

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th April, 2012

+ **W.P.(C) No. 4489/2005**

% **KALINGA POWER CORPORATION LTD. Petitioner**

Through: Mr. C.S. Vaidyanathan, Sr. Adv. with
Mr. K.B. Rohtagi, Ms. Aparna
Rohtagi, Mr. Mahesh Kasana, Mr.
S.K. Dhingra & Mr. Anand Verma,
Advs.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Piyush Sanghi, Adv. for Mr.
A.S. Chandhiok, ASG for R-1.
Ms. Aishwarya Bhati with Gp. Capt.
Karan Singh Bhati, Advs. for R-5&6.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This petition impugns the letter dated 02.07.2003 of the Ministry of Coal, Government of India, de-allocating the "Utkal-A captive coal block for supply of coal to the proposed Duburi Thermal Power Station" of the petitioner. The petition also seeks to restrain the respondents from allotting 'the area in question' to anyone else including the respondent No.5 Mahanadi Coalfields Ltd. or to the respondent No.6 Coal India Ltd. (CIL). The petitioner also seeks mandamus directing the respondents to allow the petitioner to carry on the development and other activities necessary for the

project. Before the notice of this petition could be issued, Jindal Thermal Power Company Ltd. And Jindal Vijaynagar Steel Ltd. applied for impleadment averring that the 'coal mine in question' after de-allocation from the petitioner stood allotted to them and any decision in this petition would affect their rights. They were impleaded as respondents No.7&8. Notice of the petition was issued. Pleadings have been completed and the counsels have been heard. The counsel for the petitioner has also filed a synopsis of submissions.

2. The petitioner proposes to set up a 2x250 MW coal based thermal power plant at Duburi in Jajpur district of Orissa; the capacity of the power plant is proposed to be expanded by another 500 MW in the second phase. For meeting the coal requirement for the power plant, the Ministry of Coal, Government of India vide letter dated 10.08.1993 allotted the aforesaid Utkal-A Coal Block to the petitioner under the Scheme for Allotment of Captive Coal Mining Blocks to Power, Steel and Cement Sectors.

3. The letter dated 02.07.2003 impugned in this petition, while cancelling the aforesaid allotment in favour of the petitioner, records:

- (i) that the progress of the coal mining development project as well as the proposed captive thermal power station was

reviewed in the various meetings of the Screening Committee from time to time;

- (ii) that in the meeting on 03.04.1996, it was informed by the CIL that the petitioner had not made any progress with regard to the development of the captive block and even the exploration cost had not been paid to CIL; accordingly a decision was taken that unless the exploration cost was paid within thirty days, the offer for the captive mining block shall be liable for cancellation;
- (iii) that in the meeting held on 14.11.1996, the Director of the petitioner Company had informed that no steps for development of the captive mining block had been taken till then i.e. for three years, since the Power Purchase Agreement in respect of the proposed Duburi Thermal Power Station was under revision and further since the requisite approvals for the mining project had not been received till then;
- (iv) in the meeting of the Screening Committee held on 26-27.09.1997, it was noted that the petitioner inspite of several communications had not paid the exploration charges till then;

it was again decided that unless the exploration charges were paid within three months, the allotment will be cancelled;

- (v) that in the meeting of the Screening Committee held on 03.04.1998, it was observed that in the absence of a fixed time frame, the said block may be considered for other applicants; the representative of the petitioner present in the said meeting had also explained the problem being faced by the petitioner in implementing the power project inasmuch as the Government of Orissa had backed out of the MOU on purchase of power; the Screening Committee deferred the decision by three months;
- (vi) in the meeting of the Screening Committee held on 24.08.1998, the matter was again deferred;
- (vii) in the meeting of the Screening Committee held on 18/19.06.1999, it was again noticed that the petitioner had not paid the exploration charges till then and that the representative of the petitioner had informed that though the mining plan had been submitted by the petitioner but had been found to be based on inadequate geological data;

- (viii) that in the meeting of the Screening Committee on 06.03.2000, it was again noted that the petitioner had not paid the exploration cost till then; the representative of the petitioner however committed payment by 31.03.2000;
- (ix) in the meeting of the Screening Committee held on 31.05.2001, representative of the petitioner informed that the submission of the mining plan was delayed because the viability of the project was being determined, though the petitioner was confident of implementing the power project; the petitioner further represented that the financial closure would be achieved by December, 2001 and the power plant would come into operation in 2005;
- (x) that in the meeting of the Screening Committee held on 28.11.2001, it was informed by the representative of the petitioner that mega power projects were coming up in Orissa whose power would be cheaper than of the proposed plant of the petitioner; it was also informed that financial closure even of the power plant of the petitioner had not been achieved till then;

(xi) that in the meeting of the Screening Committee held on 26.05.2003, the representative of the petitioner informed that the commissioning of the power plant had been tentatively postponed till 2007 and the actual coming up of the plant would depend upon the petitioner obtaining the approvals for selling the power; the petitioner requested for being allowed to mine and sell coal pending the setting up of the power plant but which permission was refused, the allocation being for captive mining for specified end user.

