

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Writ Petition (Civil) No.62 of 2009**

Judgment reserved on: February 24, 2009

% Judgment delivered on: April 13, 2009

1. The Tata Power Company Limited
having its registered office at
'Bombay House'
24, Homi Mody Street
Mumbai – 400 001
(through Mr. Bomi J. Shroff
Company Secretary & Constituted Attorney)

2. Mr. Bomi J. Shroff
Company Secretary of Petitioner No.1
'Bombay House'
24, Homi Mody Street
Mumbai – 400 001.

...Petitioners

Through Mr. Jaideep Gupta, Sr. Advocate with Mr. Sitesh
Mukherjee, Mr. U. Hazarika, Mr. Sakya Singha
Chaudhari, Mr. Vishal Anand & Ms. Megha Sen,
Advs.

Versus

1. Union of India
Cabinet Secretariat
Rashtrapati Bhawan
New Delhi-110004
(through the Cabinet Secretary)

2. Ministry of Coal (Union of India)
Room No.321AI, A Wing
Shastri Bhawan
New Delhi-110001
(through the Secretary, Ministry of Coal)

3. Ministry of Power (Union of India)
Shram Shakti Bhavan
New Delhi-110001
(through Secretary, Ministry of Power)
4. Sasan Power Limited
“Chandralok” Building
36, Janpath
New Delhi-110001
(through Chairman/Managing Director)
5. Reliance Power Limited
Reliance Energy Centre
Santacruz (East)
Mumbai-400055
(through Chairman/Managing Director)
6. Government of Madhya Pradesh
State of Madhya Pradesh
Secretariat, Bhopal
(through Chief Secretary)
7. Power Finance Corporation
‘Urjanidhi’
1, Barakhamba Lane, Connaught Place
New Delhi-110001
(through Chairman/Managing Director)
8. Paschimanchal Vidyut Vitran Nigam Limited
PIME, Victoria Park
Meerut, Uttar Pradesh
(through Chairman/Managing Director)
9. Purvanchal Vidyut Vitran Nigam Limited
DLW Hydrel Colony, Bhikharipur
Varanasi-221004
(through Chairman/Managing Director)

10. Madhyanchal Vidyut Vitran Nigam Limited
AA, Gokhle Marg
Lucknow-226001
(through Chairman/Managing Director)
11. Dakshinanchal Vidyut Vitran Nigam Limited
Urja Bhawan, NH-2, Sikandra
Agra-282007, U.P.
(through Chairman/Managing Director)
12. Ajmer Vidyut Vitran Nigam Limited
City Power House, Hathi Bhata
Ajmer-305001
(through Chairman/Managing Director)
13. Jaipur Vidyut Vitran Nigam Limited
Joythy Nagar, Jaipur
(through Chairman/Managing Director)
14. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area
Jodhpur-342003
(through Chairman/Managing Director)
15. North Delhi Power Limited
Grid Sub Station Building
Hudsonlines, Kingsway Camp
Delhi-110009
(through Chairman/Managing Director)
16. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place
New Delhi-110019
(through Chairman/Managing Director)
17. BSES Yamuna Power Limited
Shakti Kiran Building, Karkardooma
Delhi-110092
(through Chairman/Managing Director)

18. Punjab State Electricity Board
The Mall, Patiala-147001
[through Member (Generation)]
19. Haryana Power Generation Corporation Limited
Shakti Bhavan, Sector-6, Panchkula-134109
(Through SE/PPM/Chairman)
20. M.P. Power Trading Company Limited
Shakti Bhavan, Vidyut Nagar, Jabalpur-482008
(through Chairman/Managing Director)
21. Uttarakhand Power Corporation Limited
Urja Bhavan, Kanwali Road, Dehradun-248001
(through Chairman/Managing Director) ...Respondents

