

SUPREME COURT OF INDIA

T.N. Godavaraman Thirumulpad

Vs.

Union of India

I.A. No.2134 of 2007 In Writ Petition (Civil) No.202 of 1995

(K.G. Balakrishnan CJI., Dr. Arijit Pasayat and S.H. Kapadia JJ.)

08.08.2008

ORDER

1. 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.*¹. 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 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:

"(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. SIIL. 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. SIIL 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. SIIL shall do so on the basis of the market value of the material which is sold by OMC Ltd. to M/s. SIIL or its nominee.

(ii) In addition to what is stated above, M/s. SIIL 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. SIIL shall also bear expenses towards compensatory afforestation.

(iii) A statement shall be filed by M/s. SIIL with CEC within eight weeks from today stating number of persons who shall be absorbed on permanent basis in M/s. SIIL 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. SIIL and the period for which they would be employed.

(iv) The State Government has the following suggestions on this issue:-

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.

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.

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.

4. The user agency shall undertake Rehabilitation of Project affected families, if any as per the *Orissa Rehabilitation and Resettlement Policy 2006*.

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.

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 the protection and regeneration of the safety zone area.

7. Adequate soil conservation measures shall be undertaken by the Lessee on the overburden dumps to prevent contamination of steam flow.

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.

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.

10. The user agency shall deposit the NPV of the forest land sought for diversion for undertaking mining operations.

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.

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.

13. Controlled Blasting may be used only in exigencies wherever needed to minimize the impact of noise on wild life of the area.

14. The User Agency shall undertake development of greenery by way of plantation of suitable indigenous species in all vacant areas within the project.

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.

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)

3. By our Order dated 23.11.07 we made it clear that if SIIL 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 SIIL.

4. In the present I.A. SIIL, 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 SIIL. We also inter alia suggested that the said SPV shall be incorporated under the *Companies Act, 1956*.

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, SIIL 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 SIIL with SPV every year commencing from 1.4.07. This condition has been accepted by SIIL. Moreover, by reasons of acceptance of suggested Rehabilitation Package, 2090 persons (including displaced persons) would get employment as indicated in the Charts annexed to 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 over by SPV then we would be violating the terms and conditions of the joint venture Agreement dated 5.10.04 between OMCL and VAL (now substituted by SIIL). Moreover, it may be noted that the joint venture Agreement dated 5.10.04 was executed because the Government of Orissa wanted its Undertaking, namely, OMCL to earn revenue on its own account. Therefore, 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.

7. CEC has further suggested pre-determined mechanism for price fixation. Under the suggested new price-fixation mechanism CEC has suggested as follows:

"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 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."

8. We may state that price discovery/mechanism is a complicated 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, SIIL is required to deposit 5% of 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.

¹(2008) 2 SCC 222