The Screening Committee accordingly decided that since the very coming up of the power plant of the petitioner was uncertain and further since nine years had elapsed since the allocation of the captive block, the same be de-allocated.

Accordingly, the letter dated 02.07.2003 (supra) of de-allocation was sent to the petitioner.

4. The senior counsel for the petitioner has challenged the de-allocation on the ground of;

- (i) violation of principles of natural justice. It is contended that neither any notice nor any hearing was given to the petitioner before de-allocation;
- (ii) discrimination i.e. no such action has been taken against others similarly situated;
- (iii) that the principle of first come first served applied to coal also;
- (iv) that though by now all the clearances for setting up of the power project have been received but without the assurance of supply of coal, the petitioner is not in a position to set up the power plant; it is argued that the de-allocation has created a chicken and egg situation;
- (v) that the petitioner has already paid a sum of ₹3.8 crores for surveys;
- (vi) that the petitioner has already made investment of ₹10/- crores in the project on the assurance of supply of coal.

5. The respondent No.1 Ministry of Coal in its counter affidavit has *inter alia* stated that, the coal mines in the country were nationalized in 1973 except the leases held by the Iron and Steel producers for use of coal

in producing iron and steel; that in June, 1993 the Coal Mines (Nationalization) Act, 1973 was amended whereby a company engaged in power generation was also permitted to do mining of coal for captive use in the power plant; subsequently cement producers were also permitted to do coal mining for captive use; that the Screening Committee was constituted to consider proposals / requests for allocation of coal blocks for captive use in the specified end-uses; the said Screening Committee is a inter-ministerial and inter government body having representatives from the Ministry of Power, Ministry of Commerce and Industries, Ministry of Railways, Ministry of Steel and Representatives of the State Government concerned; that the basic concern of the Government is that the coal mine and the end use plant should be developed / installed in such a manner that there is no imbalance resulting in coal stocks lying unused while the end use capacity still remains to come into being; mismatch in timing of coal production and end use plant commissioning can lead to disposal of coal by the allocatee in the open market on the pretext that the coal cannot be stacked for long without being a fire hazard; that therefore the Screening Committee holds meetings for review of progress of development of coal mines and installation of the intended end use project of the allocatee and in

case finds prolonged unsatisfactory progress, considers de- allocation of the block.

6. It is further the stand of the Ministry of Coal that since the proposed power plant of the petitioner was nowhere in sight inspite of ten years having elapsed and further since other entrepreneurs with existing power generation capacity need the coal block, there was no rationale in waiting indefinitely for the uncertain power plant of the petitioner. It is further pleaded that such de-allocation does not bar the petitioner from applying for available coal blocks when its power plant becomes a reality. It is yet further pleaded that after de-allocation, the said coal block was displayed on the website of the Ministry of Coal on 29.05.2003 for aspiring entrepreneurs and the applications received were considered by the Screening Committee in the meeting held on 10.01.2005 and subsequently in a meeting held on 20.01.2005 the block was allotted to three companies selected by the Screening Committee.

7. The respondents No.7&8 have pleaded that as opposed to the petitioner which has not even been able to get a single approval and sanction for its proposed power project, they have an operational 260 MW power plant as well as an operational 1.6 million tonne steel plant for which they

have to import coal; that the coal from the 'aforesaid area' would be utilized for the additional 2x250 MW power plant that is proposed to be added to the existing capacity of their Power Plant as per the expansion project; that all the requisite sanctions and approvals for such expansion save allocation of coal mine block had been received; that recommendation for allotment of Utkal-A Coal Block in their favour had already been made; that the coal block allotted to the petitioner has since been merged into an adjoining coal mine block and been re-allocated. The said respondents in their counter affidavit have also set out the various clearances already received by them for their expansion project.

8. The Mahanadi Coal Fields Ltd. and CIL have also in their written submissions opposed the petition.

9. At this stage, the nature of allocation in favour of the petitioner (impugning cancellation of which this petition has been filed) may be seen. The petitioner was, vide letter dated 10.08.1993 of the Ministry of Coal, with reference to its application dated 06.05.1992 informed, that the Screening Committee had identified the aforesaid coal block as suitable for development by the petitioner as a captive source for supply of coal to the proposed thermal power plant of the petitioner and requested to approach

CIL / Mahanadi Coal Fields Ltd. for more detailed information and then contact the concerned State Government authorities for completing the necessary formalities with regard to obtaining the lease of mining rights. Vide subsequent letter dated 07.02.1996 of the Government of Orissa, the petitioner was informed of the decision of the State Government to allot mining lease of the specified area in favour of the petitioner and the petitioner was requested to furnish the mining plan and take other steps. However no mining lease came to be executed in favour of the petitioner since the petitioner failed to complete the requisite formalities for execution thereof.

