

(2006) 04 DEL CK 0177

In the Delhi High Court

Case No : Writ Petition (C) No. 2852 of 2006 and CM 2587 of 2006

SMC Power Generation Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Coal Mines (Nationalisation) Act, 1973 — Section 3, 3(3)
Constitution of India, 1950 — Article 14, 16, 226, 311
Mineral Concession Rules, 1960 — Rule 22, 22(4)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 10, 5

Citation : (2007) 98 DRJ 601

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Arun Jaitley and Mukul Rohtagi, Ajay Sharma and Krishnendu Gupta, for the Appellant; P.P. Malhotra, ASG, Manisha Dhir and Preeti Dalal for Respondent Nos. 1 and 2, V.P. Singh Harish Malhotra Tanuj Khurana, Vishnu Mehra and Karan Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—This Petition seeks to set aside the appointment of Bhushan Steel and Strips Ltd. (Respondent No. 3) as the 'Leader' of various prospective allocates including the Petitioner for a captive mining dispensation in respect of the New Patrapara [Patrapara-Aunli-Machhkata part) block in the Mahanadi Coalfields Limited (MCL) area in pursuance of the provisions contained in Section 3(3)(a)(iii) of the Coal Mines (Nationalisation) Act, 1973 [Coal Mines Act in short] . This allocation has been made by the Government of India, Ministry of Coal (Respondent No. 1), in terms of its letter dated 13.1.2006. The said statutory provisions relevant for the present purposes prescribe that no person other than a company engaged in the production of iron and steel shall carry on coal mining operations in India in any form.

2. The allocation/allotment has been made in consonance with the relevant Guidelines which envisage, inter alia, as follows:

7. Allotment of Captive coal mining to consortium of group of companies:

(i) If requirement of coal by an applicant does not match with the reserves in a natural block, then clubbing of requirements may be resorted to and in case a number of applicant companies form a consortium of utilization of a block for their captive use, the same may be considered for allocation under a legally tenable arrangement.

(ii) More than one eligible and deserving companies will be allowed to do captive mining of coal by forming a joint venture coal mining company. The constituent applicant companies would hold equity in the joint venture company in proportion to their assessed requirement of coal and the coal produced would exclusively be consumed in their respective end use projects. Distribution of coal would be in proportion to their respective assessed requirements.

(iii) One or more companies (to be called leader companies) from amongst the selected, could be allowed to do mining of coal in one or more captive blocks and the other companies (to be called associate companies) to get coal from the captive block in proportion to their assessed requirements. The local Coal India subsidiary could facilitate this arrangement by taking a nominal service charge. Leader companies will deliver coal to associate companies at a transfer price to be determined by the Central Government.

3. Respondent No. 1 had addressed a letter dated 13.10.2005 to the Petitioner reminding the latter that it had been identified as one of the joint allocates for a captive coal block of Patrapara in the MCL area. Three options were then in contemplation, as is evident from paragraph 3 of that letter:

3. It is requested that the groups identified may:

i) jointly indicate the willingness to form a joint venture company for mining under Option I and the arrangement for equity and production sharing, rights and liabilities, penalties etc., in writing, or

ii) in case a joint venture company is not contemplated among the group members, then a draft agreement between the identified leader and the remaining members as associates detailing rights, liabilities, penalties, etc. including those for non-production (leaders) and non-off take (associates) under which the production sharing would take place at a transfer price to be determined by the Government block-wise Option II, or

iii) in case Option III is preferred, then a draft tripartite agreement between the leaders, associates and the local Coal India subsidiary as in para 2(ii) above such that no liability devolves on the local CIL subsidiary in any case including in cases of no or less production by the leaders or none or less offtake by the associates, and CIL subsidiary is fully indemnified against any liability. Role of CIL subsidiary will be limited to distribution of surplus coal for a commission.

4. This Letter was jointly replied to by the Petitioner as well as Respondent Nos.

6-11 in terms of Letter dated 3.11.2005 wherein it was stated that they had proposed a Joint Venture Company (JVC) with Respondent No. 3; that although they were optimistic that Respondent No. 3 would join them, in the event that this did not transpire, the Patrapara Coal Block should be divided into two sub blocks, one to meet their requirements and the other that of Respondent No. 3. Respondent No. 3 replied to the Letter of Respondent No. 1 dated 13.10.2005 by their Letter dated 14.11.2005. Mr. Jaitley, learned Senior Counsel for the Petitioner, has emphasised the statement contained in this letter recording that Respondent No. 3 would be willing to form part of the JVC provided its Managing Director would be the Leader appointed by the Ministry of Coal as the permanent Chairman-cum-Managing Director of the JVC and secondly that the JVC shall have one Representative on the Board from each of the signatory companies. Respondents No. 6-11 addressed another Letter dated 9.12.2005 to Respondent No. 1 stating, inter alia, that they represent seven out of eight allottees for captive coal block of Patrapara and that they were jointly entitled to approximately 53 per cent of the total allocation of coal and that they had agreed to form a JVC as suggested under Option-I. Eventually, by the impugned letter dated 13.1.2006 the Petitioner and Respondents 3 and 6-11 were informed of the decision of Respondent No. 1 to allot the new Patrapara Coal Block jointly to them as "associates under Option-III to meet their coal requirement of 10.86 mtpa, 1.04 mtpa, 1.23 mtpa, 0.83 mtpa, 3.80 mtpa, 1.20 mtpa, 2.20 mtpa and 1.8 mtpa respectively. Coal extracted from the Block was meant for captive consumption; the Mining Lease would be obtained in the name of Respondent No. 3, the leader company; production from the mine shall be shared amongst the Leader and Associates through MCL and they would have the first right over the production; coal production from the Captive Block would commence within thirty six months; Respondent No. 3 would submit a Bank Guarantee of Rs. 138.77 crores (equal to one year's Royalty Amount); Respondent No. 3 would submit a Mining Plan to take care of the requirements of the joint allocates for approval by the Central Government, and that the State Government, at the time of seeking previous approval for the grant of Mining Lease should submit a Draft of the Mining Lease containing the above relevant conditions for vetting by the Central Government.

