

(2006) 05 DEL CK 0181

In the Delhi High Court

Case No : Writ Petition (C) No. 2477 of 2006

Satna Power Co. P. Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 02-05-2006

Acts Referred:

Coal Mines (Nationalisation) Act, 1973 — Section 3, 3(3), 33, 34, 4
Constitution of India, 1950 — Article 14, 16, 226, 311
Mineral Concession Rules, 1960 — Rule 59

Citation : (2006) 05 DEL CK 0181

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Rajiv Sakhdar and Sunil Mathews, for the Appellant; P.P. Malhotra, ASG, Manisha Dhir and Preeti Dalal for Respondent No. 1, G.E. Vahanvati, Solicitor General, Raju Ramachandran and V.K. Rao, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—A challenge has been cast by the Petitioner against the decision of the Central Government allocating the Kerandari, Chhatrasal, Chatti Bariatu and Dulanga Coal blocks to the National Thermal Power Corporation (NTPC). It has been pleaded in the Petition that this decision runs counter to the statutory provisions contained in the Coal Mines (Nationalisation) Act, 1973 (Nationalisation Act for brevity) and the Policy and Guidelines framed pursuant to that statute.

2. It will be recalled that the Coal industry was earlier in private hands till 1973, when the Nationalisation Act came into force. The purpose of the enactment can be gleaned from its Preamble, namely that its endeavor was to provide for the acquisition and transfer of the right, title and interest of the owners in respect of the coal mines specified in the schedule with a view to reorganising and reconstructing such coal mines so as to ensure the rational, co-ordinated and scientific development and utilisation of coal resources consistent with the

growing requirements of the country, in order that the ownership and control of such resources are vested in the State and thereby so distributed as best to subserve the common good. By an amendment to the Nationalisation Act effected in 1976 private companies engaged in specified productions were also allowed to participate in the mining of coal. Section 3 of the Nationalisation Act declares that the right, title and interest of the owners of coal mines shall stand transferred to and shall vest absolutely in the Central Government free from all encumbrances. In order to augment thermal power generation and with a view to increase thermal power capacity during the VIII Plan Period, the Central Government had decided to allow private participation in the coal sector for captive use in contradistinction to the sale of coal in the market. Accordingly, Sub-section (3) of Section 3 of the Nationalisation Act enunciates that no person other than a company engaged in the production of iron and steel, generation of power, washing of coal obtained from a mine or such other end use as the Central Government may specify, shall carry on coal mining operations in India. It has been asseverated in the Petition and not controverted at the Bar that the Petitioner is involved in the generation of power. Section 4 postulates the Central Government becoming a lessee of the State Government in relation to a coal mine. Section 33 enables the delegation of powers and Section 34 empowers the Central Government to make Rules and Regulations to carry out the provisions of the Nationalisation Act.

3. By Office Memorandum (OM) dated 14-7-1992 a Screening Committee had been constituted for screening proposals received for captive mining by private power generation companies, of which a Representative of the State Government was one of five members. In terms of OM dated 5-8-1993 the membership of the Screening Committee was increased to nine persons. The subsequent OM dated 26-10-1999 envisaged the production of iron/steel, power as well as cement in the public/private sector, and further augmented the membership of the Screening Committee to ten. In terms of the Corrigendum dated 7.5.2003 the Screening Committee was reconstituted so that the Representative of the concerned State Government would be one of its members. It is not the case of the Respondents that the Screening Committee has been subsequently wound-up and made non-existent. Since coal mines are in the ownership of the respective States, their views cannot be altogether ignored. The extant Guidelines specifically record that one of the major considerations for the grant of a coal mining lease for specified end uses is the view of the concerned State Government.

4. By virtue of the provisions of Section 5(2) of the Nationalisation Act, Coal India Limited (CIL) became the deemed lessee of the concerned State Government in relation to all nationalised coal mines. A similar status is enjoyed by CIL in relation to lands over the coal bearing areas acquired under the Nationalisation Act by virtue of provisions of the Coal-Bearing Areas (Acquisition and Development) Act, 1957. Over a period of time in addition to CIL and Singareni Collieries Company Limited (SCCL) a number of other companies are

engaged in coal mining activities in India. These two companies are alter egos of the Central Government. It appears that there are 142 captive mining blocks, of which 136 are with CIL and 7 with SCCL, and which, post the Nationalisation Act, is the Lessee of all Coal Mines, have been identified for captive mining.