Through Mr. P.P. Malhotra, ASG with Mr. Gaurav Duggal, Mr. Shanker Chhabra & Mr. Chetan Chawla, Advs. for Respondents No. 1 to 3.
Mr.Soli J. Sorabjee, Mr.Mukul Rohtagi and Mr.Rajiv Nayar, Sr. Advocates with Mr.Mahesh Agarwal, Mr.Rishi Agarwal, Mr.Sandeep Mittal, Mr.Nikhil Rohtagi, Mr.Akshay Ringe and Ms.Rohna Hameed, Advs. for Respondents 4 & 5.
Mr. R.N. Trivedi, Sr. Advocate with Mr.R.K. Joshi, Adv. for Respondent No.7.
Mr. B.P.Singh Dhakray with Mr. Shakti Singh Dhakray and Mr. D.K. Sharma, Advs. for Respondent No.11.
Mr. Jayant Bhushan, Sr. Advocate, with Mr. Santosh Kumar, Mr. R.S. Biswas and Mr. M. Chakraborty, Advs. for Respondent-15.
Mr. Manish Srivastava, Adv. for Respondent-16 & 17.
Ms. Madhu Tewatia with Ms. Sidhi Arora, Adv. for Respondent No.18.
Mr. Alishan Naqvee & Ms. Rupal Bhatia, Advs. for Respondent No.20.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MADAN B. LOKUR, J.

The issue raised for our consideration is whether we should entertain this writ petition filed by the Petitioner (Tata Power) challenging a decision taken by the Empowered Group of Ministers on 14th August, 2008. This issue arises in view of an allegation of suppression of a material fact, an alleged absence of locus standii of Tata Power to maintain the writ petition and its delay and laches in approaching this Court for relief during which period several important and significant developments have taken place. In our opinion, all these allegations are well founded and this is not an appropriate case warranting the exercise of our discretion under Article 226 of the Constitution. In our opinion, the writ petition deserves in limine dismissal.

2. On or about 31st January, 2006 the Government of India through the Ministry of Power issued a global invitation for expression of interest for selecting a developer to set up an Ultra Mega Power Project (UMPP) of 400 mega watts at Sasan, District Sidhi in Madhya Pradesh. The Government invited a Request for Qualification followed by a Request for Proposal from the pre-qualified bidders.

3. There is no dispute that the Petitioner (Tata Power) was fully qualified and it also submitted a bid for the Sasan UMPP. Similarly, there is no dispute that Respondent No.5 (Reliance Power) was also qualified and submitted its bid.

4. The tender documents suggested that captive coal mines would be allotted to the Sasan UMPP and being a part of the project, they were linked for the exclusive use of the Sasan UMPP. In this regard, the Ministry of Coal of the Government of India approved the Moher and Moher-Amlori Extension Coal Blocks as captive coal mines for the Sasan UMPP. This was in September, 2006. A little later, the Chhatrasal Coal Block was also approved for captive use by the Sasan UMPP in October, 2006. Both the allocation letters are of some

importance and will be adverted to a little later.

5. When the bids were opened, it was found that one Globleq Singapore Consortium (GSC) was the lowest bidder and, accordingly, on 28th December, 2006 a Letter of Intent was awarded to GSC for the Sasan UMPP. It transpires that it was later concluded by the Central Government that GSC did not possess the requisite qualifications as represented by it and so a letter was issued on 25th May, 2007 to all the qualified bidders to extend their bid validity for the Sasan UMPP. However, no reason was assigned for requiring the qualified bidders to extend the validity of their bids.

6. According to Tata Power, it did not extend its bid validity because it was known that the Letter of Intent had been awarded to GSC and in the absence of any specific reason requiring extension of the validity of the bid, Tata Power did not feel it necessary to comply with the request. On the other hand, Reliance Power extended its bid validity.

7. When the Central Government came to the conclusion that

GSC was not qualified, it cancelled the Letter of Intent but did not issue the tender again. However, the bidders who had extended the validity of their bid were asked to match the rates quoted by GSC. Of the bidders left in the field, only Reliance Power could match the bid of GSC and it was, therefore, selected as the successful bidder and on 30th July, 2007 a Letter of Intent was issued to Reliance Power. This was followed soon after with a Power Purchase Agreement being entered into between the Central Government and Reliance Power on 7th August, 2007.

