

T.N. GODAVARAMAN THIRUMULPAD

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v.
UNION OF INDIA AND ORS.

(I.A. No. 2134 of 2007)

AUGUST 8, 2008

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**[K.G. BALAKRISHNAN, CJI, DR. ARIJIT PASAYAT AND
S.H. KAPADIA, JJ]**

Environmental Law:

Sustainable Development – Balancing of development-needs with protection of environment and ecology – Parties unconditionally accepting the suggestions made in the order dated 23.11.2007 for Rehabilitation Package and modalities to sub-serve the purpose of Sustainable Development – Suggestion by CEC for transfer of mining lease from OMCL to SPV – HELD: The lease cannot be directed to be assigned by State Government to SPV as it would amount to substitution of lease earlier executed by State Government in favour of OMCL – At pre-operational stage, price mechanism suggested by CEC need not be applied – If at the end of Accounting Year of SILL, CEC finds that annual profits before tax and interest is depressed by pricing mechanism mentioned in joint venture agreement dated 5.10.04, then it would be open to CEC to move the Court with suggested price mechanism in its Report – In fact in the Order dated 23.11.07 it has been directed that the accounts of SPV would be audited by Auditor General after they are prepared by statutory auditors of OMCL – It would be open even to the statutory auditors of OMCL as well as CEC to inform the Court at the end of the Accounting Year whether annual profit before tax and interest stands depressed for any reason and at that stage certainly the price mechanism suggested by CEC in its Report will be considered – The Rehabilitation Package, suggested in the Order 23.11.2007 is accepted and clearance is granted to the forest*

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A *diversion proposal for diversion of 660.749 hectares of forest land to undertake bauxite mining in the area in question – Next step would be for MoEF to grant its approval in accordance with law.*

B **T.N. Godavaraman Thirumulpad Vs. Union of India and Ors. (2007) 12 SCR 447=[2008]2 SCC 222 - referred to.*

Case Law Reference

(2007) 12 SCR 447=[2008]2 SCC 222 - referred to [para 1]

C CIVIL ORIGINAL JURISDICTION : IA NO. 2134 of 2007
IN

Writ Petition (Civil) No. 202 of 1995

(Under Article 32 of the constitution of India)

D G.E. Vahanvati, S.G. Harish N. Salve (A.C.), Uday U. Lalit (A.C.), K.K. Venugopal, Dr. Rajeev Dhavan, T.R. Andhyarujina, Dr. A.M. Singhvi, Ranjit Kumar, Siddhartha Chowdhary (A.C.)
E A.D.N. Rao (A.C.) P.K. Manohar, Harris Beeran, P. Parmeswaran, Anuradha Dutt, Vijaylakshmi Menon, Ekta Kapil, Ankur Talwar, Raj Kumar Mehta, Mragank, Malini Pal, Premjit Elangbam, J.K. Das, Avijeet Bhujabai, Ajit Pudussery, K.V. Mohan, Anand K. Ganesan, Swapna Sheshadri, Manoj Saxena (for T.V. George), Dhruv Mehta, Harshvardhan Jha and Yashraj Singh Deora (for M/s. K.L. Mehta & Co.) for the Appearing Parties.

F The following Order of the Court was delivered

G This Interlocutory Application preferred by M/s. Sterlite Industries (India) Ltd. [SIIL] is a sequel to our Order dated 23.11.07 in I.A. Nos.1324 and 1474 in Writ Petition (C) No.202 of 1995 etc. in the case of *T.N. Godavaraman Thirumulpad v. Union of India & others And in the matter of : Vedanta Alumina Ltd.* reported in (2008) 2 SCC 222. We need not repeat the contents of our Order dated 23.11.07 except to state that in our Order we suggested a Rehabilitation Package and modalities
H to subserve the principle of Sustainable Development.

2. For the sake of convenience we quote hereinbelow the suggestions made in our earlier order dated 23.11.07 which read as under: A

- (i) State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stake-holders shall be State of Orissa, OMC Ltd. and M/s. SILL. Such SPV shall be incorporated under the Companies Act, 1956. The Accounts of SPV will be prepared by the statutory auditors of OMC Ltd. and they shall be audited by the Auditor General for State of Orissa every year. *M/s. SILL will deposit, every year commencing from 1.4.07, 5% of its annual profits before tax and interest from Lanjigarh Project or Rs.10 crores whichever is higher for Scheduled Area Development with the said SPV* and it shall be the duty of the said SPV to account for the expenses each year. The annual report of SPV shall be submitted to CEC every year. If CEC finds non-utilisation or mis-utilisation of funds the same shall be brought to the notice of this Court. While calculating annual profits before tax and interest M/s. SILL shall do so on the basis of the market value of the material which is sold by OMC Ltd. to M/s. SILL or its nominee. B C D E
- (ii) In addition to what is stated above, M/s. SILL shall pay NPV of Rs.55 crores and Rs.50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine and Rs.12.20 crores towards tribal development. In addition, M/s. SILL shall also bear expenses towards compensatory afforestation. F G
- (iii) A statement shall be filed by M/s. SILL with CEC within eight weeks from today stating number of persons who shall be absorbed on permanent basis in M/s. H

