

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: October 19, 2010

Decision on: October 28, 2010

W.P.(C) No. 13007 of 2009 & CM No. 13961 of 2009 (for stay)

ASHAPURA MINECHEM LTD. Petitioner
Through: Mr. Jayant Bhushan, Senior Advocate
with Mr. Akshay Ringe and
Mr. Nikhil Rohatgi, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. A.S. Chandhiok, Additional
Solicitor General with Ms. Subhangi Tuli and
Mr. Sandeep Bajaj, Advocates for R-1 & R-2.
Mr. Rajiv Nayar, Senior Advocate with Mr. Syed
Naqvi, Mr. K.N. Panindra, Mrs. Linette and
Mr. N.K. Sharma, Advocates for R-3.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
28.10.2010

1. The challenge in this writ petition under Article 226 of the Constitution is, *inter alia*, to a Notification dated 12th October 2006 issued by the State of Maharashtra through the Department of Industries, Energy & Labour, Mumbai under Section 11(2) of the Mines and Minerals (Development and Regulation) Act, 1957 ('MMDR Act') inviting applications for grant of mining lease ('ML') covering land admeasuring 91.58 hectares situated at Khasra Nos. 4 to 7 and 31 to 34 Mauze Gudeghar, Taluka Mandangad, District Ratnagiri, Maharashtra. Challenge is also laid to an order dated 9th

July 2008 passed by the State of Maharashtra through the Minister, Industries and Mining, recommending the grant of ML for bauxite ore over the said area to Infrastructure Logistics Private Ltd., Goa ('ILPL') (Respondent No.3 herein) and to the order dated 7th July 2009 passed by the Central Government acting as the Mines Tribunal under Section 30 of the MMDR Act dismissing the Petitioner's Revision Application challenging the order dated 9th July 2008.

Facts

2. The Petitioner Ashapura Minechem Ltd. ('APML') is a company having its registered office in Mumbai and is engaged in the business of mining, processing and export of industrial minerals for over three decades. It claims to be a well known mine owner, processor and exporter of bentonite and bauxite.

3. On 20th October 2003, APML applied for the grant of a ML over the aforementioned area. It was processed by the District Mining Officer, District Ratnagiri and forwarded to the Secretary, Industries, Energy & Labour Section, Government of Maharashtra on 4th February 2004 recommending the grant of ML. It is stated that under a Government Resolution dated 21st July 1999, the Government of Maharashtra had stipulated a maximum time period of 20 weeks for disposing of an application made for the grant of an ML. The said time-limit was not adhered to. APML also relies upon Rule 63A of the Mineral Concession Rules, 1960 ('MCR'), inserted by an amendment effective from 11th January 2002, which requires the State Government to dispose of the application for

ML within 12 months from the date of receipt of the said application. APML points out that even this time-limit was not adhered to.

4. On 12th October 2006, the impugned Notification was issued under Sections 11(2) and 11(4) MMDR Act notifying mineral bearing areas in several districts in Maharashtra, including Ratnagiri District, for grant of prospecting licences and MLs. It appears that at that stage, APML decided not to challenge the said Notification. By a letter dated 13th September 2007, Respondent No.2 informed APML that pursuant to the Notification dated 12th October 2006 and the applications received thereunder, a hearing would be held on 16th October 2007 in respect of all those applications as well as APML's application. APML appeared before the Respondent No.2, made its oral submissions and also filed its written submissions. It is stated that both at the time of oral submissions as well as in the written submissions, APML objected to the issuance of the Notification dated 12th October 2006 which was issued after a gap of almost three years from the date of filing of the APML's application and without first disposing it of in terms of Rule 63A MCR. In its written submissions filed before the Respondent No.2, APML mentioned its proposal to set up an alumina refinery and an aluminum smelter plant at Ratnagiri district based on bauxite deposits of Ratnagiri and Sindhudurg District and involving an investment of Rs.4,000 crores.