8. It appears that around this time, Reliance Power entered into a Memorandum of Understanding with the Government of Madhya Pradesh for setting up a 4000 mega watts power plant at Chitrangi in the State of Madhya Pradesh. In respect of the Chitrangi project, the Government of Madhya Pradesh had apparently written to the Government of India to permit Reliance Power to use incremental coal produced from the coal blocks allotted to Sasan UMPP for the power plant to be set up at Chitrangi.

9. Acting on the request made by the State of Madhya Pradesh, an Empowered Group of Ministers met on 14th August, 2008 (that is,

about a year later) and recommended to the Ministry of Coal to permit the use of the incremental coal blocks allotted to Sasan UMPP by Reliance Power. This was, of course, subject to certain conditions stipulated by the Empowered Group of Ministers.

10. On these broad facts, the grievance made out by Tata Power is simply this: The recommendation made by the Empowered Group of Ministers on 14th August, 2008 completely changed the economics of the Sasan UMPP and, therefore, that decision should be quashed and set aside. The consequential relief prayed for by Tata Power is that Reliance Power should not be allowed to utilize the coal from the captive mines allocated for the Sasan UMPP or, if necessary, the entire project be retendered. According to Tata Power, since the economics of the project has completely changed, the entire tender process is vitiated.

11. The Union of India through the Ministry of Power and Ministry of Coal appeared on advance notice and filed a counter affidavit wherein it has broadly been submitted that Tata Power has suppressed material facts and documents inasmuch as all the bidders were specifically told by a letter dated 20th November, 2006 that as in

the case of the Chhatrasal coal block, the Central Government was entitled to approve the sale, delivery, transfer or disposal of coal from the Moher and Moher-Amlori Extension coal blocks for purposes other than captive mining for the Sasan UMPP. It was submitted that under these circumstances, there was no deviation of the tender conditions or any alteration therein to the advantage of any particular bidder or to the disadvantage of any particular bidder. The Union of India has also submitted that Tata Power is not a person aggrieved inasmuch as it had withdrawn from the tender process by not extending the validity of its bid. As such, it could not maintain the writ petition.

12. Reliance Power also entered appearance on advance notice and filed a counter affidavit in which, in addition to challenging the locus standi of Tata Power to maintain the writ petition, it was submitted that the writ petition suffers from delay and laches inasmuch as the tender process has come to an end after the execution of all the project documents. That apart, it was submitted that the Empowered Group of Ministers took a decision in August, 2008 while the writ petition was filed in January, 2009 after an unexplained gap of five months.

13. During the course of oral submissions, learned counsel for Tata Power denied the allegations. He also made it absolutely clear that his client was not challenging the award of Letter of Intent or the Power Purchase Agreement in favour of Reliance Power but the grievance of Tata Power was that the tender process was vitiated by the changes made by the Union of India, more particularly as a result of the decision taken by the Empowered Group of Ministers on 14th August, 2008.

14. At this stage, it is necessary to refer to the three documents adverted to above.

(i) Allocation letter dated 13th September, 2006 re the working of the Moher and Moher-Amlori Extension coal blocks. The relevant extract of this document reads as follows:

“Sir,

I am directed to refer to Secretary, Ministry of Power letter No. 2/29/2005-P & P dated 29.03.2006 & 18.04.2006 on the above subject and to convey the ‘in principle’ approval of the Central Government to the working of Moher (402MT) and Moher-Amlori Extension (198MT) coal blocks by the M/s Sasan Power Limited (SPL) (a wholly owned subsidiary of the Power Finance Corporation), which is a SPV created for development of Sasan Ultra Mega Power Project (UMPP). The developer of the UMPP would finally be decided by the Government on the basis of tariff based International Competitive Bidding. This allocation is being done subject to the conditions given

hereunder: -

i) The coal produced from the above mines would be exclusively used in the Sasan UMPP.

ii) to vi) xxx xxx xxx”

(ii) Allocation letter dated 20th October, 2006 re the working of the Chhatrasal coal block. The relevant extract of this document reads as follows:

