

IN THE HIGH COURT OF PUNJAB AND HARYANA, AT
CHANDIGARH.

Civil Writ Petition No. 26769 of 2014
Date of Decision: 26th February, 2016

Raghvir Singh ..Petitioner

versus

State of Punjab and others ..Respondents

Civil Writ Petition No. 26367 of 2014

Sukhpal Singh ..Petitioner

versus

State of Punjab and others ..Respondents

Civil Writ Petition No.8355 of 2015

Raghvir Singh ..Petitioner

versus

State of Punjab and others ..Respondents

and

Civil Writ Petition No.1236 of 2015

Hardeep Singh ..Petitioner

versus

State of Punjab and others ..Respondents

CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. R.S.Rai, Senior Advocate, with
Mr. Harsh Bunker, Advocate, Advocate
for the petitioner (in CWP No.26769 of 2014
CWP Nos.8355 and 1236 of 2015).
Mr. Gurminder Singh, Senior Advocate
with Mr. R.P.S.Bara, Advocate, for the
petitioner (in CWP No.26367 of 2014)
Mr. Ashok Aggarwal, Advocate General, with

Mr. Sunil Kumar Vashisth, Assistant Advocate General,
Punjab, for respondent nos. 1 to 4.

Mr. Ashwani Talwar, Advocate
for PSIEC-respondent no.5.

RAJIVE BHALLA, J.

By way of this order, we shall decide Civil Writ Petition Nos. 26367 and 26769 of 2014, 1236 and 8355 of 2015 as they involve an answer to the same questions of fact and law.

The dispute, in the present case, arises from the “allotment” of 40 mines, to the Punjab Small Industries & Export Corporation (hereinafter referred to as “the PSIEC”) (a company owned by the State of Punjab), after the petitioners bid for and were allotted certain mines at commercial rates.

The facts, in brief, are that the State of Punjab invited bids at reserve price by e-auction, for grant of contracts to excavate minor minerals, in various districts. The petitioners participated in the auction and were declared successful. The petitioner, in Civil Writ Petition no.26769 of 2014, was allotted the Deowal mine situated in Hoshiarpur at Rs.126.52 per ton, i.e., a total amount of Rs.90,12,345/- per year. The petitioner, in Civil Writ Petition No.26367 of 2014, was allotted a mine at village Kakrali, District SAS Nagar, for excavation of 57000 tons of minerals, at the rate of Rs.135.07 per ton and was required to pay Rs.77,00,000/-. The petitioner, in Civil Writ Petition No.1236 of 2015, was allotted a quarry at village Aligran, in District Ropar at the rate of Rs.1682.38 per ton for extraction of 16643 tons and was required to pay Rs.2,80,00,000/-. The petitioners, apart from the bid amount, were

required to pay earnest money before the auction; 1/3rd of the bid amount, i.e., 33% as compensation to the land owners; 25% of the amount of the lease amount as security in three monthly instalments in advance, stamp duty at the rate of 4% of the bid amount and advance instalments of contract money etc. The petitioners' bid were accepted and allotments made and approved on 28.5.2013.

The Director (Mining), Industries and Commerce Department, Punjab, after accepting the bids offered by the petitioners, proposed to allot 40 mines to the Punjab State Industries & Export Corporation (for short "PSIEC"), vide letter dated 04.09.2014. The State of Punjab, thereafter, added a proviso, to rule 34 of the Punjab Minor Mineral Rules, 2013 (hereinafter referred to as "the Rules") on 19.9.2014, empowering the Director to allot mines to a government company/department on such conditions as he may determine. After the amendment, the Director, Industries and Commerce Department, Punjab, forwarded a letter dated 1.10.2014, to the PSIEC allotting 37+ 3 mines at a reserve price of Rs.30/- per ton, as detailed in the annexure attached to the letter, by waiving or revoking almost all conditions applicable to the petitioners. The petitioners are, thus, aggrieved by allotment of mines to a government company.

Counsel for the petitioners submit that the petitioners are, admittedly, successful bidders for various quarries and are required to pay a huge amount, per ton, for excavating minor minerals where as the PSIEC has been allotted quarries at a nominal reserve price with exemption or relaxation of almost all conditions imposed upon

the petitioners, i.e., a reserve price of Rs.30/-, no environmental performance guarantee, no registration, no security, no payment in advance etc. The petitioners contend that, apart from the fact that the State is not empowered by the Mines and minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the "1957 Act"), to make such an allotment, the State has created two categories of contractors, one who would be paying a huge sum of money and the other working almost for free. As an illustration, counsel for the petitioners submits that the quarry in village Kakroli, district SAS Nagar, was allotted to them at the rate of Rs.135.07 per ton, for extracting 57000 tons of minerals whereas the company (PSIEC) has been allotted @ 30 per ton in total. The other conditions are so vastly different as to render it uneconomical for the petitioners to excavate minor minerals, much less to earn any profit. Counsel for the petitioners further submit that other than the above disparity, the petitioners have to deposit a security of 25% of the total bid amount in advance whereas the government agency is exempted. Similarly, the petitioners have to deposit advance instalments of 25% as quarterly payment whereas the Corporation is not required to do so. The petitioners, in terms of rule 57 of the Punjab Minor Mineral Rules, 2013 (hereinafter referred to as "the 2013 Rules) have to provide an environmental performance guarantee so as to cover costs required to be incurred by the government for implementation of the approved environment management plan subject to a minimum of Rs.15,000/- per hectare but no such guarantee is to be furnished by the Corporation. The petitioners are also required to

pay 1% of the total amount due per year as an additional environment fund and 2% of the total amount due as TCS for both of which the corporation is exempted. After factoring in the above charges and operating costs, the cost to the petitioner, in CWP No. 26367 of 2014, would actually not be less than Rs.1221.39 per hundred cubic ft., whereas the Corporation would have a costing of Rs.810/- per cubic ft. Counsel for the petitioners, thus, submits that quarries allotted to the petitioners would, thus, be financially unviable.

