and perhaps,

most importantly, the IBM report does not disclose awareness about relaxation to mine upto an area of 150 metres (as opposed to the original restriction of 500 metres). No reasons for "blockage" alleged by PRISM, in these proceedings, are mentioned by the report. For these reasons, this Court is of the opinion that the unavailability or non consideration of such report, did not in any manner vitiate the decision of the lower authorities.

22. PRISM had argued that its capacity had been wrongly under assessed, and that of Jaypee Associates, over assessed. It is a matter of record that PRISM's capacity was assessed at 2 million MT production per annum. It argues that the report of L & T had been placed on record, which was overlooked by the state government, and the tribunal. In support of this submission PRISM relies on the report (of L& T) dated 10th July, 2002 (placed on record as Annexure P-10 in WP 1327/2007). That document reveals that it is a letter (of L & T) recalling a discussion which its officials had with L & T in July, 2002, regarding capacity enhancement from the existing 6500 TPD to 7500 TPD. The letter suggests a two phased approach to capacity augmentation, and encloses the list of machinery and equipment required for the purpose. The letter ends with the note that commercial terms were to be discussed separately. There is however, no other documentary evidence to support any follow up, leading to capacity augmentation from 6500 TPD to 7500 TPD, as is asserted today by PRISM. No document, remotely supporting that event is produced. After all, capacity assessment by the state government and the tribunal is to be based on objective material; beyond the statement of PRISM, and the offer letter by L & T, there is no such objective material or evidence. In the circumstance, this argument of PRISM, the availability of its mining reserves was assessed erroneously, has to fail. As far as the allegation that Jayvee's capacity and consumption levels have been assessed exaggeratedly, resulting in greater mineable reserves, are concerned, it is noteworthy that PRISM claimed utilization of 3.4 million MT of limestone, for production of 2.3 million MT cement; Jayvee's production capacity assessed is 6 million MT (per annum) for which the consumption assessed is 8.5 million MT per annum. PRISM does not reveal how these assessments are erroneous or exaggerated. This argument too, therefore, cannot succeed.

23. In State of N.C.T. of Delhi and Another Vs. Sanjeev @ Bittoo, the Supreme Court explained what is the concept of discretion with an executive or statutory agency:

The authority in which discretion is vested can be compelled to exercise that discretion , but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercised of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and

must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

Earlier, in *In The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, the Court stated that:

...Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power, since the authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.

In *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, it was held that:

51. A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness....

52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it....

24. The above discussion would show that courts, acting in judicial review jurisdiction, under Article 226 of the Constitution of India, would be justified in interfering with an executive or statutory determination, if relevant considerations are ignored, or irrelevant considerations are taken into account, or if the decision is contrary to the purposes of the enactment or statutory measure, or is mala fide, or plainly arbitrary. As previously noted, PRISM is unable to show how the State and the tribunal erred in their assessment about availability of its mineable reserves, nor has it been able to establish that its production capability is higher than that found (by such authorities). So far as the argument that Jaypee Associates' level of investments or the existence of their power plant or employment generation capacity (being greater than PRISM's) all being not relevant are concerned, the court is of the opinion that

such contentions are devoid of merit. Section 11(3) inter alia, enacts the relevant considerations in this regard to include the financial resources of the applicant; the nature and quality of the technical staff employed or to be employed by the applicant; the investment which the applicant proposes to make in the mines and in the industry based on the minerals, etc. Therefore, the higher investment, existence of power plant, and employment generated, cannot be considered irrelevant, as long as it subserves the larger purpose of the Act.

25. In view of the above discussion, the court is of the opinion that the petitions are lacking in merit, and have to fail. The writ petitions and all pending applications are therefore, dismissed. In the circumstances, parties shall bear their costs.