“Sir,

I am directed to refer to Secretary, Ministry of Power D.O. letter No. 12/8/2006-P&P dated the 9th October, 2006 and to say that in suppression of this Ministry’s letter No. 13016/29/2003 CA-I dated 25th January, 2006 vide which Chhaatrasal coal block was allocated to NTPC, it has now been decided to cancel the allocation of this block no. NTPC in the public interest and convey ‘in principle’ approval of the Central Government to the working of Chhaatrasal coal block by M/s. Sasan Power Limited (SPL) (a wholly subsidiary of the Power Finance Corporation). The developer of the UMPP would finally be decided by the Government on the basis of tariff based International Competitive Bidding. This allocation is being done subject to the conditions given hereunder: -

i) The coal produced from the above mines would be exclusively used in the Sasan UMPP.

ii) to xi) xxx xxx xxx

(xii) No coal shall be sold, delivered, transferred or disposed of except with the previous approval of the Central Government.”

(iii) Letter dated 20th November, 2006 sent by the Ministry of Coal to the Power Finance Corporation (special purpose vehicle created for the Sasan UMPP). This letter was forwarded by e-mail to all the pre-qualified bidders including Tata Power and Reliance Power. The relevant extract of this letter reads as follows:

“Sir,

I am directed to refer to Sasan Powers Limited’s letter No. 03:07:UMPP:SASAN:17 dated 17.11.2006 and this Ministry’s letter of even number dated the 13.09.2006 and 26.10.2006 regarding allocation of Moher, Moher-Amlori Extension and Chhatrasal coal blocks for Sasan Ultra Mega Power Project and to say that in the allocation letter for Chhatrasal coal block in item (ix) of the terms and conditions, rule for royalty @ Rs.213 per tonne was inadvertently mentioned for the purpose of bank guarantee.

2. xxx xxx xxx

3. It is also clarified that condition of bank guarantee as well as all other conditions mentioned in the allocation letter of Chhatrasal block will also apply to all the other blocks allocated for Sasan UMPP.”

15. Significantly, and this is what is agitated by the learned Additional Solicitor General and learned counsel appearing for Reliance Power, there is no mention in the writ petition of the fact that all the bidders were informed and were aware that the terms and conditions of

the allocation letter of the Chhatrasal coal block would be applicable to the other coal blocks allocated for the Sasan UMPP. A particular (and obvious) reference was made to condition No. (xii) in the allocation letter dated 20th October, 2006 read with paragraph 3 of the letter dated 20th November, 2006. It was also submitted that receipt of the letter dated 20th November, 2006 through e-mail was not denied by Tata Power.

16. However, in a rather long winded explanation given in the rejoinder affidavit, Tata Power explains that it was proceeding on the basis (in the writ petition) that condition (i) in the allocation letters for the Moher and Moher-Amlori Extension coal blocks and the Chhatrasal coal block, unequivocally states that the coal from these blocks was for captive use exclusively for the Sasan UMPP, thereby implying that any benefit arising out of coal obtained from these coal blocks could be utilized only in the Sasan UMPP. Significantly, Tata Power does not deny the fact that in terms of the letter dated 20th November, 2006 the Central Government could permit diversion of incremental coal for use other than for captive use of the Sasan UMPP. Undeniably, this fact has not been mentioned in the writ petition or any of the annexures thereto.

17. The failure of Tata Power to mention the above fact in the writ petition acquires greater significance in view of what is stated in its rejoinder affidavit to the effect that it was known to all concerned that the estimated reserves of the three allocated captive coal blocks could be in excess of the requirement of the Sasan UMPP for the period of the agreement. This averment in the rejoinder affidavit, read in conjunction with the right reserved by the Central Government for diverting the incremental coal, clearly suggests that Tata Power ought to have been alive to the fact that if necessary, the Central Government could exercise the power that it had reserved to itself for diverting the incremental coal.