Counsel for the petitioners also contends that the allotment of mines in favour of PSIEC, at fixed rates, runs contrary to the judgment of the Supreme Court in State of Tamil Nadu v. M.P.P. Kavery Chetty 1995(2) SCC 402 as the action of the State amounts to controlling prices which, as held by the Supreme Court, are only subject to control by market forces. Counsel for the petitioners contends that the act of the State is against the concept of "Public Trust Doctrine" and "Trusteeship", other than being in violation in Articles 14 and 19(g) of the Constitution. Counsel for the petitioners also argues that, as a matter of fact, the entire stand of the Government that the act of awarding contracts to the PSIEC was in public interest, i.e. to lower prices of minor minerals as the Corporation would offer lower prices in the market, is actually contrary to facts as what has happened, is that, first the price of sand went up manifold, for reasons that are public knowledge and instead of taking action, the government ignored these facts and invited bids at commercial rates and when it began to be auctioned for high

prices of minor minerals, suddenly woke up to public interest and offered mines to PSIEC with extremely low rates leading to a temporary, artificial crash of prices which, in the long run, would actually be detrimental to pricing which would have otherwise, occurred by natural market forces. In this manner, the State unjustly enriched itself as a short term measure, at the cost of the petitioners and then immediately allotted minor minerals to the Corporation at a throwaway price. The State may, though it is not conceded, allot land to a government entity but having already allotted mines to the petitioners at market rates and enriched itself, cannot blame the petitioners for rise in prices of minor minerals. It is next submitted on behalf of the petitioners that they have already altered their position having purchased the quarries for the contract period, at very high rates and as such, they came to have a legitimate expectation that they would be able to sell their "product" at rates commensurate with their bid prices. Thus, by artificially reducing prices, the petitioners' legitimate expectation, has been violated by the respondents. Counsel for the petitioners also submit that, given the same reserve price of Rs.30/- per ton, and the same terms as have been granted to the government corporation, the petitioners are also ready to sell sand at less than Rs.810/- per 100 cubic ft. offered by PSIEC. Thus, learned counsel for the petitioners submit that the action of the government, being contrary to all settled principles of law, other than being against statutory and constitutional provisions, it deserves to be quashed and the contracts awarded in favour of PSIEC cancelled. Alternatively, learned counsel submits that the

petitioners had to start working after one year of having made the deposits with government as it took that long for getting environmental clearance. Lastly, they submitted that government should revise the rates to Rs.30/- per ton even for the petitioners and the excess amount charged from them should be refunded or adjusted.

Apart from the above pleas, counsel for the petitioners submit that the proviso to rule 34 (1) of the Rules, added by amendment, is ultra vires not only of Article 14 and 19(1)(g) read with Article 31-A of the Constitution but also of Section 17-A of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as "the 1957 Act"), inasmuch as, approval of the Central Government has not been taken by the State Government, before reserving quarries allotted to the Corporation. In this regard, learned counsel has relied upon judgments of the Supreme Court in GEM Granites and others v. State of Tamil Nadu and others (1995) 2 SCC 413 and Indian Charge Chrome Ltd. and another v. Union of India and others (2006) 12 SCC 331. Counsel for the petitioners further submits that the newly inserted proviso is beyond the rule making power of the State, conferred by Sections 15 and 23-C of the 1957 Act. It is also argued that the assent of the President of India not having been obtained before notifying the amendment, the proviso is violative of Article 31-A of the Constitution as the amendment extinguishes/modifies the petitioners' rights in respect of winning minor minerals from quarries that had already been awarded by contract to them. The allotment made in favour of a competing

Company/Corporation, owned by Government, as such, violating Article 31-A(a) is, therefore, wholly arbitrary.

Mr. Ashok Aggarwal, the learned Advocate General, Punjab, submits in respect of challenge to the insertion of a proviso to Rule 34(1) of the Rules being violative of section 17-A of the 1957 Act, that the argument is wholly misplaced and misconceived in view of the fact that the provisions empowering the government to award contracts by allotment to one of its own Departments or Corporations, is not prohibited by section 17-A which, in fact, is applicable only to mining operations through a government company or a corporation. Hence, by providing for such in the proviso to rule 34(1), the government has only acted in consonance with provisions of the 1957 Act.

As regards contention by the petitioners that section 17(2) bars the State Government from reserving any area for mining operations by a Government Company etc., it is urged that it is only in respect of areas which had never before been reserved for mining, in other words, only "virgin" territory which has hitherto never been mined. In the present case, the quarries which have been allotted to the PSIEC, are not new quarries and, therefore, the question of seeking sanction or approval of the Central Government does not arise. The learned Advocate General further submitted that as is obvious from the heading of the Chapter, in which section 17-A, appears, the amendment made in the Act, in 1986, was in consonance with environmental laws, being promulgated in that period, such as the Environment Protection Act, 1986 etc. As such,

what is contained in sub-section 2 of Section 17-A, has to be read in that context and cannot be held to apply to all existing quarries. In response to a specific query as to why the sanction of Central Government, referred to in sub-section 2, could not be read in the context of the fact that mining operations have also been included in all industries/activities requiring environmental clearance and as such, when the government reserves any area for mining operations by its own agencies, Central Government approval would be required, the Advocate General submitted that if that were the case, then such sanction would also apply to any quarries being contracted out to private contractors but if this court still comes to a conclusion that Central Government approval was required for reserving areas for mining operations, for the governments own agencies, then it is not necessary that such approval must be prior to the allotment. In this regard, he pointed to the fact that sub section 2 does not specify that the approval of the Central Government must be prior. The learned Advocate General further submitted that the Act uses three expressions, i.e., "sanction", "approval" and "permission" and pointed to Sections 4(3), the proviso to clause-b of section 5(1), the proviso to section 7(2) and Section 8(4) to submit that wherever legislature thought it fit that prior approval or sanction is required for any particular act or action, it was specified as such. Thus, since section 17-A(2) does not use the words "prior approval", the obvious implication is that whether the approval of the Central Government is prior to reserving areas for mining operations by a government agency or not, such approval may be taken after or inferred.