5. Normally, Courts are loathe in interfering with a policy devised by the Government unless it is wholly reasonable in the Wednesbury sense, and/or the policy violates the equality principles articulated in Article 14 of the Constitution, or the policy infringes any of the Fundamental Rights. In *BALCO Employees Union (Regd.) Vs. Union of India and Others*, the Apex Court made the extracted 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 disinvestments 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.

6. In *State of Orissa v. Gopinath Dash JT* 2005 (10) 484 it has been opined by the Hon^{ble} Supreme Court that --

8. 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.

7. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, the Apex Court had cautioned that whenever "a writ petition is filed in the High Court challenging the award of a contract by a public authority or the state, the Court must be satisfied that there is some element of interest involved in entertaining such a petition. If, for example, the dispute is purely between the two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation". These observations are indeed pithy. In fairness to Mr. Jaitley, it must be recorded that he has clarified that the Petitioner does not challenge the power of the Government to formulate and pursue a particular Policy. Instead, the grievance of the Petitioner is that since seven out of eight of the concerned allocates had arrived at a consensus, it was unreasonable for the Central Government to overlook them and regardless appoint Respondent No. 3 as the Leader. However, in the first place it is not possible to assume that Respondents 6-11 share the views ventilated by the Petitioner. If there was commonality of mind amongst these different parties they should have jointly filed a Petition before this Court. Secondly, the allocation between these parties on the one hand and Respondent No. 3 on the other is almost in balance; the Petitioner has itself stated that Respondent No. 3 has 47 per cent of the allocation as against 53 per cent jointly for the seven other parties. In these circumstances it is not possible for the Court to arrive at the conclusion that in

appointing a party, entitled to almost half of the allocation singly, any unreasonableness in the Wednesbury sense is discernible. This is especially so since the impugned Letter takes pains to protect the entitlement of all the eight allocates. Infact, the impugned arrangement is imbued with pragmatism. Thirdly, it has not been contested that an extremely large investment is required for the Project and it is Respondent No. 3 who has the financial strength to do so. It has not been controverted that the requisite Bank Guarantee of Rs. 138.77 crores has already been provided by Respondent No. 3.

8. Section 3 of the Coal Mines Act postulates that the Coal Mines specified in the Schedule shall stand transferred to and shall vest absolutely in the Central Government. Section 5 empowers the Central Government to transfer its right, title and interest to a Government Company. Mr. Jaitley, learned Senior Counsel appearing for the Petitioner, has drawn attention to Section 5 of the Mines and Mineral (Development and Regulation) Act, 1957 (MMDR Act in short) which, inter alia, prescribes that a State Government can grant Coal Mining Leases only with the previous approval of the Central Government. He has further emphasised that by virtue of Section 10 of the MMDR Act an Application for a mining lease has to be made to the State Government concerned in the prescribed form and after payment of the prescribed fees; and that by virtue of Sub-section (3) thereof it is the State Government which may grant lease. It is his contention that the impugned Letter operates in actuality as a usurpation of the powers of the State Government. It is Mr. Jaitley's contention that the role of the Central Government is only Revisory in nature. He has further drawn attention to Rule 22 of the Mineral Concession Rules, 1960 which deal with applications to the State Government for the grant of mining leases. Rule 22(4) contemplates the forwarding of an application for the grant of mining lease by the State Government to the Central Government for its approval.

9. The Petitioner cannot be heard as a proxy for Respondent No. 4, being the Government of Orissa. There is also no reason to presume that the State Government has any objection to the impugned Decision. It is true that the mining lease has to be executed by the State Government and that it is to forward the 'Proposal' to the Central Government for its approval. At the highest, all that can be contended is that the Central Government has expressed its mind even before an application has been filed by the prospective allocate to the State Government concerned and before such an application has been forwarded to the Central Government for its consideration and approval. The effect of the course of action adopted by the Central Government is that the State Government has already been put to notice of the terms on which the Central Government would grant its approval, even in anticipation of the submission of an application for a mining lease. This would, in fact, expedite the decision in the matter in the event that all the Terms contained in the impugned Letter are also incorporated in the application for a mining lease submitted by the party concerned, which in this case is Respondent No. 3. These events have not created any rights in favor of the Petitioner on the strength of the MMDR Act

and/or the Coal Mines Act.

10. On facts, the decision conveyed in the impugned Letter does not disclose any arbitrariness or unreasonableness. The Petitioner is only one out of eight parties who has expressed any dissatisfaction with the impugned Order. As and when an application for the grant of a mining lease is filed with the State Government, it shall be free to take whatever decision it is advised and empowered to take. No interference under Article 226 of the Constitution of India, Therefore, is called for at this stage.

11. Petition is dismissed in these terms.