

Writ Petition No. 1897 of 2007

27-04-2011

Shri M. P. Shukla, learned counsel for the petitioner.

Shri Pramod Shrivastava, learned counsel for the respondent No. 1.

Shri S. P. Rai, learned Govt. Advocate for the respondents No. 3 & 4.

With consent, matter is heard finally.

Challenge put forth in this writ petition under Article 226/227 of the Constitution of India is to an order dated 21-12-2006 passed in Panchayat Revision No. 69/A-89/05-06 by Additional Collector, Seoni; whereby, the resolution dated 26-07-2006 passed by Gram Panchayat Kohka of granting fishing lease of Kohka Reservoir in favour of respondent No. 1 for a period of seven years has been upheld.

Grant of fishing lease rights of Reservoirs within Gram Panchayats are governed by policy of State Government captioned: Panchayat Raj Vyavastha Ke Aantargat Machhli Palan Ke Liye Panchayatn Dwara Gramin Talab Tatha 200 hectare Ausat Jalakshetra Tak Ke Sichai Jalashaya Patte Par Dene Ke Sambandh Mein Niti Avam Nirdesh (Annexure-P/2).

Clause 2 of the policy sets out of beneficiaries who in priority would be entitled for grant of lease. It stipulates :

“2. आंबंटिती/हितग्राही :-

2.1 शासन की स्पष्ट नीति है कि मत्स्य पालन के लिये इन तालाबों/जलाशयों को गरीबी रेखा के नीचे जीवन यापन करने वाले स्थानीय मछुओं को प्राथमिकता पर आवंटित किया जाये अर्थात् किसी भी दशा में इन जलक्षेत्रों की नीलामी नहीं की जायेगी, स्पष्ट है कि शासन के सामाजिक एवं आर्थिक उद्देश्य की पूर्ति के लिये पंचायतें भी उतनी ही जिम्मेदार हैं।

आबंटन के लिये प्राथमिकता का क्रम निम्नानुसार होगा :-

1. मछुआ/अनुसूचित जनजाति/अनुसूचित जाति की सहकारी समितियां।
2. मछुआ/अनुसूचित जनजाति/अनुसूचित जाति के समूह।
3. मछुआ/अनुसूचित जनजाति/अनुसूचित जाति के व्यक्ति।

2.2 अनुसूचित जनजाति बाहुल्य जिला/क्षेत्र में इस जाति को समिति/समूह/व्यक्ति को प्राथमिकता दी जायेगी इन प्राथमिकताओं का पालन करते हुये आर्थिक वायेबिलिटी को भी ध्यान में रखा जाये, जिसके तहत स्थानीय एक हितग्राही को 0.5 से 1.0 हैक्टेयर तक ग्रामीण तालाब आबंटित किया जाये। यदि तालाब 5.0 हैक्टेयर से अधिक जलक्षेत्र का है तो उसे उसी क्षेत्र का पंजीकृत स्थानीय मछुआ सहकारी समिति को दिया जाए सामान्यतः समूह अथवा समिति में सदस्यों का संख्या, प्रति 1000 किलोग्राम मत्स्य उत्पादन एक सदस्य के मान से निर्धारित होगी।

2.3 यदि उस क्षेत्र के मछुआ समिति/समूह से कोई आवेदन प्राप्त नहीं होता है तो पंचायत जिले के भीतर समीप के क्षेत्र की मछुआ समिति/समूह को तालाब/जलाशय का पट्टा दे सकेंगी।

टीप :- उसी क्षेत्र के पंजीकृत स्थानीय मछुआ सहकारी समिति से तात्पर्य तालाब/जलाशय के 8 कि.मी. परिधि में पंजीकृत मछुआ सहकारी समिति से है।”

Indisputably, the petitioner as well as the respondent No. 1 are societies comprising of members of SC/ST category and are within 8 kms. Periphery of the Kohka Reservoir as such both the societies enjoy equal priority rights.

Though learned counsel for the petitioner laboured hard but failed to establish that respondent No. 1 is not within 8 kms. Periphery of the Kohka Reservoir.

Since the petitioner has failed to establish any illegality or violation of any terms of policy in vogue. The petitioner has also not been able to establish that vide resolution dated 10-07-2006 reservoir was allotted to petitioner. The resolution in question cannot be interfered.

In result petition fails and is hereby dismissed. No costs.

(SANJAY YADAV)
JUDGE

sc

HIGH COURT OF MADHYA PRADEESH JABALPUR

(Writ Petition No. 10194/2008)

KSK Energy Ventures Limited,
Vs.
M.P. State Mining Corporation Ltd. & ors.

PRESENT : **HON'BLE SHRI JUSTICE**
SANJAY YADAV

Counsel for Petitioner	Shri Ravi Shankar Prasad, Sr. Advocate with Shri Naman Nagrath, Shri Sanjay Sen and Shri Deepak Biswas, Advocates.
Counsel for respondent No. 1	Shri M.L. Jaiswal, Sr. Advocate with Shri H.K. Upadhyay, Advocate.
Counsel for respondent No. 2	Shri Samdarshi Tiwari, Govt. Adv.
Counsel for intervenor	Shri Shashank

Shekhar, Advocate.