Mr. Aggarwal, produced in Court a gazette notification issued by the Government of India, Ministry of Law and Justice, dated 27.3.2015, which promulgates the Mines and Minerals (Development and Regulation) Amendment Act, 2015. Section 17 of the Amendment Act stipulates as follows:-

“17. In section 17A of the principal Act, after sub-section (2), the following sub-sections shall be inserted, namely:-

“(2A) Where in exercise of the powers conferred by sub-section (1A) or sub section (2), the Central Government or the State Government, as the case may be, reserves any area for undertaking prospecting or mining operations, the State Government shall grant prospecting licence or mining lease, as the case may be, in respect of such area to such Government company or Corporation.

Provided that in respect of any mineral specified in Part A and Part B of the First Schedule, the State Government shall grant the prospecting licence or mining lease, as the case may be, only after obtaining the previous approval of the Central Government.

(2B) Where the Government company or corporation is desirous of carrying out the prospecting operations or mining operations in a joint venture with other persons, the joint venture partner shall be selected through a competitive process, and such Government company or corporation shall hold more than seventy-four per cent of

the paid up share capital in such joint venture

(2C) A mining lease granted to a Government company or corporations, or a joint venture, referred to in sub-sections (2A) and (2B), shall be granted on payment of such amount as may be prescribed by the Central Government.”

The learned Advocate General also produced the statement of objects and reasons underlining the amendment and then submitted that the proviso to the newly inserted sub-section 2A in Section 17-A, makes it amply clear that previous approval of the Central Government, is required to be taken by the State Government only in respect of the minerals specified in parts-A and B of the First Schedule of the Act. The minor minerals not being a part of the said schedule, no previous sanction or approval is required. In this regard, the Advocate General relied upon the judgments of the Supreme Court in Life Insurance Corporation of India v. Escorts Ltd. (1996) 1 SCC 264 and Monnet Ispat and Energy Ltd. vs. Union of India and others (2012) 11 SCC 1. Mr. Aggarwal submitted that the judgments cited by the learned counsel for the petitioners in GEM Grenites and others (supra) and Indian Charge Chrome Ltd. and another (supra) are wholly distinguishable.

As regards granting of mining leases in general to its own agencies and in fact, the government creating a monopoly in itself, the learned Advocate General cited the judgments in Beg Raj Singh v. State of U.P. (2003) 1 SCC 726, Doiwala Sehkari Sharm Samvida Samiti Ltd. vs. State of Uttranchal and others (2007) 11 SCC 641

and M/s Pallava Granite Industries (India) Pvt. Ltd. v. Union of India and others (2007) 15 SCC 30. Finally, the learned Advocate General submitted that the government having exercised its jurisdiction as per law as conferred under section 15 of the 1957 Act, which empowers a government to make rules in respect of minor minerals, the impugned proviso inserted Rule 34(1) of the Rules 2013, does not countenance any challenge. The Punjab Minerals (Vesting of Rights) Act, 1994, provides that all minor minerals shall vest in the State and as such, as to whom the State grants the privilege of winning such minerals, is wholly within the domain of the State.

Mr. Ashwani Talwar, learned counsel appearing for the Punjab Small Industries & Export Corporation, has, in essence, supported the arguments advanced by the learned Advocate General.

We have heard counsel for the parties, perused the pleadings as well as the statutory provisions and based upon the submissions shall answer the following questions :

1. Whether the proviso to Rule 34 of the Punjab Minor Minerals Rules, 2013 (hereinafter referred to as “the Rules 2013”), enacted, by State of Punjab, to allot mining contracts, to a Government Department or a Government Corporation, is ultra vires of Articles 14 and 19(1)(g) of the Constitution?
2. Whether before awarding a contract to a Government Department or a Corporation, the State of Punjab was required to obtain the approval of the Central

Government under Section 17-A(2) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as “the 1957 Act”)? and

3. Whether the State can, while awarding mining contracts, prescribe two sets of vastly different conditions, one for a private party and the other for a Government Department/ company, particularly after it has invited and accepted bids at commercial rates.

Before answering the questions posed, it would be necessary to refer to relevant statutory provisions of the 1957 Act and the 2013 Rules so as to avoid repetition, while answering the questions posed.

The 1957 Act was enacted, by Parliament, to provide for development and regulation of mines and minerals, which were classified into two categories, namely, minerals that are defined in Section 3 (a) and “minor minerals” and minerals that are defined in Section 3 (e) of the 1957 Act. Section 14 of the 1957 Act declares that Sections 5 to 13 shall not apply to minor minerals. Section 15 of the 1957 Act, however, empowers a State Government to make rules regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Section 15 of the 1957 Act, reads as follows:-

“15. Power of State Governments to make rules in respect of minor minerals:- (1) The State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or

other minerals concessions in respect of minor minerals and for purposes connected therewith.

(1-A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

“(a) the person by whom and the manner in which applications for quarry leases, mining leases or other minerals concessions may be made and the fees to be paid therefor;

(b) the time within which, and the form in which, acknowledgment of the receipt of any such applications may be sent.

(c) the matters which may be considered where applications in respect of the same land are received within the same day;

(d) the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed.