- A SILL including land-losers. They shall give categories in which they would be permanently absorbed. The list would also show particulars of persons who would be employed by the contractors of M/s. SILL and the period for which they would be employed.
- B (iv) The State Government has the following suggestions on this issue:-
- C 1. The user agency shall undertake demarcation of the lease area on the ground using four feet high cement concrete pillars with serial number, forward and back bearings and distance from pillar to pillar.
- D 2. The user agency shall make arrangements for mutation and transfer of equivalent non-forest land identified for compensatory afforestation to the ownership of the State Forest Department.
- E 3. The State Forest Department will take up compensatory afforestation at project cost with suitable indigenous species and will declare the said area identified for compensatory afforestation as "*protected forest*" under the Orissa Forest Act 1972 for the purpose of management.
- F 4. The user agency shall undertake *Rehabilitation* of Project affected families, if any as per the Orissa Rehabilitation and Resettlement Policy 2006.
- G 5. The user agency shall undertake *Phased reclamation* of mined out area. All overburden should be used for back filling and reclamation of the mined out areas.
- H 6. The user agency shall undertake *fencing of the safety zone* area and endeavour for protection as well as regeneration of the said area. It shall deposit funds with the State Forest Deptt. for

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- the protection and regeneration of the safety zone area. A
7. Adequate *soil conservation measures* shall be undertaken by the Lessee on the overburden dumps to prevent contamination of steam flow. B
8. The user agency should undertake comprehensive *study on hydrogeology* of the area and the impact of mining on the surrounding water quality and stream flow at regular interval and take effective measures so as to maintain the pre mining water condition as far as possible. C
9. The user agency should undertake a comprehensive study of the wild life available in the area in association with institutes of repute like Wild Life Institute of India, Dehradun, Forest Research Institute, Dehradun etc. and shall prepare a *site specific comprehensive Wild Life Management plan* for conservation and management of the wild life in the project impact area under the guidance of the Chief Wild Life Warden of the State. D E
10. The user agency shall *deposit the NPV* of the forest land sought for diversion for undertaking mining operations. E
11. The user agency shall prepare a comprehensive plan for the development of tribals in the project impact area taking into consideration their requirements for health, education, communication, recreation, livelihood and cultural lifestyle. F
12. As per the policy of the State Government, the user agency shall earmark *5% of the net profit* accrued in the project to be spent for the development of health, education, communication, irrigation and agriculture of the said schedule area within a radius of 50 Kms. G H

- A 13. *Controlled Blasting* may be used only in exigencies wherever needed to minimize the impact of noise on wild life of the area.
- B 14. The User Agency shall undertake *development of greenery* by way of plantation of suitable indigenous species in all vacant areas within the project.
- C 15. *Trees shall be felled from* the diverted area *only when it is necessary* with the strict supervision of the State Forest Deptt. at the cost of the project.
- D 16. The forest land diverted shall be *non transferable*. Whenever the forest land is not required, the same shall be surrendered to the State Forest Deptt. under intimation to Ministry of Environment and Forests, Government of India.”

(emphasis supplied by us)

E 3. By our Order dated 23.11.07 we made it clear that if SIIIL is agreeable to the suggested *Rehabilitation Package* they were at liberty to move this Court by way of interlocutory application. Consequently, the present I.A. No.2134 of 2007 has been preferred by SIIIL.

F 4. In the present I.A. SIIIL, State of Orissa and Orissa Mining Corporation Ltd. [OMCL] have unconditionally accepted the terms and conditions and modalities suggested by this Court under the caption “*Rehabilitation Package*” in its Order dated 23.11.07. However, CEC has filed its Report dated 24.4.08. The Report contains response/counter suggestions on certain aspects. In our Order dated 23.11.07 we *inter alia* suggested formation of *SPV* for Scheduled Area Development of Lanjigarh Project in which we suggested that the stake-holders shall be State of Orissa, OMCL and SIIIL. We also *inter alia* suggested that the said *SPV* shall be incorporated under the Companies Act, 1956.

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5. CEC in its response has suggested that SPV should work the Niyamgiri Bauxite Mine in a business-like manner and that the mining lease of Niyamgiri Bauxite Mine may be assigned to the SPV from OMCL. In other words, CEC wants that State of Orissa should participate in the mining operations and it has further suggested that the State of Orissa should transfer or assign the mining lease from OMCL to SPV.