ORDER

(28.11.2008)

PER SANJAY YADAV, J

Non operationalisation of Memorandum of Undertaking leading to its cancellation and a decision to invite fresh expression of interest drives the petitioner to this Court seeking quashment of cancellation of Memorandum Of Understanding (MOU) dated 15.6.2006 by order dated 12.8.2008 (Annexure P/20) and notice dated 14.8.2008 which is an invitation of Expression of Interest (EOI) for selection of Joint Venture Partner Cum MOD for Exploration, Development, Mining and Supply of Coal from Morga-1 Coal Block of MPSMCL and setting up of Power Plant. And a consequence thereof, the petitioner seeks implementation of tripartite agreement dated 15.6.2006, which, as per the petitioner, has been kept in a state of desuetude.

2. The relevant facts briefly are that in the year 2006, the Madhya Pradesh State Mining Corporation Ltd. (referred to as MPSMCL) vide its letter dated 4.2.2006

(Annexure P-4) approached the Government of India, Ministry of Coal for allocation of 4 Coal Blocks, viz., Gare Palema-III Mand-Raigarh; Morga-I, Hasdeo Arand; Morga II, Hasdeo-Arand and Parsa, Hasdeo-Arand. This request by the MPSMCL was in advancement of the revised Policy 2001 of Government of India, Ministry of Coal, whereby State undertakings were permitted to undertake mining and supply of coal even outside their State. In pursuant thereof, the Government of India, Ministry of Coal, vide its letter dated 2.8.2006 (Annexure P-9) conveyed 'in principle' approval to the working of Morga-I Coal Block by M/s. MPSMCL under the Government Company dispensation in pursuance of Section 3 (3) (1) (i) of the Coal Mines (Nationalisation) Act, 1973 subject to various conditions, viz.,

- (i) Coal Mining shall be carried out by M/s. MPSMCL, or a separate company to be created with participation of M/s. MPSMCL or provided that the separate created company is a government company.
- (ii) The allocatee will do coal mining in accordance with the provisions of the Coal Mines (Nationalisation) Act, 1973, the Mines and Minerals (Development & Regulation) Act, 1957, the Contract Labour (Regulation & Abolition) Act,

1970, and all the Minerals, environmental and labour laws along with other regulations governing coal industry.

- (iii) The allocatee would do mining of coal from the allocated block in accordance with a mining plan approved by the Central Government.
- (iv) The mining lease will be executed between the State Government and the allocatee as per the provisions of MMDR Act 1957 and rules framed thereunder.
- (v) The exploration of the coal block shall be done either through CMPDIL or under the direct supervision of CMPDIL. Prospecting license shall be applied for within three months of date of allotment and the detailed exploration shall be completed at the earliest. After the detailed exploration is completed the allocatee of the block shall proceed for ensuring earliest commencement of production. The milestone chart appended shall be adhered to. Any slippage would render this allocation liable for cancellation, and withdrawal of block from the allocatee.
- (vi) Whether the block could be operated as one mine or otherwise would be determined by the Central Government after the detailed exploration is completed, having regard to factors such as the interest of conservation, safety, deployment of optimal technology for optimal extraction of coal, mine capacity, the earliest commencement of production, etc.
- (vii) The existing coal linkages granted from CIL/SCCL would not be disturbed in any way with coal mined from Morga-I block.
- (viii) Any violation of the conditions imposed above in mining and disposing of coal from the Morga-I coal block will render the mining lease liable for cancellation.

3. Prior to 'in principle' approval of Government of

India, Ministry of Coal, a tripartite Memorandum of understanding (referred to as MOU) was arrived at between MPSMCL, IDFC and KSK, the petitioner, for development of Coal block outside of Madhya Pradesh on 15.6.2006 (Annexure P/1). This MOU was in anticipation of allotment of Coal blocks outside the State of Madhya Pradesh. The terms of MOU relevant for present controversy appears in clauses 1, 2, 3, 5, 6, 8, 9 and 11 which read thus:

1. KSK shall enter into memorandum of Understanding (MOU) with MPSMCL for coal mining and for supply of coal and the idfc Consortium shall set up or acquire Thermal Power Projects (Power Projects) in one or more phases.
2. The Coal block development shall have two portions-one relating to detailed exploration and mining of coal block by KSK and the other relating to the coal supply to the thermal project(s) set up or acquired by the IDFC Consortium. KSK has the right to undertake coal mining either directly or through one or more SPVs or through contract mining or a combination of these options. The cost of coal mining shall be notified by KSK.
3. IDFC Consortium has the right to execute Power Projects through one or more SPVs and could undertake such projects either through Greenfield and/or acquisition of existing projects. KSK has the exclusive