18. In our opinion, this fact is an extremely important and relevant fact that ought to have been disclosed by Tata Power because it explains the jurisdictional or foundational basis on which the Empowered Group of Ministers took its decision on 14th August, 2008. Were this fact not in existence, it could have been argued that the decision taken by the Empowered Group of Ministers was without any basis or was an off the cuff decision. However, with the reservation being there, such an allegation cannot be made in respect of the decision taken by the Empowered Group of Ministers on 14th August, 2008. It is for this

reason that we are of the view that it was imperative for Tata Power to have disclosed the fact that through the letter dated 20th November, 2006 the Central Government had reserved unto itself the right to divert incremental coal mined from the Moher and Moher-Amlori Extension coal blocks and the Chhatrasal coal block away from the Sasan UMPP.

19. It is another matter altogether that Tata Power may have proceeded on the basis that the Central Government was bound by its representation that the incremental coal could not be used for any project other than the Sasan UMPP. This would have been a possible understanding were the letter dated 20th November, 2006 not in existence; but since that letter is very much in existence and was very much in the knowledge of Tata Power, it could not have proceeded on the basis that it did, as stated in its rejoinder affidavit, except at its own peril. In view of this, we have no option but to hold that Tata Power has not come to the Court with a full and complete disclosure of relevant and material facts.

20. Our attention has been drawn to *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar & Others, (2004) 7 SCC 166* wherein the

effect of suppression of a material fact has been stated in paragraph 13 of the Report:

“As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court whatever view the court may have taken.”

21. Similarly, in *Poorvanchal Caterers & Anr. v. Indian Railway Catering & Tourism Corporation Ltd.*, 127 (2006) DLT 41 (DB), a Division Bench of this Court observed in paragraph 23 of the Report that it is well settled that since the writ jurisdiction is a discretionary jurisdiction, a writ petition is liable to be dismissed if the petitioner does not come to the Court with clean hands.

22. The effect of suppression of a relevant fact was also considered by another Division Bench of this Court in *M/s Hillcrest Realty Sdn. Bhd. v. M/s Hotel Queen Road Pvt. Ltd.*, MANU/D0023/2009 wherein it was observed in paragraph 34 of the decision that a litigant approaching a Court must disclose all relevant

facts and documents, for the failure to do so amounts to playing a fraud on the Court and the opposing party. It is of no consequence which way the facts or the documents may impact – they are required to be disclosed if they are likely to affect the decision of the Court one way or the other.

23. Finally, in *The King v. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington, 1917 [1] KB 486*, it was observed on page 505 of the Report (after referring to *Dalglish v. Jarvie, 2 Mac. & G. 231, 238*) that:

“That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practiced on the Court, the Court ought not to go into the merits of the case, but simply say “We will not listen to your application because of what you have done.”

A little later on page 506 of the Report, it is stated that:

“If you make a statement which is false or conceal something which is relevant from the Court, the Court will discharge the order and say “You can come again if you like, but we will discharge this order, and we will apply the general rule of the Court to applications like this.” There are many cases in which the same principle would apply. Then it is said “That is so unfair; you are depriving us of our right to a prohibition on

the ground of concealment or misstatement in the affidavit.” The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the Court.”

It is true that this case pertains to the grant of an injunction and a writ of prohibition but we are of the view that the principles equally apply to the writ jurisdiction inherent in the superior Courts in India, the principle being applicable not only through judgments of our Supreme Court but also by at least two Division Benches of this Court.

24. As we have held above, in our opinion, the contents of the letter dated 20th November, 2006 were material one way or the other and, therefore, suppression of that letter falls foul of the law laid down by the Supreme Court and other courts. The existence of the fact that incremental coal could be diverted clearly has a significant impact on the merits of the case and since this relevant fact has been concealed or at least not brought out, we can certainly decline to entertain this writ petition on the ground that there has been a suppression of a material fact.

25. Under the circumstances, we decline to entertain this writ

petition on the ground of suppression of a material and relevant fact.

26. The next submission that we are required to deal with is the locus standi of Tata Power to maintain this writ petition. This submission arises from the fact that Tata Power did not extend its bid validity when asked to do so. Effectively, therefore, it was not even a participant in the bidding process.