5. The impugned order dated 9th July 2008 was passed by the Minister for Industries & Mines of the Government of Maharashtra recommending the grant of ML in favour of ILPL. In the said order, it was noticed that pursuant

to the Notification dated 12th October 2006, 18 applicants including APML appeared at the hearing. The details of each of the applicants were noted. Since the area had been notified under Section 11(2) of the MMDR Act, all the applications received during the period specified in the Notification dated 12th October 2006 and the applications received prior thereto were deemed to have been received on the same day. A note was made of the criteria stipulated under Section 11(3) of the MMDR Act as well as Rule 35 of the MCR concerning end-use of the mineral. Thereafter it was observed as under:

“As such the above criteria laid down in the Act and Rules is mandatory on the State Government. However, it may be borne in mind that matters referred to in the said criteria are Guiding Principles to select a proper eligible applicant who is well equipped in terms of experience, technical expertise or hired it and do have enough financial resource to carry out the mining activities viz. RP/PL/ML scientifically in the interest of Conservation and Development of mineral wealth. This naturally follows that the said criteria doesn't discriminate among the aspirant Applicants on account of experience/Financial resources/technical expertise and has not laid down the restrictive provisions that the Applicants having enough experience and requisite financial resources shall not be preferred against the Applicants having experience/financial resources. Thus while selecting Applicant/s to be recommended for grant of mineral concession the State Government has to ensure that such selected Applicant/s must be eligible to carry out the mining activities say RP/PL/ML successfully. The Constitution of India has also adopted the Principle of Welfare State and accordingly it is the endeavour of the State to protect the interest of eligible Small/Medium/Major interpreters with a

view to achieve harmony and to extend the fruits of economic growth to each category.

In view of foregoing and strictly keeping within the ambit of prevailing Rules and Regulation it is inferred that the State is empowered to adopt either one of the following criteria to select the eligible Applicant/Applicants to be recommend for grant of mineral concession (i.e. RP/PL/ML) in the interest of conservation and development of mineral wealth and to implement the Principal of Welfare State:--

- (i) those having special knowledge of or experience in RP/PL/ML as the case may be and do have technical expertise and sound financial position.
- (ii) those who are otherwise eligible for selection and have established mineral based industry or intends to set-up mineral based industry with sizable investment but don't have captive source of mineral.
- (iii) those who have hired the technical expertise or intends to hire it and do have enough financial resources to carry out mining activities. i.e. RP/PL/ML and will utilize the mineral for sale, in raw form or after processing/benefication to supply it to indigenous industries or exports.”

6. The State Government had formulated a State Mineral Policy, 1999 based on the Revised Mineral Policy of the Government of India which *inter alia* promoted private sector participation in as many ventures as possible with due regard to conservation of minerals, safety of labour and mines and environmental protection. Thereafter a reference was made to the inter-se merit chart giving the comparative assessment of the applicants. APML and ILPL were included among nine applicants who were found to have the

experience of mining, adequate technical expertise and sound financial position to carry out mining activities. Thereafter while choosing from among these nine applicants, it was observed that the area had already been prospected and the available reserves of bauxite ore was only 0.32 Million Tonnes ('MT'). In view of this, the Government of Maharashtra had to take a balanced view to make the said reserves available for captive use in the form of processing Unit/Value addition Plant. On this criteria, the nine applicants shortlisted (including APML and ILPL) got priority over the nine who were not found suitable as they lacked experience of mining, best technical expertise and adequate financial resources. Of these nine applicants who were shortlisted, it was noticed that five of them, including APML had already been granted mineral concessions in the past. As regards these five applicants, including APML, it was then observed: "Thus they have been considered to the extent possible taking into consideration their merits." This left only four applicants and on an assessment of their 'inter-se merit', it was concluded that ILPL was the most eligible applicant to be recommended for the grant of ML.

7. The inter-se merit chart enclosed with the order showed that as far as APML was concerned, under the column 'Special knowledge or experience possessed by the applicant', it was noted "Holding mining leases for Bauxite in the State Mining & Export of Minerals". The financial resources of APML were noted as Rs. 53.68 crores as on 31st March 2002. The proposed investment was noted as Rs. 30 lakhs for mining and Rs. 4232 crores for the proposed alumina refinery. As regards the reasons for rejection it was stated

as under:

“Taking into consideration the merits of Applicant the State Govt. has already granted them mineral concessions over 4.25 Sq. Kms so far. Thus their case has already been considered to the extent possible. The State has to cater the needs of other eligible applicants. Hence their Application over this area is rejected.”