- right to notify Power Projects where coal needs to be supplied.
5. After the detailed exploration of the block and preparation of Geological Report MPSMCL and KSK may form a Joint Venture Company (JVC) under the standard terms and conditions of MPSMCL prevailing at the time of signing of this MOU.
 6. The MPSMCL shall obtain and continue to have the mining leases. The MPSMCL shall outsource the mining operation to KSK through the MOU.
 8. KSK shall pay a facilitation fee to the MPSMCL for every tonne of ROM coal sold calculated on the basis of the cost of mining notified by KSK. The price of supply by MPSMCL shall be the cost of the mining notified by KSK and a facilitation fee as outlined herein below:
 - a. The facilitation fee for sale of coal to consumers other than Power Projects shall be : for 'A' to 'C' grade of Coal – 35%, for grade 'D' to 'E' 25 % and for grade 'F' and 'G' and below grade 20 % respectively, of the basic sale price of various grades of Coal per tonne fixed by the respective Coalfield in the area where block is located, from time to time or the price of Coal notified by KSK whichever is higher.
 - b. For coal sold to the Thermal Power Projects set up or acquired by IDFC Consortium, the facilitation fee payable to MPSMCL shall be fixed on mutual agreement. However, it shall not be less than Rs.25/- per tonne of ROM Coal.
 9. Coal produced from the mining Blocks shall be supplied on priority basis to the Power

Projects to be set up or acquired by the IDFC Consortium and the surplus, if any, after meeting the Coal requirements of the Power Projects can be sold to other consumers.

11. This MOU is for and in respect of only the coal blocks outside of Madhya Pradesh, expected to be allotted to MPSMCL. However, the request of the IDFC Consortium for allotment of additional blocks outside Madhya Pradesh, if allocated to MPSMCL and subject to approval of the State Government, may be considered on priority basis for long-term sustainability and viability of the Power Projects.

4. The aforesaid terms of understanding qua the stipulations contained in the approval dated 2.8.2006 by Govt. of India and the decision in meeting dated 20.9.2006 held at State level led to seeking of clarification by Government of Madhya Pradesh, Mineral Resources Department vide letter dated 28/29.11.2006 as to whether the terms of understanding arrived at on 15.6.2006 was in consonance with those in letter dated 2.8.2006. Government of India, Ministry of Coal, responding to the aforesaid wrote back on 31.7.2007, Annexure P/15, indicating therein that the State of Madhya Pradesh to ensure the following before operationalising the MOU:

- (i) Since the block is allocated to the Madhya Pradesh State Mining Corporation Limited (MPSMCL) under Government Company dispensation route, which provides for commercial mining, if joint venture route is adopted for such mining, such an entity shall be a government company in nature and Character.
- (ii) MPSMCL can opt for outsourcing/contract mining if they so desire, subject to conformity with the relevant laws in this behalf.
- (iii) In case of outsourcing option, mining lease shall be in the name of MPSMCL only.
- (iv) Mining contractor shall have no say in fixing the sale price of coal and choice of consumers.
- (v) All commercial decisions shall be taken by MPSMCL/separate joint venture government company, as the case may be.
- (vi) Mining contractor shall be paid only the cost of mining and incidentals thereof.
- (vii) Mining contractor is not entitled to receive any proceeds of the sale price of coal decided by MPSMCL.
- (viii) In accordance with the above, the conditions of allotment and relevant rules/regulations shall be followed.

5. In sequel thereof a meeting was held on 11.10.2007 under the Chairmanship of the Chief Secretary comprising of Principal Secretaries, Department of Commerce & Industries, Finance, Power, Mineral Resources whereof following decision was taken:

“1- e0iz0 esa fLFkr dsfIVo dksy
Cykd ds vkoaVu ds laca/k esa izkIr
vkosnu Ik=ksa esa ewY;kadu

izfrosnu lfefr ds le{k j[kk x;kA lfefr
 }kjk fopkjkksijkUr ;g fu.kZ; fy;k x;k
 fd izns'k esa fuos'k djus okyh
 rFkk ,UM+;wt IykV LFkkfir djus
 okyh daiuh dks izkFkfedrk fn;s
 tkus dh n`f"V ls izkIr vkosnu
 lk=ksa dk iqu% ewY;kadu dk
 izfrosnu lfefr ds le{k izLrqr fd;k
 tk,A ewY;kadu dk ekin.M
 fuEuukuqlkj fu/kkZj.k fd;k tk, %&
 vad

$\frac{1}{4}1\frac{1}{2}$ e;/izns'k esa ,UM+;wt IykaV
 dh izLrkfor LFkkiuk 30

$\frac{1}{4}2\frac{1}{2}$ e;/izns'k esa izLrkfor fuos'k
 30

$\frac{1}{4}3\frac{1}{2}$ vkosnd dh foRrh; fLFkfr
 20

$\frac{1}{4}4\frac{1}{2}$ [kuu ,oa ,UM+;wt esa
 vuqHko 10

$\frac{1}{4}5\frac{1}{2}$ izLrkfor izkstsDV dh rS;kjh
 dh fLFkfr@fo|eku 10

izkstsDV dh fLFkfr

foHkkx mijksDrkuqlkj izkIr
 vkosnuksa dk fo'kys"k.k dj vkxkeh
 CkSBd esa izLrqr djsaA