(e) the procedure for obtaining quarry leases, mining leases or other mineral concessions;

(f) the facilities to be afforded by holders of quarry leases, mining leases or other mineral concessions to persons deputed by the Government for the purpose of undertaking research or training in matters relating to mining operations;

(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;

(h) the manner in which rights of third parties may be protected (whether by way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations;

(i) the manner in which rehabilitation of flora and other vegetation such as trees, shrubs and the like destroyed by reason of any quarrying or mining operations shall be made in the same area or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;

(j) the manner in which and the conditions subject to which, a quarry lease, mining lease or other mineral concession may be transferred;

(k) the construction, maintenance and use of roads, power transmission lines, tramways, railways, aerial ropeways, pipelines and the making of passage for water for mining purposes on any land comprised in a quarry or mining lease or other mineral concession;

(l) the form of registers to be maintained under this Act;

(m) the reports and statements to be submitted by

holders of quarry or mining leases or other mineral concessions and the authority to which such reports and statements shall be submitted;

(n) the period within which and the manner in which and the authority to which applications for revision of any order passed by any authority under these rules may be made, the fees to be paid therefor, and the powers of the revisional authority; and

(o) any other matter which is to be, or may be prescribed.

The State of Punjab, has, in the exercise of power conferred by Sections 15(1) and 15(1-A) of the 1957 Act, notified the Punjab Minor Mineral Rules, 2013. Rule 34 of the 2013 Rules of Chapter 'C', the rule relevant for the present controversy, bears the title '**Grant of Contracts**' and reads as follows:-

“ 34. Grant of contracts by auction:- (1) Contracts may be granted by the Government by auction for a maximum period of five years.

(2) No contract shall be renewed or extended beyond the maximum period of five years.

(3) No contract shall be granted to a person, who does not hold a certificate of approval in Form 'B'.

(4) The contract shall be granted for a quantity of the mineral to be excavated per annum as specified in Form 'L'.

(5) If the contractor excavates excess quantity of

mineral during the the period for which the advance payment has been made, then he shall make advance payment for subsequent quarter (s) also before further excavation.

Provided that the Government may award a contract to a Government Department or a Corporation (owned and controlled by the State Government), as the case may be, in public interest. The mode of giving a contract through auction or award by selection, shall be decided by the Director.”

In case the Director, awards a contract to the Government Department or Corporation, the same shall be subject to the following conditions, namely:-

(1) The contracts shall be awarded for a period not exceeding five years, on reserve price, which may be extended from time to time, as decided by the Government;

(2) The Government Department or a Corporation as the case may be, shall execute a contract with the Government in the format, as decided by the Director from time to time;

(3) No security is required to be deposited by the said Government Department or a Corporation on award of a contract;

(4) The Government Department or a Corporation, as the case may be, shall deposit the royalty

as specified in the Schedule, at the end of each quarter, for the minor minerals extracted and sold by them; and

(5) The Government Department or a Corporation as the case may be, shall not be charged any amount under rule 57.”

Rule 34 of the 2013 Rules, provides that a contract can only be granted by auction, for a maximum period of 5 years and shall be granted for a quantity specified in form 'L' etc. The proviso to rule 34 shall be dealt with later. Rule 35 relates to the power of the presiding officer; Rule 36 relates to the notice to auction; Rule 37, which sets out the procedure for auction and provides that the intending bidders shall deposit earnest money in such manner as may be fixed by the Director and in case of an e-auction, the earnest money shall be deposited prior to the auction and on completion of the bidding process, the successful bidder shall be afforded a provisional acceptance of the bid and would be required to deposit the amount, including security within two working days from the issuance of the provisional acceptance. Rule 38 provides that the contract money shall be paid in advance for every quarter or for such period as may be specified by the Director. A security of 25% of the annual contract shall be paid in advance in addition to the contract money and then prescribes the mode and manner of deposit of contract money. Rule 39 relates to the surrender of a mining contract; Rule 40 relates to execution of contract; Rule 41 relates to general restrictions for grant of mineral concession. Rule 42 pertains to exemptions in certain cases and rule 57 of the Rules relates to

environmental performance guarantee, etc.

The relevant statutory provisions having been set out, it would be appropriate to answer the questions posed. An answer to the question whether the State can enact a provision reserving to itself a right to “allot” mines to a government company, need not detain us as for long as this question is elementary and even otherwise, was answered by the Supreme Court in favour of the State in State of Tamil Nadu versus M.P.P.Kavery Chetty (1995) 2 Supreme Court Cases 402 in favour of the government. This apart, Section 15 of the 1957 Act, empowers the State Government to make rules for regulating the grant of quarry leases and mineral concessions with respect to minor minerals and by way of sub-rule (1-A) of Section 15, empowers the State to prescribe the person by whom applications for leases of quarry and mines or other mineral concessions, may be made. Section 15 of the 1957 Act does not contain any provision that prohibits the State Government, from enacting a rule to provide for granting of a mining lease to a Government Company/Government Department. Section 15 gives power not only to “regulate” the grant of mining leases and mining concessions but also to identify the person by whom an application may be made for a mining lease etc. The use of the word “person” would necessarily include a Government Department or a Government Company and, therefore, even without the proviso, Rule 34 of the 2013 Rules could be read to include a government company, which would, however, have to participate in an auction.

The Punjab Minor Mineral Rules, 2013, have, admittedly,

been notified in exercise of power conferred by Section 15, read with Section 23 of the 1957 Act. Rule 34, enacted in the exercise of power conferred by section 15 of the 1957 Act, does not draw a distinction between a private contractor or a government company and nor does it prohibit a government company from participating in an auction. The State has, however, by adding a proviso to Rule 34 of the 2013 Rules, reserved the right to award a contract to a Government Department or a Government Company while maintaining its rights to award contracts to private parties. The object of the proviso, however, is to empower the Director, Industries, where it is so required to award, a contract to a government company by "auction or selection", i.e., confers power to do away with an auction in case of a government company, subject, however, to conditions set out in, sub rules 2 to 5 of Rule 34. The proviso enacted to provide for award of a mining lease to a Government Company, does not, in our considered opinion, exceed the rule making power of the government as even Section 17-A(2) of the Act empowers the State Government to reserve any area not already held under any prospecting licence or mining lease and to lease it out to a Government Company or Corporation by a notification in the official Gazette. The only condition is approval of the Central Government, which we will consider hereinafter.

