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Geomin Minerals and Marketing (P) Ltd. V. State of Orissa, 2013

Supreme Court of India, Judgment of 10 May 2013

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4561 OF 2013
(ARISING OUT OF SLP(C) NO.31593 OF 2010)

GEOMIN MINERALS & MARKETING (P) LTD. ... APPELLANT

VERUS

STATE OF ORISSA AND ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO. 4562 OF 2013
(ARISING OUT OF SLP(C) NO.31957 OF 2010)

STATE OF ORISSA ... APPELLANT

VERUS

GEOMIN MINERALS & MARKETING (P) LTD. ... RESPONDENTS
AND ORS.

WITH

CIVIL APPEAL NO. 4563 OF 2013
(ARISING OUT OF SLP(C) NO.32040 OF 2010)

POSCO INDIA PVT. LTD. ... APPELLANT

VERUS

GEOMIN MINERALS & MARKETING (P) LTD
AND ORS. ... RESPONDENTS

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Leave granted.

2. These appeals by special leave have been preferred against the order of Division Bench of Orissa High Court, Cuttack dated 14th July, 2010 in W.P. (C) No.23 of 2009 whereby the writ petition preferred by Geomin Minerals & Marketing (P) Ltd. was allowed and the recommendation made by the State Government dated 9th January, 2009 in favour of POSCO India (P) Ltd. was set aside with a direction to the State Government to take a fresh decision in terms of order dated 27th September, 2007 passed by the Revisional Authority in Revision Application File No.22 (41)/2007-RC-1 by giving the Geomin Minerals & Marketing (P) Ltd. the preferential right of consideration. The Division Bench further observed that in the event the State Government decides to invoke the provisions of Section 11(5) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the "MM(D&R) Act") , "special reasons" for the same in terms of guidelines dated 24th June, 2009 issued by the Ministry of Mines, Government of India be recorded in writing. The State Government was directed to complete the entire exercise within specified period.

3. The factual matrix of the case is as follows:

The availability of two sets of land for fresh grant of lease was notified by the State of Orissa vide Notification dated 20th August, 1991 issued under Rule 59(1) of the Mineral Concession Rules, 1960. The first set comprised of 85.60 acres plus 94.47 acres of land in Village Kansar and Village Gokhurang of Balangir District which had earlier been granted on lease in favour of Shri S.K. Padhi and Shri B.K. Agarwal. These leases were subsequently surrendered to the State Government and were, therefore, available for re-grant. The State Government vide notification dated 20th August, 1991 notified the availability w.e.f. 24th October, 1991. The second set of land comprised of 283.06 square miles in Horomoto Guali Block, Malangtoli Block, Khandhdhar-Pahar in Block Keonjhar and Sundargarh districts, Taldihi Toda Block, Sundargarh District and Dubna Block I and III which was declared to be reserved for public sector corporations vide Notification dated 05.06.1962 and 06.12.1962. The State Government decided to de-reserve the said mineral bearing areas and the availability of the

said area was notified vide Notification dated 23rd August, 1991. The date of availability for re-grant was on and from 29th October, 1991. The dispute in the case of Geomin's SLP No. 31593/2010 is regarding 186 hectares of land located in village Rantha District Sundergarh. Although, the recommendation made in favour of POSCO covers an area of 2500 hectares, thus Geomin's interest is limited to a fraction of the land recommended for POSCO.

4. POSCO had made an application for prospecting licence for an area of 6828.54 hectares. Initially a recommendation was made to the Central Government in favour of POSCO for an area of 6204.352 hectares by the State Government on 19.12.2006. The recommendation was challenged by Kudremukh Iron Ore Company (hereinafter referred to as the "Kudremukh Company") by means of a writ petition being W.P. No. 1775 of 2007. The High Court refrained from exercising its discretion since the matter was pending before the Central Government and directed that representation of Kudremukh Company may be treated as revisional application. The recommendation of the State Government was set aside

vide order dated 27th September, 2007 by the Revisional Authority as all mineral concession applications were not considered simultaneously and no orders were passed on those applications. It was directed that all pending applications be considered simultaneously and inter se merit be examined and then order be passed as per law after affording an opportunity of hearing to all the applicants. Earlier the Central Government by its letter dated 16.7.2007 had informed the State Government that the recommendation in favour of POSCO could not be processed as the process of hearing in respect of 203 applicants was still not complete. It was noted that the recommendation in favour of POSCO was for an area which was partially notified and partially non-notified and, hence, the applications should be considered accordingly as per law.