2- eksjxk& 1 dksy Cykd ds fy;s
 e0iz0 jkT; [kfut fuxe] esllZ
 ds0,l0ds0 rFkk vkbZ-Mh-,Q-lh-
 dalksfV;e ds e/; fu"ikfnr f=lk{kh;
 ,e0vks0;w0 ds fØ;kUo;u ds laca/k

esa lfefr }kjk fopkj fd;k x;kA Hkkjr
 ljdkj dks;yk ea=kky; }kjk bl dksy
 Cykd ds vkoaVu vkns'k esa
 mYysf[kr "krksZ ds vfrfjDr
 foHkkx }kjk mDr ,e0vks0;w0 ds
 fØ;kUo;u ds laca/k esa Hkkjr ljdkj]
 dks;yk ea=ky; ls pkgS x;s
 ekxZn'kZu ds ifjizs{; esa fnukad
 31&7&07 dks Hkkjr ljdkj }kjk fn;s
 x;s vfHker esa mYysf[kr 'krksZ ds
 izdk'k esa lfefr dk ;g vfHker gS fd
 eksjxk & 1 dksy Cykd ds laca/k esa
 iz'uk/khu ,e0vksa0;w0 ds varxZr
 dksbZ dkjZokbZ djuk e0iz0 jkT;
 [kfut fuxe ds fy, laHko ugha gS A"

6. Thereafter Cabinet took a decision on or about 5.8.2008 which was communicated to the MPSMCL vide letter dated 21.8.2008; Annexure R/5 whereby the MPSMCL was directed to act in accordance with clause 3, 4 and 5 of departmental précis dated 5.8.2008 placed before the Cabinet. Further requiring the MPSMCL to get the terms and conditions of agreement verified from Department of Energy, Govt. of M.P. in respect of Coal Block Morga 2, clause 4 of the precise is relevant which besides other things required

“vr% foHkkx dk izLrko gS fd
eksjxk&1 dksy CykWd dks FkeZy
ikoj IykUV dh LFkkiuk ds fy;s
vkjf{kr djuk gksxkA bl dksy CykWd
esa 250 fefy;u Vu ds fjtZl miyC/k
gSaA eksjxk&1 dks fuEu 'krksZ ds
v/khu FkeZy ikoj IykUV dh LFkkiuk
ds fy;s vkjf{kr fd;s tkus dk izLrko
gS%&

$\frac{1}{4}1\frac{1}{2}$;g FkeZy ikoj IykUV
e/;izns'k ,oa NRrhlx<+ esa
LFkkfir fd;k tk ldrk gSA

$\frac{1}{4}2\frac{1}{2}$ bl ikoj IykUV lss fon~;qr
Ø; djus dh uhfr ,oa Ø; dh tkus
okyh fon~;qr dh njksa ds laca/
k esa lfpo] ÅtkZ dk tks er izkIr
gqvk gS og ifjf'k"V&d ij gSA”

6@ ÅtkZ foHkkx ds mDr er ij
foHkkx dk er fuEukuqlkj gS
%&

$\frac{1}{4}6-1\frac{1}{2}$ eksjxk&1 dksy CykWd
esa 250 fefy;u Vu HkkSfedh;
fjtZl gSaA buesa ls yxHkx 80
izfr'kr [kuu ;ksX; dksy izkIr
fd;k tk ldsxkA lkekU;r% 1000
esxkokV ds ikoj IykUV ds fy;s
5 fefy;u Vu dksy dh izfro"kJZ
vko';drk gksrh gSA 25 o"kksZ
ds fy;s 1000 esxkokV dss ikoj

IykUV ds 125 fefy;u Vu dksy
dh vko';drk gksxhA bl izdkj bu
Hk.Mkjksa ij vk/kkfjr yxHkx
1500 esxkokV dk ikoj IykUV
LFkkfir fd;k tk ldrk gSA u fd
2000 esxkokV dkA

$\frac{1}{4}6-2\frac{1}{2}$ ÅtkZ foHkkx }kjk
lq>k;s x;s QkeZwys ftlds
vk/kkj ij fufonkdkjksa dk p;u
fd;k tkuk gS dks fl/nkUr%
Lohdkj fd;k tk ldrk gS fdUrq
blesa fofHkUu ?kVdksa dks
fuEukuqlkj oSVst fn;k tkuk
izLrkfor gS%&

$\frac{1}{4}6-2-1\frac{1}{2}$ fon~;qr iznk;
dh ek=k gsrq 0-33

$\frac{1}{4}6-2-2\frac{1}{2}$ fon~;qr iznk;
dh nj gsrq 0-33

$\frac{1}{4}6-2-3\frac{1}{2}$ QsflfyVs'ku Qhl
gsrq 0-34

$\frac{1}{4}3\frac{1}{2}$ la{ksfidk dh dafMdk 4-2
lgifBr dafMdk 3-10 Loa; Li"V
gSA ,slh fon~;qr {ks= dEiuh tks
fu/kkZfjr VuZ vksoj rFkk usV oFkZ
ds ekin.M iw.kZ djrh gS dks
mR[kuu ds {ks= esa vuqHkoh
dEiuh ds lkFk dUlksZf'k;e cukus
dh ik=rk jgsxhA