8. As regards ILPL, under the column “Special knowledge or experience possessed by the Applicant”, the remark was “Nil”. The financial resources referred to as “Solvency certificate of Rs. 10 crores”. The proposed investment was Rs. 100 crores for development and use of minerals. The reason for acceptance of ILPL’s application was stated as under:

“Applicant is eligible in all respect as per criteria laid down in Rules and Regulations. They do have vast experience of mining and best technical expertise is available. Their financial position is sound. Applicant is committed to undertake value addition project. Hence it is decided to recommend his case for grant of M.L. over the area applied by him.”

9. APML filed a revision application before the Mines Tribunal challenging the said order dated 9th July 2008 of the Minister of Mines, Government of Maharashtra. In rejoinder to the replies filed by Respondents 2 and 3 therein, the Petitioner placed on record its audited financial results.

10. It is stated that in the meanwhile on 3rd February 2009, APML entered into a Memorandum of Understanding (‘MoU’) with the Government of Maharashtra for setting up the proposed alumina refinery, aluminum smelter and captive power plant. Following this, on 12th March 2009, APML wrote

to the Chief Minister of Respondent No.2 stating that preference ought to be given to it for grant of ML.

11. By the impugned order dated 7th July 2009, the Mines Tribunal dismissed the revision application filed by APML. The Mines Tribunal, concurred with the State Government that since APML had already been granted ML to an extent of 4.25 sq.km (425 hectares) and Hindalco Industries Ltd. (Revision Applicant No. 2 therein) had already been granted ML over an area of 14 sq.km. (1400 hectares), they could, as a matter of policy, be excluded from consideration. It was observed that the mineral reserves of the States were to be equitably distributed and that in terms of Section 11(3) (e) MMDR Act, the State had considered other matters that were prescribed in the Constitution of India and broad policy and guidelines of the State. The reasons given by Respondent No. 2 for making the allotment in favour of ILPL were found to be satisfactory.

Submissions of Counsel

12. Mr. Jayant Bhushan, learned Senior counsel appearing for APML submitted that the right of APML to have its application considered on merits, without being clubbed with later applicants, could not have been defeated by the State Government by deliberately delaying the taking of a decision thereon. It was submitted that although no consequence is spelt out under Rule 63A for the State Government not disposing of an application for ML within 12 months, whatever right the applicant might have had could not be rendered nugatory as was done in the instant case by the State Government by issuing the Notification dated 12th October 2006 under

Section 11(2) inviting other applications. As regards the challenge to the Notification dated 12th October 2006, it was submitted that although no such challenge was raised in the revision application filed before the Central Government, in its written submissions before the State Government, APML did question the issuance of such Notification without APML's application being disposed of by the State Government. Thirdly, it was submitted that the 'Inter-Se-Merit Chart' itself shows that in every respect APML was a far better candidate than ILPL. A collective reading of Section 11(3) MMDR Act with Rule 35 MCR would show that consistent with the National Mineral Development Policy, preference had to be given to a party which is going to captively use the bauxite ore which would be mined. As far as APML is concerned, the inter-se merit chart itself showed that it proposed to use the bauxite ore captively for its alumina refinery plant, the investment for which was in the range of Rs. 4,000 crores. On the other hand, ILPL was going to use the bauxite ore only for the purposes of further value addition before export. Reliance was placed on the judgment of the Supreme Court in *Sandur Manganese v. State of Karnataka 2010 (9) SCALE 492* to urge that the criteria on which the application of APML was rejected had to necessarily be found within the four corners of the MMDR Act and MCR. Reasons extraneous to the MMDR Act and MCR could not be used to reject an application. It is submitted that the so-called social welfare approach adopted in the order dated 9th July 2008 passed by the Minister of Industries and Mining of the Respondent No.2 was not relevant. It was further submitted that the fact that the area of the reserve was not adequate for the needs of the APML was also not a relevant criterion. As regards the APML already having 4.25 sq.km. of mining area allotted to it, it is pointed out that

under Section 6 of the MMDR Act, the maximum area that can be allocated was 10 sq.km. The Central Government's order of 7th July 2009 approving the order of the State Government was also a non-speaking one.