After the amendment of Section 17-A w.e.f. 27.03.2015, sub-section (2B) stipulates that if a Government Company or Corporation wishes to enter into a joint venture with other persons, for prospecting or mining operations, then such partner shall be

selected through a competitive process, and the Government Company shall hold more than 74% of the paid up share capital of the joint venture.

The obvious inference of the above is that whereas in the case of a joint venture, the future partner is to be selected through a competitive process, the Government Company or Corporation may simply be allotted a mining area for prospecting and mining. Thus, even as per Section 17-A, as amended, the procedure for allotment of a mining lease to a Government Company/Corporation and a private individual, can be different.

Hence, after 27.03.2015, the proviso to the rules, in any case, cannot be held to be ultra-vires the principal Act or in excess of the power delegated to the State Government, to frame rules.

No doubt, the period in question in these petitions, during which the petitioners were awarded contracts, and even the PSIEC was allotted mining quarries, is before 27.03.2015 but we shall consider this issue later.

At this stage, it would also be appropriate to point out that the proviso to Rule 34(1) uses the words “may award a contract to a Government Department or Corporation “in public interest”, thereby leaving no ambiguity that the Government may, circumstances so permitting and if public interest so requires, award a contract to a Government Department or a Corporation by auction or by selection. The learned Advocate General, Punjab, has, while praying that the proviso to rule 34(1) of the 2013 Rules, may be upheld, pointed out that the proviso to Rule 34 (1) was enacted in a bona fide attempt,

by the Government, to ensure that minor minerals like stone, sand etc. are available to the public at affordable prices.

In this regard, it may be useful to cite from Khoday Distilleries Ltd. v. State of Karnataka (1996) 10 SCC 304 with regard to the exercise of power under delegated legislation, it was held as follows:-

“The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of Indian Express Newspapers (Bombay) (P) Ltd. V. Union of India (SCR at p. 243) this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; “unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.”

In the present case, we do not find the reasoning given by the Government, for at least awarding the contract to a Government Corporation, in terms of the proviso to Rule 34, to be unreasonable nor to find the proviso itself as being arbitrary, so as to hold it to be beyond the power of delegated legislation granted by

the statute.

The question then is as to whether, de hors the insertion of sub-section (2A) and (2B) in Section 17-A, w.e.f. 27.03.2015 would the proviso still be beyond the power conferred by the Act of 1957, on the State Government. In our opinion, firstly, because sub-section (2) itself empowers the State Government, to reserve and to allot a mining area, to a Government Company, the manner of doing so, is not restricted in any manner by either Section 17-A(2) or by any other provision brought to our notice. Hence we hold that even prior to the insertion of sub-sections (2A) and 2(B) w.e.f. 27.03.2015, by virtue of the rule making power conferred under section 15 of the Act, read with Section 17-A(2), the proviso to Rule 34 of the 2013 Rules, was not beyond the power delegated to the State Government.

The explanation for enacting the proviso to rule 34 reveals that the government may have sacrificed commercial expediency in favour of public interest but whether while doing so, it has violated any rights vested in the petitioners as a result of the acceptance of their bids, is a matter, which we shall decide later and, therefore, have no hesitation in holding that the government is fully empowered, in the exercise of power of delegated legislation conferred by Section 15 of the 1957 Act, to notify the proviso to Rule 34 (1) of the 2013 Rules but as to whether the proviso could be notified without approval of the Central Government, under Section 17-A(2) of the 1957 Act or whether the special terms and conditions of the contract to be awarded to a government company are violative of Article 14 or 19(1)(g) of the Constitution, are questions,

that we shall now proceed to answer.

The next question is whether the State of Punjab was required to obtain prior approval of the Central Government. The 1957 Act contains a Chapter titled “**Special Powers of the Central Government to undertake prospecting or mining operations in certain cases**”.

Section 17 XX XX XX

Section 17-A of the 1957 Act prior to insertion of sub sections (2A),(2(B) and (2(C) reads as follows:-

“17-A. **Reservation of area for purposes of conservation:-**

(1) The Central Government with a view to conserving any mineral and after consultation with the State Government, may reserve any area not already held under any prospecting license or mining lease and, where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of which such area will be reserved.

(1-A) The Central Government may in consultation with the State Government, reserve any area not already held under any prospecting license or mining lease, for undertaking prospecting or mining operations through a Government company or Corporation owned or controlled by it, and where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of

which such area will be reserved.

(2) The State Government may, with the approval of the Central Government, reserve any area not already held under any prospecting licence or mining lease, for undertaking prospecting or mining operations through a Government company or corporation owned or controlled by it and where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of which such area will be reserved.

(3) Where, in exercise of the powers conferred by sub-section (1-A) or sub-section (2), the Central Government or the State Government, as the case may be, undertakes prospecting or mining operations in any area in which the minerals vest in a private person, it shall be liable to pay prospecting fee, royalty, surface rent or dead rent, as the case may be, from time to time at the same rate at which it would have been payable under this Act if such prospecting or mining operations had been undertaken by a private person under prospecting license or mining lease.”

Section 17-A enacted with the object of conserving minerals, confers power upon the Central Government, to specify the boundaries of such area and the minerals in respect of which area shall be reserved. Section 17(1-A) empowers the Central Government, in consultation with the State Government to reserve

any area not already held under any prospecting license or mining lease, for prospecting or mining operations to a Government Company. The bone of contention is sub-section (2) of Section 17-A of the 1957 Act, which provides that the State Government 'may' "with the approval" of the Central Government reserve any area etc. for prospecting or mining operations to a Government Company or a Corporation owned or controlled by it.