$\frac{1}{4}4\frac{1}{2}$ jkT; 'kklu }kjk futh dEiuh
ds lkFk jkT; esa rki fon~;qr

ifj;kstuk,a LFkkfir djus gsrq
 le>kSrk Kkiu gLrk{kfjr fd;s gSa
 muesa ls ,slh lHkh dEifu;kW fufonk
 esa Hkkx ysus dh ik= gksaxh A tks
 la{ksfidk esa lq>k;s vuqlkj
 rduhdh ,oa foRrh; vgZrk,a j[krh
 gksaA”

7. After the aforesaid decision of the Cabinet following deficiencies were noted marked by the MPSMCL in the MOU dated 15.6.2006 in respect of clause 1,2,3,5,6,8, 9 viz.

- (i) Since the allotment of coal block is under Section 3 (3) (a) (i) of the Coal Mines (Nationalization) Act, 1973 which envisages the work to be done by the Government Company, therefore, no further MOU can be entered between the petitioner and the respondent No. 1.
- (ii) Clause 2 of the MOU gives an understanding that KSK, the petitioner, will do the coal mining either itself or through one or more SPVs and this clause further gives an understanding that cost of coal will be fixed by KSK. This was in confrontation of clause (i) of the letter and also clause (iv) and (vi) of the letter dated 31.7.2007.
- (iii) Clause 3 of the MOU is contrary to the order dated 2.8.2006 as well letter dated 3.7.2007 as it gives an understanding that KSK has power to notify Power Projects where coal needs to be supplied whereas Clause (iv) specifically bars such a course.
- (iv) Clause 5 of the MOU is contrary to clause (v) of the letter dated 31.7.2007.
- (v) Clause 6 of the MOU is in direct confrontation of

- clause (i) of the order of allotment and makes any action pursuant to the MOU unworkable.
- (vi) Clause 8 of the MOU gives an understanding that KSK will do the coal mining either by itself or through one or more SPVs and this clause further gives an understanding that cost of coal will be fixed by KSK. This is in direct confrontation of clause (i) of the letter and also clauses (iv) and (vi) of the letter dated 31.7.2007.
 - (vii) Clause 9 of the MOU is contrary to the order dated 2.8.2006 as well as letter dated 31.7.2007 as it gives an understanding that KSK has power to notify Power Projects where coal needs to be supplied, whereas clause ((iv) specifically bars such a course.

8. These discrepancies led to issuance of impugned order dated 12.8.2008 Annexure P/20 whereby the petitioner was informed that:

- (i) The MOU dated 15.6.2006 to the extent to which it is contrary to the provisions of the Act, the Govt. Policy and the conditions of the grant is void and unenforceable.
- (ii) The conditional order of MORGA-I Coal block 02.08.2005 of GOI read along with the contents of the letter dated 31.7.2007 supersedes the MOU dated 15.6.2006. The MOU cannot be enforced in departure from the terms and conditions dictated by the allotment dated 2.8.2006 and letter dated 31.7.2007.

9. Consequent whereof the MOU stood cancelled and an invitation for expression of interest (EOI) for selection of joint ventures partner cum MDO for exploration,

development, mining and supply of coal from Morga I Coal Block of MPSMC and setting up of power plant was issued on 15.8.2008, Annexure P-19. These two, i.e., order dated 12.8.2008 and the invitation for EOI are under challenge in this writ petition and a further plea that the MOU be operationalised.

10. Assailing the action of the respondents the three fold submissions put forth by the learned Senior Counsel on behalf of the petitioner are that:-

- (i) The cancellation of MOU is void ab initio being without affording any opportunity of hearing, because the action of the respondent not only led to an adverse civil consequences, but has also adversely affected its corporate right which the petitioner had harnessed after entering into the MOU.
- (ii) The respondents not only entered with MOU with open eyes but also got the same approved at various stages on the basis of which the petitioner had acted upon and irreversibly changed its position and therefore the respondents cannot be allowed to reile from the MOU entered into.
- (iii) The action of the respondents suffers from the vice of arbitrariness because the MOU has been entered into after much deliberations and even if the terms thereof are at some variance to the stipulations contained in the 'in principle' allocation by the Govt. of India, the respondents were not justified in unilaterally abdicating the MOU. This action, it is urged, violates Article 14 of the Constitution of India.