5. On 8.12.2005 a Meeting was held under the Chairmanship of the Secretary to the Prime Minister and four other persons primarily from the Prime Minister Office, the Secretaries to the Government of India in the Ministry of Coal and in the Ministry of Power and the CMD, Director (Operations), Executive Director and GM of NTPC. At that Meeting it was decided to allocate the subject mines under the Captive Mining route. It has not been controverted that the extant (17-10-2005) Guidelines for allocation of Captive Blocks envisage the entertainment of applications from any entity incorporated under the Companies Act.

6. A proposal for introducing the competitive bidding process for allocation of coal blocks for captive mining was presently under the active consideration of the Government. The objective of the Ministry of Coal is for increasing the number of applicants. It has been submitted that the competitive bidding process of selection would require amendment to the Nationalisation Act before it could be implemented. It appears that the decision to allot coal blocks to the NTPC emanates from the latter's request to the Secretary, Ministry of Coal vide letter dated 1.3.2005. In respect of the subject coal blocks NTPC had stated therein that they were neither in the captive mining list nor were they held by CIL. NTPC had requested at the end of that letter/request that such allotment would serve as basket source of supply for meeting coal shortfall at our various power plants and, Therefore, they should be allocated to it under Captive/Government dispensation route. It needs to be emphasised and highlighted that the allocation made to NTPC at the Meeting held on 8.12.2005 was without consultation with the Screening Committee.

7. One of the questions that had previously arisen before me in *Jitendra Nath Banerjee and Others Vs. Union of India (UOI) and Others*, was the sweep of Rule 59 of the Mineral Concession Rules, 1960 which postulates the prior publication of a Notification in the Official Gazette before any lease in respect of the mining of a major mineral can be granted. The Central Government had declined to give its sanction to the grant of a mining lease without following the procedure of notifying the public at large. The approach of the Central Government was upheld since otherwise it would become possible to surreptitiously or secretly dispose of national wealth. The Hindustan Times of March 9, 2006 carried an article on Reforms catching up with the coal sector, one of which is the allotment of coal mines for captive consumers on competitive bidding. If there is lack of transparency in the method of allocation of coal mines, it will never be affirmatively established whether PSUs are working at optimum efficiency. The public believes that PSUs are in operation only because of State monopoly.

8. It appears that a Proposal for introducing competitive bidding for allocation of coal blocks for captive mining to make the selection process transparent and objective in view of the increasing number of applicants with diminishing number of coal blocks available has engaged the attention of the Ministry of Coal. In the Budget 2006-2007 it has been stated that a Comprehensive Review of the Coal Policy is underway, and that after reserving blocks for CIL and its subsidiaries for the period up to 2012 it has been decided to de-block coal reserves of 20 billion tonnes for power projects.

9. Wherever Government contracts come into question the following trailblazing observations of the Hon'ble Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, come to mind for immediate adherence and application: 11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licenses, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licenses. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. licenses are required before one can engage in many kinds of businesses or work. The power of giving licenses means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or license. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection. "Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure" Is the position of the Government in this respect the same as that of a private giver" We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/

structuring and checking Government discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Y LJ 733, "that Government action be based on standards that are not arbitrary or unauthorised". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favor of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

10. Apart from the extracted enunciation of the law Mr. Rajiv Sakhdar, learned Senior counsel for the Petitioner, has also drawn attention to similar observations made in *Ram and Shyam Company Vs. State of Haryana and Others*, The Court had recorded its shock and dismay at the manner in which the public property was squandered away for a song by persons in power by ensuring that only favored persons could enjoy and aggrandize their unjust enrichment. In that very Judgment the Court also recorded that "socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy.... A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradication of poverty. All its attempt must be to obtain the best available price while disposing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the arm." When the public is shut out from participation in the use of national wealth, and when the Government does not route the grant of exploitation rights without the approval of Screening Committee, these sentiments become poignantly relevant.