Counsel for the petitioners urge that the State Government has not obtained approval from the Central Government and, therefore, can not issue a contract in favour of PSIEC (a company wholly owned by Government), thereby rendering the contract awarded to PSIEC, null and void for violation of Section 17-A(2) of the 1957 Act. Per contra, the learned Advocate General, representing the State of Punjab, submits that the State Government may obtain approval at any time and if the Central Government does not raise any objection, the approval, as required by sub-section (2) of Section 17-A, may be deemed to have been granted. In support of his arguments, reliance is placed upon Life Insurance Corporation of India versus Escort Limited, 1986(1)SCC 264.

A due consideration of Section 17-A reveals that it was inserted in the parent Act by Act No. 37 of 1986 w.e.f. 10.2.1987 with the object of reserving an area for conservation and prescribes by way of sub-section (2) of Section 17-A, that where the State Government proposes to reserve any area for prospecting or mining operations through a Government company or a Corporation owned or controlled by a Government, it shall do so with the approval

of the Central Government. The word “approval” has different connotations in different situations but must be read in the context in which it appears in a statutory provision. The 1957 Act uses various expressions at various stages, namely, “previous approval”, “prior consultation” but in Section 17-A(2) of the 1957 Act, uses the word “approval”. The Hon'ble Supreme Court, while considering the import of the word “approval”, used in Section 17-A(2), has held in Monnet Ispat Energy Limited versus Union of India and others 2012(11) SCC 1, that the approval contemplated by Section 17-A may be obtained by the State Government before the exercise of power or after such exercise and may even be express or implied. A relevant extract from the aforesaid judgment, reads as follows:-

“160. The types of reservation under section 17-A and their scope have been considered by this Court in Indian Metals and Ferro Alloys Ltd in paras 45 and 46 (pp. 136-39) of the Report. I am in respectful agreement with that view. However, it was argued that Section 17-A(2) requires prior approval of the Central Government before reservation of any area by the State Government for the public sector undertaking. The argument is founded on an incorrect reading of section 17-A(2). This provision does not use the expression “prior approval” which has been used in Section 11. On the other hand, Section 17-A(2) uses the words “with the approval of the Central Government”. These words in Section 17-A(2) cannot be equated with prior approval of the Central Government.

According to me, the approval contemplated in Section 17-A may be obtained by the State Government before the exercise of power of reservation or after exercise of such power. The approval by the Central Government contemplated in Section 17-A(2) may be express or implied. In a case such as the present one where the Central Government has relied upon the 2006 Notification while rejecting the appellants' application for grant of mining lease, it necessarily implies that the Central Government has approved reservation made by the State Government in the 2006 Notification otherwise it would not have acted on the same. In any case, the Central Government has not disapproved reservation made by the State Government in the 2006 Notification.

263. The provisions of the MMDR Act contain certain regulations. However, to say that there are certain provisions regulating the exercise of power is one thing, and to say that there is no power is another. The provisions of the Act do not in any way take away or curtail the right of the State Government to reserve the area of mines in public interest, which right flows from vesting of the mines in the State Government. It is inherent in its ownership of the mines. In the present case we are concerned with the challenge to the Letter of the State Government dated 13-9-2005, and that of the Central Government dated 6-3-2006, and the challenge to

the Notification dated 27-10-2006 issued by the State Government. There is no difficulty in accepting that the Central Government does have the power to issue a direction as contained in the Letter dated 6-3-2006. As far as the Notification of 27-10-2006 is concerned, the same is also clearly traceable to Section 17-A(2) of the MMDR Act. This Section 17-A(2) reads as follows:

“17-A (2) The State Government may, with the approval of the Central Government, reserve any area not already held under any prospecting licence or mining lease, for undertaking prospecting or mining operations through a government company or corporation owned or controlled by it and where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of which such areas will be reserved.”

As can be seen, this sub-section requires the approval of the Central Government for reserving any new area which is not already held through a government company or corporation, and where the proposal is to do so. The Notification of 27-10-2006 refers to the previous Notifications of 1962 and 1969 whereunder the mining areas in Ghatkuri Forest were already reserved and reiterates the decision of the State Government that the minerals which were already reserved in the Ghatkuri

area under the two notifications will continue to be utilised for exploitation by public sector undertakings or joint venture projects of the State Government. Therefore this Notification of 27-10-2006 did not require the approval of the Central Government.”

We, therefore, hold that the State was not required to obtain prior approval as the approval may be post facto, express or implied. The fact that the Central Government has not raised any objection, to the award of contracts to a government company, does not render award of the contract to the PSIEC null or void for failure to obtain approval from the Central Government, under Section 17-A (2) of the 1957 Act.

The question that remains is, whether terms and conditions for awarding the contract to the PSIEC, are, in any manner, violative of Articles 14 or 19(1)(g) of the Constitution or the rights of the petitioners that came into existence before the mines were allotted to PSIEC.

The State of Punjab, it is not denied, invited bids for mining minor minerals, by an open e-auction. The reserve price and the conditions were fixed taking into consideration the commercial potential of the sand, gravel etc., to be excavated. The petitioners bid for and as they were the highest bidders, their bids were accepted, and as all conditions were fulfilled, mines were allotted.

After conclusion of the auction in favour of the petitioners, the Director (Mining) Industries & Commerce Department, Punjab, confirmed allotment of mines to the petitioners and then proposed

to allot 40 mines to the PSIEC, without auction, in apparent compliance with a Cabinet decision dated 2.9.2014. The State of Punjab, thereafter, amended rule 34(1), by adding a proviso that provides for allotment of mines to a government department/company. The proviso empowers the government to allot a contract to a government department or a government corporation, either through auction or by selection pursuant to a mode to be determined by the Director. The terms and conditions for such an allotment are set out in sub- rules 1 to 5 of Rule 34 of the Rules and provide that the contract may be awarded for a period not exceeding five years at reserve price and may be extended from time to time as decided by the government. The government department or the corporation, which is allotted a contract, shall execute a contract in the format prescribed by the Director but shall not be required to deposit any security, shall be required to deposit royalty as specified in the schedule at the end of each quarter and shall not be charged any amount as prescribed by rule 57 of the Rules, thereby prescribing conditions that are vastly different from the conditions prescribed in the just concluded auctions in which the petitioners were declared successful. The Corporation was allotted these mines at a reserve price of Rs.30/- per ton, whereas in the case of the petitioners, it was Rs.90/-per ton. To place the aforesaid facts and the response of the State in perspective, a chart prepared by the petitioners is reproduced, from paragraph 11 of the pleadings.