11. On the anvil of these submissions the learned Senior Counsel while craving for indulgence urges that the MOU which consists of two parts viz., one relating to exploration and mining of Morga I Coal block and the other relating to coal supply to thermal power projects and the two being severable and the outsourcing of mining activity to the petitioner is not linked to supply of coal and neither any provision of law nor the conditions set in the Govt. of India's letter/classification dated 31.7.2007 create any impediment in the supply of coal, therefore, it is contended that, the MOU creates a binding obligation upon respondent No. 1 MPSMC to execute the coal supply agreement.

12. The respondent No. 1 on its turn while raising preliminary objection relating to maintainability of the writ petition has opposed all such relief as sought for by the respondents. It is urged by the learned Senior Counsel appearing for respondent No. 1 that it is beyond the scope of prerogative jurisdiction under Article 226 of the Constitution either to enforce the MOU or to compel

the respondent to restrain from selecting a partner for a joint venture. A specific performance of contract, it is urged, is impermissible under the writ jurisdiction. While advertent to merits, it is contended that, the said MOU was entered into on implied acceptance of two assumptions, viz., (a) that the MPSMC will be allocated coal block outside State of M.P. and (b) the terms and conditions of the allocation by the Govt. of India, Ministry of Coal will permit the parties to forward its intent, expressed through their private MOU. And since the terms and conditions contained in the "in principle" approval to the working of Morga I block under the provisions of Section 3 (3) (a) (i) of the Act of 1973, mandating therein that, the mining has to be done either by the MPSMC or a Company in which MPSMC is a participant and the same is 'government company' eligible to do coal mining as per the provisions of the Act of 1973. This conditional grant of the coal block have emerged as a legal hurdle for the implementations or the operationalisation of the MOU. The learned Senior

Counsel while relying upon various conditions of the MOU and comparing the same with 'in principle' approval granted on 2.8.2006 and clarification dated 31.7.2007 pointed out about eight areas whereof were found creating stumble in operationalization of MOU. It is further contended that MOU is an arrangement which is non-statutory and runs in the realm of private law and there are disputed questions of facts involved in the case which can be deciphered only after recording evidence on both the sides, which is not possible in a writ petition under Article 226 of the Constitution of India. It is further stated that, there being no concluded contract and since the operationalization of MOU was dependent on the terms and conditions laid down by the Govt. of India and the terms and conditions of the MOU being in contravention thereof, the non operationalization of MOU, ipso facto, does not attract principle of natural justice, because the same is not in the realm of quasi-judicial act but is purely an administrative act in the periphery of private contract.

13. The State of Madhya Pradesh, on their turn has supported the contentions raised by respondent No. 1 MPSMCL. Contending inter alia, that there being no concluded contract, the question of its enforcement does not arise. It is also reiterated that the petitioner being not a government company cannot seek enforcement contrary to the statute. Reliance is placed on Section 3 (3) of the Act of 1973.

14. The Govt. of India, Ministry of Coal in its short reply stated that the allocation of coal block to State Government under Government dispensation confers on it the right to do commercial mining of coal; thereunder, the State Govt. undertaking is entitled to sell coal to any consumers of its choice. This right of commercial mining, it is urged, is denied to private sector allocatees of coal block. It is further stated that the State undertaking is free to outsource various operations including the mining operations with respect to the allocated coal block which is allowed under law and it is for the Govt. of Madhya Pradesh and MPSMCL to examine the MOU and ensure

that it meets the requirements of the conditions contained in the letter of allocation.

15. Heard at length the respective counsel for the parties and perused the written submissions put-forth.

16. Before entering into the merits of respective submission, apt it will be to first deal with the preliminary objections in respect of the maintainability of the writ petition.

17. The law journals are replenished with plethora of cases decided by the Apex Court holding therein that in the matter of contract when no statutory violation is established, the aggrieved party should refer to the remedy available under the common law and interference in the writ petition is not permissible. In **State of Bihar and others v. Jain Plastics and Chemicals Ltd.** [(2002) I SCC 216], their Lordships were pleased to observe in paragraph 3:

3. Settled law – writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of

competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226.”

18. In the **Whirlpool Corporation v. Registrar of Trade Marks** [(1998) 8 SCC 1], their Lordships while observing that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution and can be exercised by the High Courts not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”, were pleased to hold in paragraph 15:

“But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of

the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged..... “

(emphasis supplied)

This view has been recently endorsed in the case of **Popcorn Entertainment and another v. City Industrial Development Corporation and another** [(2007) 9 SCC 593].

19. In the case at hand the extra ordinary jurisdiction is being invoked on the ground that the order of cancellation of MOU has been formulated without affording any opportunity of hearing, because right has been accrued in favour of the petitioner and an order leading to adverse civil consequences can be questioned in writ petition under Article 226 of the Constitution of India. And secondly, that the decision of resiling from an understanding arrived at consciously reflects an arbitrary exercise of power coupled with the facts that under similar circumstances at least two companies, viz., Sainik Mining And Allied Services Limited and Jaiprakash Associates Ltd. have been selected as the joint venture

partners for development, coal production, sale of coal from coal Block/Blocks which may be allotted to MPSMCL, the petitioner cannot be discriminated, being violative of Article 14 of the Constitution of India. Therefore, unless it is couched that there is no violation of rule of natural justice or of Article 14 of the Constitution of India, this Court can exercise its power of judicial review of an administrative action where public element is involved. Therefore, the preliminary objection as to maintainability of writ petition is over-ruled.

