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HIGH COURT OF DELHI : NEW DELHI

Reserved on : January 24, 2012

Pronounced on : February 09, 2012

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**W.P.(C) 8793/2011
& C.M. No. 19877/2011**

SK SARAWAGI & CO. PVT. LTD. Petitioner

Through: Mr.Rajiv Nayar, Senior Advocate with
Mr.Rishi Aggarwala, Mr.Akshay Ringe,
Mr.Nikhil Rohtagi and Ms.Nisha Rohtagi,
Advocates

versus

UNION OF INDIA & ORS. Respondents

Through: Ms.Sapna Chauhan, Advocate for respondent
No. 1.
Mr.Sudhir Chandra, Senior Advocate,
Mr.Jayant Bhushan, Senior Advocate with
Mr.Kamal Budhiraja, Ms.Simar K. Narula,
Ms.Sanyukta Singh, Mr.Aman Gupta,
Advocates for respondent No. 3.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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ORDER

09.02.2012

1. Under *The Mines and Minerals (Development and Regulation) Act, 1957*, the Central Government's constituted Mines Tribunal/Revisional Authority in its order of 14th September, 2011 (Annexure P-1) has negated right of the petitioner to obtain the mining lease of the subject land and has upheld the order of the State Government of Andhra Pradesh recommending grant of mining lease to respondent No. 3- *M/s. Radhika Metals*, which is impugned in this petition.

2. State Government of Andhra Pradesh vide Notification of 5th September, 1994 under Rule 59 (1) of the *Mineral Concession Rules, 1960*, had declared the *Manganese Ore Buarius* in the area of Srikakkula and Viziananaream district (as specified in the annexure thereto) being available to public for grant of mining lease after expiry of thirty days from the date of publication of this Notification.

3. In pursuance to the aforesaid Notification, the petitioner had sought the Mining Lease on 20th April, 2007 whereas application of 3rd September, 1991 of respondent No.3 was already pending when this Notification came into force. The second respondent – State Government of Andhra Pradesh vide its order of 5th January, 2009 (Annexure P-20) took note of the fact that the area applied for grant of Mining Lease by the petitioner is overlapping with the area already applied for by Respondent No. 3 – *M/s. Radhika Metals* and had recommended the case of Respondent No. 3 for the grant of Mining Lease as Respondent No. 3 had priority under sub-section 2 of Section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the MMDR Act)*. Petitioner had preferred a statutory revision against the aforesaid order which was dismissed on 21st June, 2010 by the Mines Tribunal.

4. The order of 21st June, 2010 of the Mines Tribunal of the Central Government was impugned in W.P.(C) No. 6618/2010 which was allowed by coordinate bench of this Court on 4th October, 2010 while remanding the revision petition to the Mines Tribunal who has vide impugned order of 14th September, 2011 dismissed petitioner's revision petition upholding the order of 5th January, 2009 (Annexure P-20) passed by the State Government of Andhra Pradesh.

5. The issue arising in this case, as noted in the impugned order, of 14th September, 2011 (Annexure P-1) is as under:-

Whether in the notified area, as per the Sandur case of Hon'ble Supreme Court application of both the Revisionist and the Impleaded party are required to be adjudged under Section 11(4) of MMDR Act and thereby the application filed by the impleaded party becomes premature, as only the applications received pursuant to the notification are required to be assessed in this sub-section; OR Whether this case is required to be adjudged under Section 11(2) of MMDR Act, where even the application received prior to the issue of notification are also adjudged alongwith application received pursuant to issue of the Notification.

6. The impleaded party in the impugned order is the Respondent No. 3 herein and the **Sandur** case, as noted above is the decision of the Apex Court reported in (2010) 13 SCC 1, (*Sandur Manganese and Iron Ores Ltd. vs. State Of Karnataka and Ors*).

7. After having heard learned counsel for the parties and upon perusal of the impugned order (Annexure P-1) and the material on record, it transpires that petitioner's contention regarding the end date not being provided and with the valid date, i.e., of thirty days from the date of communication of Notification makes the petitioner eligible to apply for Mining Lease even after a period of thirteen years, has been repelled in the impugned order by observing that the petitioner has not given any reason as to why he has applied so late and the conclusion arrived at in the impugned order is that the decision of the Apex Court in **Sandur Manganese** (Supra) is of no help in view of the various infirmities in the petitioner's application for grant of Mining Lease, which are noted in detail in paragraph no: 9 to 12 of the impugned order.

8. At the hearing, though learned senior counsel for the petitioner could not successfully assail the finding in the impugned order in

paragraphs no: 9 to 12 regarding petitioner's application for grant of Mining Lease being defective but much emphasis was laid upon the fact that the grant of Mining Lease to Respondent No. 3 on a pre-mature application is bad in law and is unsustainable in view of the decision of the Apex Court in *Sandur Manganese* (Supra).

9. To the contrary, it was asserted by learned senior counsel for the respondent No.3 that the rejection of petitioner's application for grant of Mining Lease has been rightly rejected being highly belated as Apex Court in *Shri Santoshkumar Shivgonda Patil & Ors. vs. Shri Balasaheb Tukaram Shevale & Ors.*, JT 2009 (13) SC 69, has declared in no uncertain terms that where no time limit is prescribed for exercise of power under the statute, it should be exercised within a reasonable time. Regarding entertaining of application of Respondent No. 3 for grant of Mining Lease, before the issuance of Notification in question is concerned, it was pointed out by learned senior counsel for the respondent No.3 that proviso to sub-section 2 of Section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957* provides that application received prior to the publication of the Notification shall be deemed to have been received on the day of the Notification for assigning priority. As regards the decision of the Apex Court in *Sandur Manganese* (Supra), it was asserted by learned senior counsel for the respondent No.3 that the aforesaid decision was not of a case under Section 11(2) of *The Mines and Minerals (Development and Regulation) Act, 1957* and pertained to Section 11(4) of the aforesaid enactment and is thus distinguishable.