11. Courts are always reluctant and slow in interfering with a policy devised by the Government unless it is wholly unreasonable in the *Wednesbury* sense, and/or the policy violates the equality principles enshrined in Article 14 of the Constitution, or the policy infringes any of the other Fundamental Rights. In *BALCO Employees Union (Regd.) Vs. Union of India and Others*, the Apex Court made these observations:

45. In *Narmada Bachao Andolan v. Union of India* there was a challenge to the validity of the establishment of a large dam. It was held by the majority at p. 762 as follows : (SCC para 229)

229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to

be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.

46. It is evident from the above that is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

47. Process of disinvestment is a policy decision involving complex economic factors. The courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so vocative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law. Even a government servant, having the protection of not only Articles 14 and 16 of the Constitution but also of Article 311, has no absolute right to remain in service. For example, apart from cases of disciplinary action, the services of government servants can be terminated if posts are abolished. If such employee cannot make a grievance based on Part III of the Constitution or Article 311 then it cannot stand to reason that like the petitioners, non-government employees working in a company which by reason of judicial pronouncement may be regarded as a State for the purpose of Part III of the Constitution can claim a superior or a better right than a government servant and impugn its change of status. In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision....

92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting

some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court. 93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-3-2001.

12. In similar vein, the Hon'ble Supreme Court has opined in *State of Orissa v. Gopinath Dash JT* 2005 (10) 484 that-- "The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decision or exercise of discretion by the Government so long as the infringement of fundamental right is not shown courts will have no occasion to interfere and the court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the court cannot interfere even if a second view is possible from that of the Government". However, it is not the contention of the Petitioner that the new Policy, which will ensure transparency as well as competitiveness, is already in vogue.

13. By its letter dated 21.9.2005, addressed to the Chief Minister, Government of Madhya Pradesh, the Petitioner had sought its Recommendation for allotment of captive coal mining block in three areas, one of which was Chhatrasal. However, allocation of this block, along with three others, has been made in favor of the NTPC by the letter dated 25.1.2006 of the Ministry of Coal, meant for captive use in power generation, in response to the request contained in NTPC letter dated 1.3.2005. The letter states that the allocation is for "exclusive use in your specified proposed Power Plants (detail of location, capacity, coal requirement and schedule for commissioning of each associated power plant to be provided by NTPC). This allocation is in pursuance of the provisions contained in Section 3(3)(a)(iii) of the Coal Mines (Nationalisation) Act, 1973".

14. The learned ASG has painstakingly elaborated the shortage of power in India and the endeavor of the Government to meet all the consumption requirements of power by accelerating power generation within the country. It has been clarified that the allocation of coal blocks for captive mining purposes is called an allocation under captive mining dispensation, whereas allocation of coal block for commercial mining is called allocation under "Government company dispensation". A distinction has been drawn between requests by Government company dispensation, which are dealt with by the Ministry of Coal directly, and other application for allocation under captive mining dispensation, which are considered by the Screening Committee. It has further been contended on behalf

of the Respondent that only those coal blocks which were not identified or included in future production plans of CIL, could be considered for allocation to companies such as the Petitioner for captive mining. In order to assist aspiring Companies from dissipating time and money in making futile applications in respect of coal blocks reserved to the CIL or the SCCL in its future production plans, a list of such coal blocks was drawn- up. It has further been submitted that CIL and SCCL together produce eighty per cent of the total coal production in the country. Almost seventy per cent of power generation in India is coal based. Accordingly, the nationalised coal sector is required to augment coal production in order to honour its coal linkages commitments to various sectors, including the power sector. After due study a list of 289 blocks was identified by CIL to cater for their future production programme up to 2036-37; these are not meant for captive mining except to other eligible Government undertakings. So far as Chhatrasal Coal Block is concerned it is the contention of learned ASG that it is neither included in the 148 coal blocks identified for captive mining, nor does it find inclusion in the List of 289 coal blocks earmarked for development by CIL. It has further been contended that the Screening Committee, which has been constituted by the Government, in exercise of its administrative powers, is only a delegatee and does not impinge upon the sovereign power of the Central Government in regard to allocation of coal blocks for captive mining. The Guidelines are only specific to consideration of applications by the Screening Committee for allocation of coal blocks out of the captive list.