20. Now coming to the merits of respective submissions.

21. "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of legitimate expectation form part of the principle of non-arbitrariness, a necessary concomitant of the rule of law." This was observed by their Lordships of the Supreme Court in the case of **Food Corporation of India v. Kamdhenu**

Cattle Feed Industries : AIR 1993 SC 160, in the context of the determination of a question not in accordance with the claimants perception but in larger public interest “wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant.” It was accordingly observed by their Lordships in paragraph 8 that, “A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.”

22. In **Bannari Amman Sugars Ltd. v. Commercial Tax Officer and others** [(2005) 1 SCC 625], while observing that “The doctrine of legitimate expectation has an important place in the developing law of judicial review.” Their Lordships were pleased to observe in paragraph 8 :

“It is, however, not necessary to explore the doctrine in this case, it is enough merely to

note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the Court to apply for judicial review. It is generally agreed that "legitimate expectation" gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest."

Their Lordships were further pleased to observe in paragraph 19 and 20 :

"19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expression without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are

bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court.

20. In *Shrijee Sales Corporation v. Union of India* [(1997) 3 SCC 398] it was observed that once public interest is accepted as the superior equity which can override individual equity the principle would be applicable even in cases where a period has been indicated for operation of the promise. If there is a supervening public equity, the Government would be allowed to change its stand and has the power to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. Moreover, the Government is competent to rescind from the promise even if there is no manifest public interest involved, provided no one is put in any adverse situation which cannot be rectified. Similar view was expressed in *Pawan Alloys and Casting (P) Ltd. v. U.P.SEB* [(1997) 7 SCC 251] and in *STO v. Shree Durga Oil Mills* [(1998) 1 SCC 572] and it was further held that the Government could change its industrial policy if the situation so warranted and merely because the resolution was announced for a particular period, it did not mean that the Government could not amend and change the policy under any circumstances. If the party claiming application of the doctrine acted on the basis of a notification it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to

do so in public interest.”

In this context it was observed by their Lordships in
State of Punjab v. Nestle India Ltd. and another (2004) 6
SCC 465 in paragraph 44:

“44. Of course, the Government cannot rely on a representation made without complying with the procedure prescribed by the relevant statute, but a citizen may and can compel the Government to do so if the factors necessary for founding a plea of promissory estoppel are established. Such a proposition would not ‘fall foul of our constitutional scheme and public interest’. On the other hand, as was observed in Motilal Padampat Sugar Mills case and approved in the subsequent decisions: (SCC p. 442, para 24)

“It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel.”

23. In **Mahabir Auto Stores v. Indian Oil Corporation and others** (AIR 1990 SC:1031), the context which led their Lordships to observe “every action of the State or an instrumentality of the State in exercise of its executive power must be informed by reason; was

that the respondent there, i.e., the Indian Oil Corporation had continuously uninterrupted, consistently and repeatedly dealt with the appellant and recognized the appellant, and treated it as a dealer and on that basis the appellants and his family had acted for 19 years. Therefore, their Lordships were pleased to observe in paragraph 17:

“17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such “power” and not cases of exercise of a “right” arising either under a contract or under a Statute. We are of the opinion that that would depend upon the factual matrix.”

24. In **Dresser Rand S.A. v. Bindal Agro Chem. Ltd. and K.G. Khosla Compressors Ltd.** [(2006) 1 SCC 751]

their Lordships were pleased to observe:

“39. It is now well settled that a letter of intent merely indicates a party’s intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any

contract. This Court while considering the nature of a letter of intent, observed thus in Rajasthan Co-operative Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd : [(1996) 10 SCC 405]:

“ The letter of intent merely expressed an intention to enter into a contract. There is no binding legal relationship between the appellant and respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not”.

25. Article 39 (c) of the Constitution of India stipulating that, the State shall, in particular, direct its policy towards securing that the operation of the economic system which does not result in the concentration of wealth and means of production to the common detriment, has been the harbinger of the Coal Mines (Nationalisation) Act, 1973 (Act No. 26 of 1973) which is an Act to provide for the acquisition and transfer of the right, title and interest of the owners in respect of the coal mines specified in the schedule with a view to re-organising and reconstructing such coal mines so as to ensure the rational, co-ordinated and scientific development and utilization of coal resources consistent

with the growing requirements of the country, in order that the ownership and control of such resources are vested in the State and thereby so distributed as best to sub serve the common good and for matters connected therewith or incidental thereto. This object gets perfected through sub-section (1) and (3) of Section 3 of the Act of 1973, which stipulates:

“3. Acquisition of rights of owners in respect of Coal mines:- (1) On the appointed day the right, title and interest of the owners in relation to the coal mines specified in the Schedule shall stand transferred to, and shall vest absolutely in, the Central Government free from all incumbrances.