10. The real issue which falls for determination is whether the grant of Mining Lease to Respondent No. 3 in respect of the subject areas de-reserved by virtue of exercise of power under Rule 59(1) of the *Mineral*

Concession Rules, 1960 would be governed by the proviso to sub-section 2 of Section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957* or the same would fall for consideration under sub-section 4 of Section 11 of the aforesaid enactment.

11. In view of the decision of the Apex Court in ***Sandur Manganese*** (Supra), this Court is of the considered opinion that the issue raised in the instant petition is no longer *res integra*. The clinching observations of the Apex Court in paragraph no: 63 in ***Sandur Manganese*** (Supra), are as under:-

“As discussed earlier, Section 11(4) is consistent with Rules 59 and 60 when it provides for consideration only of applications made pursuant to a notification. On the other hand, the consideration of applications made prior to the notification, as required by the first proviso to Section 11(2), is clearly inconsistent with Rules 59 and 60. In such circumstances, a harmonious reading of Section 11 with Rules 59 and 60, therefore, mandates an interpretation under which notifications would be issued under Section 11(4) in the case of categories of areas covered by Rule 59(1). In these circumstances, we are unable to accept the argument of the learned Senior Counsel for Jindal and Kalyani with reference to those provisions.”

12. The ratio of the decision in ***Sandur Manganese*** (Supra) as culled out in paragraph no: 68 is as under:-

“In the light of the above discussion about Section 11(2) alongwith Rules 59 and 60, it should be interpreted that Section 11(2) is to cover virgin areas alone. In view of the same, Jindal’s application made prior to the notification cannot be entertained alongwith the applications made pursuant to the Notification dated 15.3.2003 because it is Section 11(4) which covers the said notification alongwith Rule 59(1) and not the first proviso to Section 11(2) as contended by the respondents.”

13. In the face of the Notification of 5th September, 1994 (Annexure P-10) it cannot be said that the subject area de-reserved by virtue of the

aforesaid Notification was a non virgin area and thus, *Rule 59 and Rule 60 of the Mineral Concession Rules, 1960* were clearly applicable.

14. *Rule 60 of Mineral Concession Rules, 1960* reads as under:-

“60. Premature applications. – *Applications for grant of a reconnaissance permit, prospecting licence or mining lease in respect of areas whose availability for grant is required to be notified under Rule 59 shall, if –*

- a) *no notification has been issued, under that rule; or*
- b) *where any such notification has been issued, the period specified in the notification has not expired, shall be deemed to be premature and shall not be entertained.”*

15. Undisputedly, the subject area was de-reserved while exercising powers under Rule 59 of *Mineral Concession Rules, 1960* and Notification of 5th September, 1994 (Annexure P-10) had made the subject area available for grant of Mining Lease after expiry of thirty days from the date of publication of this Notification and so clearly, in view of aforesaid Rule 60 of *Mineral Concession Rules, 1960*, respondent's application of 3rd September, 1991 i.e., of period prior to the coming into force the Notification of 5th September, 1994 was clearly pre-mature and the same could not have been granted priority by relying upon sub-section 2 of Section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957*.

16. In the light of the aforesaid factual and legal position, this court is of considered view that impugned order of 14th September, 2011 (Annexure P-1), though rightly rejects petitioner's application for grant of Mining Lease but erroneously upholds the order of 5th September, 2009 of the State Government of Andhra Pradesh recommending case of Respondent No. 3 to the Central Government for grant of Mining Lease. Infact, aforesaid order of 5th September, 2009 (Annexure P-20)

recommending grant of Mining Lease to Respondent No. 3 purely on account of priority by relying upon sub-section 2 of Section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957* is otherwise also rendered unsustainable as it does not take note of sub-section 5 of section 11 of *The Mines and Minerals (Development and Regulation) Act, 1957*, which reads as under:-

“11. Preferential right of certain persons.

(1) xxx

(2) xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx xxx

(5) *Notwithstanding anything contained in sub-Section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier:*

Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section.”

17. Such a view is being taken in view of the fact that the Apex Court in its recent decision in W.P.(C) No. 423/2010, titled as ***Centre for Public Interest Litigation and Others vs. Union of India & Ors***, rendered on 2nd February, 2012 has succinctly considered the priority aspect in paragraph no: 76, which is as under:-

“There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the

invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.”

18. In such a scenario, a piquant situation has arisen. Petitioner's application is clearly defective, whereas application of Respondent No. 3 is found to be pre-mature. What is the option left with the respondents except to invite fresh applications in light of the observations of the Apex Court in W.P.(C) No.423/2010, titled as ***Centre for Public Interest***

Litigation and Others vs. Union of India & Ors, rendered on 2nd February, 2012 as noted hereinabove.

19. Consequently, this petition is disposed of while setting aside the impugned order of 14th September, 2011 (Annexure P-1) to the extent of upholding order of 5th January, 2009 (Annexure P-20) recommending grant of Mining Lease to respondent No. 3, as well as order of 5th January, 2009 (Annexure P-20) to the aforesaid extent, with liberty to respondents to promptly invite fresh applications in terms of Notification of 5th September, 1994 (Annexure P-10) by giving wide publicity so that the interested parties can apply for grant of Mining Lease in question.

20. Accordingly, this petition stands disposed of with no orders as to costs. Pending application is rendered as infructuous and is disposed of as such.

(SUNIL GAUR)
JUDGE

February 09, 2012
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