27. Learned counsel for Tata Power relied upon ***Ramana Dayaram Shetty v. International Airport Authority of India & Others, (1979) 3 SCC 489*** to contend that a person who is not a bidder can nevertheless challenge the award of a contract in favour of another party. A reading of paragraph 34 of the Report, which is relied upon by learned counsel, shows that both the appellant in that case as well as respondent No.4 did not meet the eligibility criterion. However, respondent No.1 therein accepted the tender of respondent No.4. It was in that context that the Supreme Court held that the appellant could challenge the acceptance of the tender submitted by respondent No.4 since the action of respondent No.1 therein was clearly discriminatory and arbitrary because it excluded other persons similarly situate from

tendering for the contract.

28. Similarly, in *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Others*, (1999) 1 SCC 492, both Raunaq International as well as I.V.R. Construction were ineligible to bid but their bids were considered for awarding the contract. I.V.R. Construction challenged the award of the contract to Raunaq International on the ground that it did not fulfill the eligibility criterion but, as the Supreme Court noted, even I.V.R. Construction did not fulfill the eligibility requirements and nevertheless its bid was entertained. Therefore, I.V.R. construction could have no real grievance.

29. In our opinion, none of these decisions are apposite. In *Ramana Dayaram Shetty*, the bid of one ineligible person was entertained while that of another ineligible person was not entertained. The Supreme Court held this to be discriminatory and arbitrary. In *Raunaq International*, the bid of both ineligible persons was entertained. In the writ petition that we are concerned with, there is no question about either Tata Power being ineligible or Reliance Power being ineligible. Admittedly, both are eligible and their bids were

entertained and neither one of them has made a grievance in this regard. That apart, the two decisions referred to above show that as long as the playing field remains level for all the bidders or putative bidders, no one can make an allegation of discrimination or arbitrariness.

30. In so far as we are concerned, the situation for Tata Power is not at all a happy one because during the tendering process it opted out of the race by not extending the validity of its bid. We are not concerned with the reasons why Tata Power opted out of the race – the reason may be good, bad or indifferent - but the fact remains that Tata Power did not run the full course. By not having done so, it signaled its intention not to complete the race and, therefore, it is hardly of any relevance, at least in so far as Tata Power is concerned, who wins the race. It is for this reason that learned counsel for Tata Power stated that he was not challenging the award of the contract to Reliance Power but his client was nevertheless aggrieved by the change brought about by virtue of the decision taken by the Empowered Group of Ministers on 14th August, 2008. However, as we have noted above, this decision was taken after the Letter of Intent was awarded to Reliance Power on 30th July, 2007 and the Power Purchase Agreement was entered into between

the Central Government and Reliance Power on 7th August, 2007 after the race was over. Consequently, the rules of the race did not change while the race was on.

31. It might have been a different matter if the Empowered Group of Ministers had taken its decision before the award of the Letter of Intent or before the Power Purchase Agreement was entered into. However, since that has not happened, we need not dwell on that aspect of the matter. The fact is that the Empowered Group of Ministers took a decision well after Tata Power opted out of the race and well after the Letter of Intent was awarded to Reliance Power and the Power Purchase Agreement was entered into between the Central Government and Reliance Power. Whether the Empowered Group of Ministers thereafter took the decision or not would have no bearing after the race was over or in any case it was irrespective of who the participants were. On the facts before us, we have no doubt that Tata Power cannot be described as a person aggrieved and, therefore, does not have any locus standii to maintain the writ petition.

32. The final submission relating to delay and laches was made

before us by learned counsel for Reliance Power. The submission was that the writ petition should not be entertained because the Empowered Group of Ministers took a decision on 14th August, 2008 while the writ petition was filed in early January, 2009 after an unexplained delay of about five months. By and large, it is not as if delay in every case can be described as unreasonable or fatal to the interests of a petitioner. The facts of each case have to be taken into consideration. [See for example *Indian Iron & Steel Co. Ltd. v. Prahlad Singh, (2001) 1 SCC 424*]. Therefore, we need to ascertain the events that transpired after 14th August, 2008 and whether they are sufficient to non-suit Tata Power on the grounds of delay.