(2) x x x x x x x
x

(3) On and from the commencement of section 3 of the Coal Mines (Nationalisation) Amendment Act, 1976,-

(a) no person, other than

(i) the Central Government or a Government Company or a corporation owned, managed or controlled by the Central Government, or

(ii) a person to whom a sub-lease, referred to in the proviso to clause (c), has been granted by any such Government, company or corporation, or

(iii) a company engaged in

(1) the production of iron and steel,

(2) generation of power,

(3) washing of coal obtained from a mine, or

(4) such other end use as the Central

Government may, by notification, specify;

- (b) excepting the mining leases granted before such commencement in favour of the Government, company or corporation, referred to in clause (a), and any sub-lease granted by any such Government, company or corporation, all other mining leases and sub-leases in force immediately before such commencement, shall, in so far as they relate to the winning or mining of coal, stand terminated.
- (c) no lease for winning or mining coal shall be granted in favour of any person other than the Government, company or corporation, referred to in clause (1):

Provided that the Government, company or corporation to whom a lease for winning or mining coal has been granted may grant a sub-lease to any person in any area on such terms and conditions as may be specified in the instrument granting the sub-lease, if the Government, company or corporation is satisfied that-

- (i) the reserves of coal in the area are in isolated small pockets or are not sufficient for scientific and economical development in a co-ordinated and integrated manner, and
- (ii) the coal produced by the sub-lessee will not be required to be transported by rail.

26. The expression 'Government Company' has been defined under Section 2 (f) of the Act of 1973 to mean:

"Government company has the meaning

assigned to it by Section 617 of the Companies Act, 1956”

And Section 617 of the Companies Act 1956 defines “government company” to mean:

617. Definition of “Government company”.- For the purposes of this Act Government company means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company as thus defined”.

27. The coal mining policy as mooted by the Government of India vide its circular No. 38035/2/97-CA dated 12.12.2001 in supersession of its earlier letter No. 20 (5)/79-CL dated 30.7.1979 allowed the State Government Companies or undertaking to do mining of coking and non-coking coal or lignite reserves, either by opencast or underground method, anywhere in the country subject to certain conditions stipulated therein and one of them being that, only State Government Company or undertaking is authorized to do coal or lignite

mining by its memorandum and Articles of Association. Thus even with the change in policy the opening up of mines were confined to the State Government Companies or undertakings, thus necessarily excluding the private entrepreneurs. This is in consonance with the goal sought to be achieved by the mandate of Article 39 (c) of the Constitution of India.

28. In the case at hand the “in principle” approval of the Central Government to the working of Morga I Coal Blockmining is “by M/s MPSMCL, or by a separate company to be created with participation of M/s MPSMCL provided that the separate created company is a Government Company eligible to do coal mining as per the provisions of the Coal Mines (Nationalisation) Act, 1973 and if the joint ventures route is adopted for such mining, such an entity shall be a government company in nature and character”.

29. The issue, therefore, which immediately falls for consideration is whether the joint venture route adopted by the MPSMCL by entering into a MOU with the

petitioner on 15.6.2006, in anticipation of the allocation of coal block will make it a government company in nature and character. If the joint venture is adjudged on the touchstone of Section 2 (f) of the Act of 1973 read with Section 617 of the Companies Act, 1956, the answer is in negative, though proviso to clause (c) of sub-section (3) of section 3 does permit sub-leasing of wining and mining; a perusal of MOU however reflects that, the petitioner is a partner in the joint venture and not a sub-lessee. Therefore, the operationalisation of the MOU would be contrary to the Statutory provisions contained under Section 3 of the Act of 1973, if mandated.

30. Furthermore, the MOU was entered into between the petitioner and MPSMCL for facilitating of Coal Mining and Marketing in anticipation of allotment of Coal blocks outside the State of Madhya Pradesh. The operationalisation of the MOU was thus dependent on the allocation of coal block by the Government of India outside State of M.P. And though the approval was granted by the Government of M.P. vide letter dated

22.5.2006, but that will not lend support to the contentions of the learned Senior Counsel for the petitioner that the terms and conditions of which MOU arrived at will have an overriding effect on the terms and conditions stipulated in the 'in principle' allocation of Morga I Coal Block by the Government of India dated 2.8.2006 and the clarification issued thereafter on 31.7.2007. There exists as many as eight areas of differences qua the conditional grant by the Govt. of India has been noted which stumbles the operation of the MOU. With these differences no direction can be given to the MPSMCL to operationalise the MOU and to execute Coal supply agreement.

31. In the result the relief as sought for by the petitioner for cancellation of notice for EOI for selection of joint venture partner cum MOD for exploration, development, mining and supply of coal from Morga-I Coal Block of MPSMCL & setting up of power plant and for setting aside of the termination of MOU and a direction for operationalisation thereof cannot be acceded to.

32. The petition, therefore, fails and is hereby dismissed. However no costs.

(SANJAY YADAV)
J U D G E

VIVEK TRIPATHI