<i>PSIEC</i>	<i>PETITIONER</i>
DISPARITY IN ALLOTMENT RATE	
Contract allotted to PSIEC at a flat of <u>Rs.30/-per ton</u>	Petitioner secured contract on the basis of his highest bid of Rs. 9012345/- for a Quantity of 71228 ton. The reserve price for auction was fixed at Rs.90/- per ton After highest bid of petitioner, the rate per ton rose to Rs.126.52 per ton
DISPARITY IN EXPENSES	
Compensation to be paid to land owner at fixed rate of Rs.50/- per ton, i.e. Rs.30+Rs.50=Rs.80/-per ton	As per clause 18 of the Auction Notification dated 29.01.2013; Compensation is to be paid @ 1/3 rd of bid amount, i.e. 33% of Rs.126.52 =41.75; Thus: Rs.126.52 + Rs.41.75= Rs.168.27 per ton
DISPARITY IN YEARLY CONTRACT AMOUNT	
No change in contract amount for 2nd year. Thus, <u>Rs.80 per ton</u>	As per clause 39 of the Auction Notification dated 29.01.2013; there shall be an increase of 15% in the amount of Yearly bid, thus: Rs.126.52 = 15% increase Rs.126.52 +Rs.18.98=Rs.145.50 per ton ADD 33% compensation, thus: Rs.145.50 +Rs.48= Rs.193.50 per ton
<u>DISPARITY IN SECURITY AMOUNT</u>	
No security deposit	As per clause 8 of the auction Notification dated 29.01.2013; 25% of the Yearly Bid amount is to be deposited as Security Amount.
<u>DISPARITY IN PAYMENT OF INSTALMENT</u>	
No advance instalment	First instalment for 3 months to be paid in advance.
<u>DISPARITY IN AMOUNT OF STAMP DUTY ON AGREEMENT</u>	
PSIEC shall pay stamp duty @ 4% of Allotment Rate of Rs.30/-per ton	Petitioner would pay stamp duty @ 4% of Bid Amount i.e. on Rs.126.52 per ton.
<u>DISPARITY IN PAYMENT OF ROYALTY/CONTRACT AMOUNT</u>	
As per Clause (4) of proviso added to Rule 34(1) as per 2014 Amendment; PSIEC shall deposit the royalty at the end of each Quarter for the minerals extracted and sold by them	Petitioner shall pay the Advance 3 Monthly installment of Contract Money, whether the extracted minerals are sold or not; failing which an interest of 18% is attracted.

<i>PSIEC</i>	<i>PETITIONER</i>
<u>DISPARITY IN PERIOD OF CONTRACT</u>	
Contract can be allotted for <u>Five years</u> period	Contract in open auction is for <u>Two Years</u>
<u>WEIGHMENT SCALE</u>	
PSIEC has not installed any Weighment scale on the Pithead PSIEC has hired the Weighment scale, which is at a distance of around 5KM to 6KM from the Mine/Pit Head	Petitioner is required to install Weighment scale at the Pit Head.

A perusal of the aforesaid chart as well as the reply filed by the State of Punjab reveals that the terms and conditions applicable to the Corporation are markedly lower than the terms and conditions applicable to the petitioners. The petitioners assert that by enacting the proviso to Rule 34, the State has created two different categories of mines, with two different sets of terms and conditions, a set of conditions for private parties and another for a government company. The petitioners also contend that even if it is accepted that the State may, in public interest, though it is not admitted, allot mines to a government company/department but not by providing terms and conditions that are different and favourable to a government company. The State has, by adopting the latter course ruined the petitioners' business and violated Articles 14 and 19(1)(g) of the Constitution. The mines were allotted after the petitioners had paid reserve price, bid for the mines, bids were accepted and as they had deposited all charges, mines were allotted. Had the petitioners been aware that the government would, after inviting bids calculated at commercial reserved price, offer mines to a government company at a pittance, they would never have offered bids. The State has, after offering mines at a reserved price, calculated on commercial

considerations, enriched itself at the expense of the petitioners providing terms and conditions so markedly different from those set out for the petitioners as to render their business meaningless. The mines were, admittedly, allotted to the company after the petitioners had bid and their bids accepted. Even the proviso to rule 34 of the Act was amended after the mines were allotted to the petitioners. The reply filed by Shri Sushminder Singh, State Geologist Department of Industries and Commerce, Punjab, dated 05.01.2015 reads as follows:-

“ 11. That contents of this Para are admitted but it is a fact that the decision to operate the mines through Government owned Corporation has only been taken in the public interest so as to provide sand/Bajri at affordable rates. It has been shown as disparity in the allotment rate of contracts amongst Punjab Small Industries & Export Corporation and the petitioner, whereas, on the contrary as submitted in foregoing paragraph, the decision has only been taken to contain the rising prices of sand/Bajri and could only be possible with the intervention of Government in the market and to sell the same at bare minimum rates. It is a disparity as shown by the petitioner but at the same time it is a conscious decision taken by the Government. In regard to weighbridge, there is no disparity as alleged in this para, as the Punjab Small Industries & Export Corporation is in the process of installing weighbridges at the pit heads. At present, in the quarries under operation,

the weighbridges in the vicinity of the quarries are being used by the Punjab Small Industries & Export Corporation.”