6. There are serious problems in the above suggestion made by CEC. At the outset, it needs to be stated that under our Order dated 23.11.07 we suggested, as a part of *Rehabilitation Package*, formation of SPV for Scheduled Area Development of Lanjigarh Project. We wanted the State of Orissa to be associated with SPV in order to ensure implementation of proper schemes for the development of the tribal area and in our Order it has not been suggested for incorporation of SPV to take over the mines which have been leased out by State of Orissa to OMCL (lessee). The reason is obvious. We cannot change leases/MoUs/joint venture agreements signed between the parties at earlier point of time which have been approved by the Ministry of Mines, Government of India, and other Authorities. The object for passing the Order dated 23.11.07 was to strike a balance between development and environmental protection. The Lanjigarh Tehsil in District Kalahandi, as stated in our Order dated 23.11.07, faces abject poverty. At the same time the area is eco-sensitive area. We have tried to strike a balance in order to subserve the principle of Sustainable Development. Under our Order we suggested *Rehabilitation Package* under which apart from NPV, SILL is also required to deposit 5% of annual profits before tax and interest from Lanjigarh Project or Rs.10 crores *per annum* whichever is higher. The said Project covers both mining and refining. The amount is required to be deposited by SILL with SPV every year commencing from 1.4.07. This condition has been accepted by SILL. Moreover, by reasons of acceptance of suggested *Rehabilitation Package*, 2090 persons (including displaced persons) would get employment as indicated in the Charts annexed to

A the Report of CEC. In addition, 2400 more persons would earn
income by support services. However, we cannot change the
existing structure in its entirety. If we were to accept the said
counter suggestion of CEC, namely, that the mines be taken
B over by *SPV* then we would be violating the terms and condi-
tions of the joint venture Agreement dated 5.10.04 between
OMCL and VAL (now substituted by SILL). Moreover, it may be
noted that the joint venture Agreement dated 5.10.04 was ex-
C ecuted because the Government of Orissa wanted its Under-
taking, namely, OMCL to earn revenue on its own account. There-
fore, we cannot direct a complete changeover. Under the joint
venture Agreement, OMCL was a lessee from Government of
Orissa. We cannot modify that lease. We cannot direct the lease
to be assigned by Government of Orissa to *SPV* as it would
amount to substitution of lease earlier executed by Government
of Orissa in favour of OMCL.
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7. CEC has further suggested pre-determined mechanism
for price fixation. Under the suggested new price-fixation mecha-
nism CEC has suggested as follows:

E “The price of the Bauxite Ore in the market is not ascertainable
since there is no market for this ore as such of significance, but
its price can be ascertained by reducing the normative cost of
conversion plus profit from the market price of Aluminium. The
CEC also examined the feasibility of determining the price of
the Ore by reducing the cost of conversion (plus profit) from
F the price of Alumina, but did not consider this an advisable
option since the price of Alumina shows a great degree of
variation from supplier to supplier (...). This method of
calculating price is in effect a mirror image of the Cost plus
Return basis adopted for determining tariff.”

G 8. We may state that price discovery/mechanism is a com-
plicated exercise. Moreover, on account of economic factors,
price variation takes place throughout the year. We do not wish
to rule out the formula suggested by CEC. Ultimately, as stated
in our Order dated 23.11.07, SILL is required to deposit 5% of
H its annual profits before tax and interest from Lanjigarh Project

or Rs.10 crores whichever is higher as contribution for Scheduled Area Development. This contribution is to be made every year commencing from 1.4.07. Under clause (i) of *Rehabilitation Package*, SPV has to account for Scheduled Area Development. Further under the said *Package*, SIIL is also required to contribute Rs.12.20 crores towards tribal development apart from payment of NPV and apart from contribution to the Management of Wildlife around Lanjigarh Bauxite Mine (See: clause (ii) of the *Rehabilitation Package*). While allocating CAMPA Funds the said amount of Rs.12.20 crores shall be earmarked specifically for tribal development. Therefore, we are of the view that, at the pre-operational stage, we need not apply the price mechanism suggested by CEC. If at the end of the Accounting Year of SIIL, CEC finds that the annual profits before tax and interest is depressed by the pricing mechanism mentioned in joint venture Agreement dated 5.10.04 vide clause 2.3.3(a) then it would be open to CEC to move this Court with the suggested price mechanism in its Report. In fact, in our Order dated 23.11.07 we have directed that the Accounts of SPV to be audited by Auditor General for State of Orissa after they are prepared by the statutory auditors of OMCL. It would be open even to the statutory auditors of OMCL as well as CEC to inform this Court at the end of the Accounting Year whether annual profits before tax and interest stands depressed for any reason and at that stage we will certainly consider the price mechanism suggested by CEC in its Report placed before us.

9. For the above reasons and in the light of the Affidavits filed by SIIL, OMCL and State of Orissa, accepting the *Rehabilitation Package*, suggested in our Order 23.11.07, we hereby grant clearance - to the forest diversion proposal for diversion of 660.749 ha of forest land to undertake bauxite mining on the Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law.

10. I.A. No.2134 of 2007 is disposed of accordingly.

R.P.

Interlocutory Application disposed of.