10. Thus the right of the petitioner is only under a document of allocation and not under any mining lease. The said allocation itself was subject to fulfillment of various conditions and which have not been fulfilled by the petitioner.

11. I have therefore wondered as to what is the right of the petitioner. It is the settled position in law that such minerals including coal are a national asset to be used for the good / betterment of public at large. The Supreme Court in *Centre for Public Interest Litigation v. Union of India* (2012) 3 SCC 1 held that public trust doctrine enjoins upon the Government to

protect the resources for enjoyment of general public rather than to permit their use for private ownership or commercial purposes. It was further held that this doctrine puts an implicit embargo on the right of the State to transfer public property to private party if such transfer affects public interest and mandates affirmative State action for effective management of natural resources. Reliance was placed on *M.C. Mehta v. Kamal Nath* 1997 (1) SCC 388 laying down that it is the duty of the Government to provide complete protection to natural resources as trustee of people at large. I have wondered as to what public good is being served or will be served by keeping the coal reserved for the petitioner when till date, after nearly ten years have passed, the power plant of the petitioner is nowhere in sight. The intent of the petitioner became clear when the petitioner as aforesaid without even setting up the power plant for captive use of coal wherein allocation was made in favour of the petitioner, wanted mining rights with permission for sale of the coal. It is thus clear that the petitioner itself did not want to preserve the coal for captive use in the power plant and rather wanted to profiteer therefrom. The same was / is impermissible.

12. As far as the ground of violation of principles of natural justice is concerned, the decision aforesaid was a purely administrative decision. The

Scheme of allocation as explained in the counter affidavit of the Ministry of Coal requires the Ministry to, from time to time assess the situation. It is clearly borne out from the Minutes of the Meetings of the Screening Committee that the petitioner was aware of and was participating in the said assessment being done. Once the petitioner was part of the assessment, law does not require pedantic compliance of such principles by still insisting on a notice being given. Moreover, as aforesaid, the petitioner even now has precious little to explain and no prejudice is shown to have been suffered by the petitioner.

13. As far as the ground of discrimination is concerned, no basis therefor has been laid in the writ petition. Moreover even if that be so, once the decision of de-allocation is found to be correct, merely because a wrong is being perpetuated qua others would not be a ground or reason to interfere with the same. There is no negative equality (See *Union of India v. M.K. Sarkar* 2010(2) SCC 59) and the remedy if any, of the petitioner is to challenge the continuance of allocation in favor of those no longer eligible. In *Union of India v. M.K. Sarkar* 2010(2) SCC 59 the Supreme Court observed that a claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly

placed has been lawfully granted the relief and the person claiming relief is also lawfully entitled for the same.

14. This writ petition has remained pending for eight years. The petitioner even during the said time has been unable to report any progress in the setting of its power project. It is now more than twenty years since when the petitioner had conceived the thermal power plant. In the said two decades, there has been a sea change in the industrial and economic sector. The Indian economy has opened up to foreign investments. Nuclear Power, then a distant dream is available. Environmentalists are requiring a relook at thermal power plants. Coal reserves have been depleting. The petitioner cannot act on projections / estimates which are decades old. This Court is thus unable to assume that merely because the petitioner had twenty years ago conceived setting up of a power plan, it will definitely be set up. Moreover, if the petitioner ultimately sets up, it will be entitled to apply again. Even if it were to be held that the supply of coal is limited, in that case too it is better that existing supplies are used by / saved for plants already in existence rather than allowing new coal based plants to come up.

15. The argument of first come first served is also misconceived. The allocation in favour of petitioner was not because petitioner was first to

apply but because the petitioner had then represented that it was soon going to be a specified end user of coal. That representation of the petitioner has not borne fruit. Moreover, in today's time, the principle of first come first served is being frowned upon, as commented in *Centre for Public Interest Litigation* (supra).

16. The petitioner in its written submissions has referred to various judgments but the said written submissions having been placed on record and in view of the above, need is not felt to burden this judgment with the same.

17. No ground for interference with the decision of the high level Screening Committee is made out. There is no merit in the petition; the same is dismissed with cost of ₹25,000/- to the Ministry of Coal.

RAJIV SAHAI ENDLAW, J

APRIL 13, 2012

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