A perusal of the reply reveals that the State seeks to justify these distinct and separate contractual stipulations on the premise that the decision has been taken in public interest so as to reign in rising prices of minor minerals. Rule 34 of the Rules read with the proviso, empowers the State of Punjab to contract/lease out its right to excavate minor minerals by auction to a private person and the newly added proviso to a government company by auction or selection but the State has allotted contracts to PSIEC on terms and conditions that are vastly different or shall we say, loaded against the private entity and in favour of the government company. The State, after enriching itself from a private entity by charging a hefty reserve price etc., leading to bids that were astronomical, suddenly and obviously realised, after pocketing the money, that the price of minor minerals had shot up, inviting criticism from many quarters. The transaction between the petitioners and the State was a purely commercial transaction, based upon reserved price and other conditions calculated by the State. The petitioners could not have visualised an eventuality that an adjoining mine would be offered at a pittance, particularly when the State had collected comparatively astronomical amounts from the petitioners. The increase in price, of minor minerals, occurred for facts that we shall not enumerate but the government did not wake up from its slumber, or acquiesced at that stage and instead auctioned mines on

exorbitant rates. The State, if it was so concerned about the rise in prices, should have kept the reserved price stated other financial conditions, at a minimum, and in such a situation, we are sure the mines would not have fetched the exorbitant prices that the petitioners have admittedly paid. The State gleefully accepted these exorbitant amounts, enriched itself at the expense of the petitioners and when it came to the petitioners' turn to sell the minerals, the State suddenly invoked public interest and offered adjoining mines to a government company at about 1/3rd the reserved price offered to the petitioners, and on the other hand, by waiving almost all conditions for the PSIEC. The State was conscious of the fact that if a private person purchases the right of the State in minor minerals at such an exorbitant price, he would necessarily harbour a legitimate expectation of a profit but the State appears to have devised a ploy, to ward off criticism of rising prices, which the State does not allege, can be attributed to the petitioners but may be attributed to factors that we shall not delve into. It, therefore, suddenly changed track and allotted mines at a pittance to the PSIEC. The fact, however, remains that the State fixed the reserved price on commercial consideration, offered the mines to the general public at a reserved price and for contract money etc. on commercial considerations. The State, therefore, had no right, particularly after having accepted the bids offered by the petitioners, to offer terms and conditions that would adversely impact and almost destroy their business. The State has, by allotting mines to PSIEC at rates that are markedly lower than the rates offered to the petitioners, created two distinct

categories of mines and though we can not disagree with the government that sand, stone etc. should be available at affordable rates, we cannot allow the State to run with the hare and hunt with the hound, i.e. first, enrich itself at the expense of a private entity by demanding an exorbitant reserved price and then, in an about face of this decision, allot mines at rates markedly lower than the rates offered to the petitioners. The rise in prices may be attributed to unrealistically high reserved price, sought by the State, or the onerous conditions imposed regarding payment of contract money in advance, payment of other amounts, registration of the lease etc., but this does not justify creating for a different sets of mines with different conditions.

Learned counsel for the petitioners had also made a submission that, in fact, the PSIEC had further contracted out the actual mining operation to sub-contractors. Mr. Talwar, learned counsel appearing for the PSIEC, did not deny that fact to the extent that the actual work of digging and excavation had been handed over, in some cases, to sub-contractors. We may, therefore, say that if the sub-contract is only to the extent of actual digging and excavation of the mineral, i.e. 'labour contracts' for that purpose, there may not be much to say anything on, but if any such contract actually goes to the extent of allowing the sub-contractor to sell the mineral extracted, then before 27.3.2015, it would actually amount to a fraud being played on both, the public, as well as on the petitioners and others who had bid high prices for the other mining quarries.

Obviously, if the price fixed for the PSIEC was Rs.30 per ton and a

sub-contractor sold it for the same or near about the same prices as those on which the petitioners were selling the mineral, the very purpose given by the Government to allot the quarries to the PSIEC so as to bring down the prices, would be wholly defeated, thereby making it not an action in public interest.

After the insertion of sub-section (2C) in Section 17-A, i.e., w.e.f. 27.3.2015, in any case such a practice cannot be resorted to, because if a Government Company is to enter into a partnership/venture with a private player, then the private player has to be selected by fair competition. Even given that the private players (if any) were chosen by a process of competition, that still would not alter the fact that the public interest professed by Government would stand completely defeated. We say this in reference to a situation where the contractor of the PSIEC may have been given the rights to not just excavate, but also sell the minerals.

Be that as it may, taking into consideration the observations recorded hereinabove, we dispose of the writ petitions by affirming the power of the government to allot, by selection, mines to a government department, affirm the validity of the proviso to rule 34 of the Rules by holding that it does not violate Section 17-A of the 1957 Act but comment adversely upon the course adopted by the State, as, while enriching itself by offering mines at commercial rates, it has, thereafter by offering mines at nominal reserved price, to the Government Corporation, seriously impacted the business of the petitioners. However, as there are no statistical bases before us about the loss suffered by the petitioners, we grant liberty to the petitioners, to file an appropriate representation to the Director,

Mining, Industries & Commerce Department, 30 Bays Building, Sector 17-C, Chandigarh, seeking modification of their contracts, reduction of the reserve price, granting terms and conditions similar to those provided to PSIEC and in case, they are able to establish an adverse impact to their commercial interests to compensation and/or seek cancellation of their contracts, in accordance with the provisions of the Act. However, if their contracts are to be cancelled in the circumstances detailed by us in this judgment, it would be in the fairness of things for the State to not forfeit the earnest money deposited by the petitioners and those similarly placed like them and in fact, to refund such earnest money, after, of course, setting off the price of the minerals already sold by the petitioners. The representation, so filed, shall be decided within six months of their filing and inconsonance with the Act and the Rules.

(RAJIVE BHALLA)
JUDGE

26th February, 2016
VK

(AMOL RATTAN SINGH)
JUDGE