33. In this regard, we have been taken through the affidavit filed by Reliance Power in which it is stated, inter alia, that a supplemental Power Purchase Agreement was signed by Reliance Power with several parties on 15th October, 2008 as a result of which the commissioning of the Sasan UMPP has been substantially advanced by three years (from 2016 to 2013). Additionally, a large number of clearances and approvals have been obtained from various authorities such as an ‘in principle’ forest clearance has been obtained on 3rd December, 2008

from the Ministry of Environment & Forests of the Government of India; a defence clearance has been obtained on 16th December, 2008 from the Ministry of Defence of the Government of India; an environmental clearance has been obtained on 10th December, 2008 for the Moher and Moher-Amlori Extension coal blocks from the Ministry of Environment & Forests of the Government of India. It is stated that Sasan Power Limited, the project company has already spent Rs.900 crores towards land and project related expenditure upto December, 2008. Reliance Power is said to have received sanction of loans of over Rs.11,500 crores by banks and financial institutions from October, 2008 onwards. None of these facts have been substantially denied by Tata Power – the denials being rather perfunctory.

34. In this background and context, the issue of delay and laches assumes tremendous significance. Reliance Power has obviously made substantial progress in the implementation of the Sasan UMPP and to interdict it now would certainly not be in anybody's interest. In fact, altering one's position by incurring substantial expenditure was one of the factors (coupled with delay) that prompted the Supreme Court to hold against the writ petitioner in *State of Madhya Pradesh v. Nandlal*

Jaiswal, (1986) 4 SCC 566 and in *Ramana Dayaram Shetty*. In our opinion, the law laid down by these two decisions is fully applicable to the facts of the present case. Even if the decision of the Empowered Group of Ministers is unconstitutional, the decisions of the Supreme Court prohibit us from interfering, particularly since we are of the opinion that the demand of justice is not so compelling as to necessitate our interdiction.

35. In *Raunaq International*, the Supreme Court has observed in paragraph 11 of the Report that when 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 public interest involved in entertaining such a petition. By way of an example, the Supreme Court noted that if the dispute is purely between two tenderers, the Court should be very careful to see if there is any element of public interest involved in the litigation. Keeping the dictum laid down by the Supreme Court in mind, it does appear to us that there is no public interest subserved in quashing the decision taken by the Empowered Group of Ministers on 14th August, 2008. The dispute really appears to be a commercial one between two tenderers, that is, Tata

Power and Reliance Power and that being so, it will not be proper for us to entertain the writ petition which is devoid of any public interest element.

36. Moreover, we have no reason to come to the conclusion that the Empowered Group of Ministers did not act in public interest. There is nothing on record to suggest that. On the contrary, it appears that the Empowered Group of Ministers acted on a representation having been made by the Government of Madhya Pradesh and there is nothing to suggest that the Government of Madhya Pradesh did not have the public interest in mind. On these facts, we decline to exercise our discretion in favour of Tata Power for entertaining this writ petition, partly in view of the delay and laches and partly in view of the fact that this writ petition does not attract any public interest element.

37. Consequently, we are in agreement with the learned Additional Solicitor General as well as learned counsel for Reliance Power that the writ petition filed by Tata Power ought not to be entertained because of suppression of a material fact, an absence of locus standi of Tata Power to maintain the writ petition and on account of the time taken for

approaching this Court for relief during which period a large number of important developments have taken place which lead us to conclude that the writ petition should not be entertained on account of delay and laches on the part of Tata Power in approaching this Court. There is also no warrant for otherwise exercising our discretion in favour of Tata Power.

38. The writ petition is dismissed. Since no notice had been issued to any of the parties and all of them had appeared on an advance copy of the writ petition having been served on them, we are not inclined to award any costs.

MADAN B. LOKUR, J

April 13, 2009
ncg

SIDDHARTH MRIDUL, J

Certified that the corrected copy of the judgment has been transmitted in the main Server.