13. Appearing for ILPL, Mr. Rajiv Nayar learned Senior counsel first pointed out that the challenge by APML to the Notification dated 12th October 2006 issued by the Government of Maharashtra is not only barred by laches since it has been raised for the first time by this writ petition but also because this Court lacks territorial jurisdiction to examine a challenge to the said Notification issued by the Government of Maharashtra for applicability in the State of Maharashtra. It is submitted that APML not only participated in the proceedings pursuant to the Notification dated 12th October 2006 without protest, but also in the revision application filed before the Central Government did not challenge the said Notification. Therefore, APML should be deemed to have waived its challenge to the said Notification. It is submitted that the order dated 9th July 2008 passed by the Minister of Industries and Mining of Respondent No. 2 was a detailed and reasoned one giving cogent reasons as to why ILPL was the best candidate for the grant of ML. The said order could not be said to be perverse or arbitrary or without reasons. There was an element of discretion available with the State Government even in terms of Section 11(3) MMDR Act and, in this case, it was rightly exercised. There was nothing arbitrary in adopting a policy to encourage small entrepreneurs and not to grant ML to a party that has already been granted mineral concessions in the past. In any event, the use to which the bauxite ore was proposed to be put in terms of APML's application was for export and was not for captive use.

14. Appearing for Respondent Nos. 1 and 2, Mr. A.S. Chandhiok learned Additional Solicitor General ('ASG'), pointed out that APML had already been granted ML over an area of 4.25 sq.km. He referred to the counter affidavits filed by the Respondent No.2 both before the Mines Tribunal and in this Court, which categorically stated that APML had failed to even submit a mining plan for utilisation of the MLs already granted to it. In the circumstances, to repeatedly grant MLs to APML over different areas was not found to be desirable. Even APML's consistent stand in its application was that it intended to export the bauxite ore. The proposal to set up an alumina plant came much later and the MoU with the Respondent No.2 was also entered only on 3rd February 2009. The actual needs of APML were in the region of 60 to 70 MT of bauxite whereas the available reserves in the area in question were only 0.32 MT. Consequently, this quantity was hardly sufficient for APML's needs. It is pointed out that unlike certain other reasons where the failure to dispose of an application for grant of ML might result in a deemed grant, there is no such consequence reason spelt out under Rule 63 A MCR for the failure to dispose of an application for grant of ML within twelve months. It is pointed out that the judgment in *Sandur Manganese* concerned Section 11(4) and Section 11(3) MMDR Act. It is submitted that as long as the decision-making process was perfectly legal, this Court under Article 226 of the Constitution cannot interfere with the decision ultimately taken by the State Government.

Challenge to Notification dated 12th October 2006

15. The first issue is the challenge to the validity of the Notification dated 12th October 2006 issued by the State Government inviting applications for

grant of MLs over the area in question. There is no satisfactory answer to the objections raised by the Respondents that the said challenge is a belated one and secondly, that this Court lacks the territorial jurisdiction to entertain such challenge.

16. That apart, the facts narrated show that APML might have been making representations against the Notification dated 12th October 2006 but never really came forward to challenge the said Notification. The mere making of representations against a notification cannot explain the laches in raising a challenge to such notification. In the instant case, APML neither challenged the Notification dated 12th October 2006 which obviously would deprive APML of any priority for consideration of its application nor questioned before any court the failure by the State Government to dispose of its pending application within twelve months as required by Rule 63A MCR. On the other hand, APML went ahead and participated in the proceedings pursuant to the Notification dated 12th October 2006. Consequently, APML must be deemed to have waived its right to challenge the Notification dated 12th October 2006 and the failure of the State Government to dispose of its pending application for grant of an ML within a period of twelve months from the date of receipt of the application, as required by Rule 63A MCR. In the circumstances, it is too late in the day for APML to raise a challenge to the Notification dated 12th October 2006 for the first time in this writ petition.

17. Even as regards the territorial jurisdiction, the Respondents are right that the impugned Notification dated 12th October 2006 is by the Government of

Maharashtra for applicability in the entire State of Maharashtra. It is difficult for this Court to appreciate how it has the territorial jurisdiction for the purposes of Article 226 of the Constitution, to entertain such a challenge in this writ petition.

Challenge to Order dated 9th July 2008

18. Once it is held that APML is precluded from raising any challenge to either the Notification dated 12th October 2006 or the failure of the Respondent No.2 to dispose of its application within 12 months under Rule 63A MCR, the only issue that remains is whether the impugned order dated 9th July 2008 passed by the Minister of Industries and Mining of the Respondent No. 2 deciding to allot the ML in question in favour of ILPL can be said to be valid.