15. The learned ASG has relied on the observations of the Apex Court in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, The Court had enunciated that where the decision making process of the State had been structured, and a grant had been made for bona fide reasons, the Court should hesitate to intervene. In granting the stay Orders in such matters the Court should be absolutely satisfied that the public (sic. Private) interest in holding up the project far outweighs the public interest in carrying it out.

16. Mr. Raju Ramachandran, learned Senior Advocate appearing on behalf of Respondent No. 2, has argued that every practice or policy can be departed from for strong reasons especially for larger national interests. The duty to increase power production to 66,000 MW by 2017 has been rested on the corporate shoulders of the NTPC. The endeavor is to bring about a change from the present energy scarcity position to one of energy independence. Given that almost 70 per cent of generated power is coal based, unless much larger reserve of coal are allocated to NTPC power generation would not receive the necessary fillip. Predicated on these statistics Mr. Ramachandran has forcefully contended that even if a departure has been made from the extant policy, i.e. in not referring to the Screening Committee, since allocation of coal mining blocks to the NTPC is in national interest and has been carried out in a bona fide manner, the exercise of extraordinary jurisdiction vested in this Court under Article 226 is not warranted. This is especially so since the Petitioner, on its own showing in the writ, has evinced interest only in one block in Madhya Pradesh. Mr. Vahanvati, the Learned

Solicitor General, who also appeared for NTPC on 27.4.2006, has submitted that recourse need not have been had to the Screening Committee at all as the Petitioner and other similarly placed persons has no right for allocation of the subject coal block. He has reiterated the position that Chhatrasal has not been enumerated on the captive list and hence the Screening Committee has no role to play. It has been clarified that the allocation of this coal block vests in CIL who has no objection to its transfer for exploitation purpose to NTPC.

17. On careful consideration of this conundrum, it seems to me that confusion has clearly been created because of reliance upon Section 3(3)(a)(iii) of the Nationalisation Act in the allocation letter of the Government of India dated 25th January, 2006. This provision does not speak of any 'captive list'; what it envisages is that the general rule that mining of coal will be carried out only by the Central Government or a government company owned, managed or controlled by it may be departed from in favor of any other Company provided it is engaged inter alias in generation of power. So far as the statute is concerned, the misnomer of a captive list stems from the implicit understanding that a Section 3(3)(a)(iii) company which has been permitted to carry on coal mining operations must do so in a captive capacity, namely, to ensure that all the coal mined from the area is used exclusively by it and, in the case in hand, solely for the purpose of generation of power. In my view it is but axiomatic to hold that if any Practice or Guidelines have evolved contrary to the statute that governs them, they would not have any efficacy. It has not been argued that NTPC would not fall within the sweep of Section 3(3)(a)(i) of the Nationalisation Act. Therefore, NTPC could have been allocated mining rights in any area including those enumerated in the 'Captive List'. It is true that the State Government should have a say in the manner in which natural resources vested in its ownership are distributed, but as observed in W.P. (C) 2852 of 2006 titled S.M.C. Power Generation Limited v. Union of India decided on April 5, 2006 the Petitioner has no legal standing to fight a proxy war in this regard. If CIL or the State Government is aggrieved by the allocation made to NTPC they can very well initiate appropriate legal action. Mr. Sakhdar has vehemently emphasised on the request of NTPC in its letter dated 1.3.2005 for inclusion of the subject coal block in the 'Captive List' and allocation under the captive route. If this argument is to be accepted I would have to ignore and gloss over the other NTPC request for allocation of the coal blocks under the Government dispensation route. It is my understanding that it is the latter route that has been traversed upon in the present case.

18. Judicial approach should not be only influenced only by semantics. If allocation in favor of NTPC can be predicated on Section 3(3)(a)(i) this provision should not be ignored merely because Section 3(3)(a)(iii) has been referred to in the impugned decision. The Petitioner obviously does not qualify for the grant of a mining lease under the Government dispensation route. The Petitioner can apply only against the provisions of Section 3(3)(a)(iii), and that too in respect of those coal blocks placed in a List intended solely for captive exploitation in

specified activities. It cannot demand to be equated with companies such as NTPC, until the entire policy pertaining to the mining of coal is changed.

19. It is for these reasons that I do not consider it appropriate to exercise the extraordinary powers reposed in this Court by Article 226 of the Constitution.

20. The writ petition is dismissed. However, there shall be no order as to costs.