19. This Court has carefully perused the judgment in ***Sandur Manganese***. The facts in that case were that a Notification was issued under Rule 59 MCR by the Government of Karnataka on 15th March 2003 inviting applications for MLs over the area in question. Prior to this Notification, Sandur Manganese and Iron Ores Ltd. ('Sandur') had already applied for grant of ML which had been rejected by the State Government. The revision petition filed by Sandur before the Central Government was allowed on 9th April 1999 and the matter was remanded to the State Government for disposal in accordance with the MMDR Act. On 26th/27th February 2002, Sandur got a letter from the Government of Karnataka that out of the area of 513.16 hectares applied for by it, only an extent of 256 hectares was available and it could choose either Block A (168 acres or 67 hectares) or

Block B (472 acres of 189 hectares). This was challenged by Sandur by filing a revision petition again before the Central Government. In the meanwhile, on 15th March 2003, the aforementioned Notification was issued under Rule 59 MCR. Pursuant thereto, Sandur again applied out of abundant caution and without prejudice to its rights for consideration of its earlier application dated 24th June 1993. On 29th July 2003, the Central Government allowed the revision petition of Sandur and again directed the Government of Karnataka to consider Sandur's application dated 24th June 1993 on merits. No order was passed by the Government of Karnataka pursuant to this. On the other hand, on 6th December 2004, the Government of Karnataka sought approval of the Central Government for grant of licences to two other applicants i.e. Jindal Vijayanagar Steels Ltd. ('Jindal') and Kalyani Steels Ltd. ('Kalyani') Sandur then filed a writ petition in the High Court challenging this decision. The writ petition was allowed by the learned Single Judge quashing the Notification dated 15th March 2003 as well as the MLs granted in favour of Jindal and Kalyani. In appeal, the Division Bench set aside the order of the learned Single Judge and upheld the validity of the Notification dated 15th March 2003. Thereafter Sandur approached the Supreme Court.

20. In the course of the narration of facts, the Supreme Court noticed that the hearing pursuant to the Notification dated 15th March 2003 was conducted by the Chief Minister. 21 applications were filed for grant of ML prior to the Notification and 90 applications were received after the Notification. Out of the total 111 applications, 85 applicants attended the hearing and 75 applicants gave their representations. In para 18, it was noticed that the

proceedings of the Chief Minister showed that “no clear reasons were given to show as to why Jindal and Kalyani were preferred over other applicants. There is also no plausible reason why the applications of the appellants herein were not considered favourably. A summary of the applications was prepared and at the end certain columns were left blank which the Chief Minister filled by hand and then signed the proceedings.”

21. In the present case, the detailed analysis of the comparative merits of the applicants is evident from the inter-se merit chart. In fact, the said chart gives the details column-wise of each applicant. It gives proper and cogent reasons why each applicant's case has been rejected and ILPL's case has been accepted. Even the order dated 9th July 2008 passed by the Minister gives the process of reasoning and the basis on which the conclusions were arrived at. This, in the considered view of this Court, is sufficient to distinguish the decision in *Sandur Manganese* in its applicability to the present case. While it was held in *Sandur Manganese* in para 28 that it was not open to the State Government to justify grant based on criteria that were *de hors* the MMDR Act and the MCR, in the instant case it cannot be held that the State Government has decided the issue on criteria which are *de hors* the MMDR Act and the MCR. While the question of captive consumption is certainly one such criterion spelt out under Section 11(3) read with Rule 35 MCR, given the extent of the available resources which is 0.32 MT, this criterion has to be weighed with other criteria, including the one applied by the State Government in the instant case i.e. the small entrepreneurs should be encouraged. It cannot be said that the decision of the State Government in the instant case is arbitrary or irrational or unreasonable. Also, a

reference is made in the order dated 9th July 2008 to the State Mineral Policy and, therefore, it is not as if a criterion was not known to the parties. The central government's order grant approval also cannot for the same reasons be faulted.

Conclusion

22. For all of the aforementioned reasons, this Court finds no grounds having been made out by the Petitioner for interference with the orders dated 9th July 2008 passed by Respondent No.2 and the order dated 7th July 2009 of the Mines Tribunal. There is no merit either to the challenge made to the Notification dated 12th October 2006.

23. The writ petition is accordingly dismissed with costs of Rs.15,000/- of which Rs. 5,000/- each will be paid by the Petitioner to Respondents 1, 2 and 3 within a period of four weeks from today. The application is dismissed.

S. MURALIDHAR, J

**OCTOBER 28, 2010
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