5. The order passed by the Revisional Authority dated 27th September, 2007 was challenged by one 'Dhananjay Kumar Dagara' before the Orissa High Court in a Writ Petition being W.P(C) No. 15315 of 2007. It was challenged on the ground that the directions for simultaneous consideration of all applications

affects the preferential rights of the first day applicants under Section 11(2) of the MM(D&R) Act. In the said Writ Petition No. 15315 of 2007, Geomin Minerals & Marketing (P) Ltd. filed an application for intervention. The intervention application was dismissed by the Orissa High Court on 22nd February, 2008 with the observation that Geomin Minerals & Marketing (P) Ltd. may take independent steps in respect of its grievance. On 2nd May, 2008 the Orissa High Court by judgment in W.P(C) No.15315 of 2007 held that there was no preferential right for the applicant. The High Court thus dismissed the writ petition and upheld the order of the Revisional Authority dated 27th September, 2007.

6. Geomin Minerals & Marketing (P) Ltd. filed another Writ Petition being W.P(C) No.6484 of 2008 praying expeditious disposal of all pending applications for mineral concessions filed by it, based on its right arising from Rule 63-A of the MC Rules. The said writ petition was disposed of on 14th July, 2008 by the Orissa High Court with a direction to the State Government to consider the pending PL/RP applications of Geomin Minerals &

Marketing (P) Ltd. preferably within a period of six months without discrimination and in accordance with law.

7. In the meantime, during the pendency of the applications preferred by different persons including Geomin Minerals & Marketing (P) Ltd. for Preferential Licence ('PL' for short) and Mining Licence ('ML' for short), on 20th December, 1999 amendments carried out in Section 11 of MM(D&R) Act became effective. By the amending Act, the first proviso to Section 11(2) of MM(D&R) Act was inserted as under:

"11. Preferential right of certain persons.

(2).....

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day for the purposes of assigning priority under this sub-section."

The non obstante clause i.e. Sub-section (4) of Section 11 was re-numbered as Sub-section (5), and a

new Sub-section (4) was introduced, which reads as under:-

"11. (4) Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit."

8. Pursuant to the order of the Revisional Authority dated 27th September, 2007 passed in the case of Kudremukh Company, the State Government issued a notice to Geomin Minerals & Marketing (P) Ltd. under Rule 12(1) of the MC Rules giving them opportunity of being heard. The officials of the Geomin Minerals & Marketing (P) Ltd. attended the hearing. Thereafter, by a minutes of the meeting, inter se merits of all applicants was prepared by the State of Orissa on 17th October, 2008, but no recommendation was made. Therefore, Geomin Minerals

& Marketing (P) Ltd. filed a Writ Petition being W.P(C) No.23 of 2009 inter alia with the following prayer:

"Order the opposite parties to dispose of all pending applications for Mineral Concessions filed by the petitioner and set out in the petition in accordance with its vested right to preferential consideration in view of the fact that the petitioner's applications have been filed on the first date of availability and eligibility.

Issue a writ of prohibition or any other appropriate writ, order or direction restraining the opposite parties from considering applications for Mineral Concessions of later applicants to the petitioner until the applications of the petitioner are first considered and disposed of by according priority or preferential right based on the petitioner being a first day applicant having applied for the concerned Mineral Concessions set out in the petition on the first date of availability and eligibility."

The Writ Petition was filed on 5th January, 2009 by Geomin Minerals & Marketing (P) Ltd. and just after few days on 9th January, 2009, the State Government made impugned recommendation to the Central Government in favour of POSCO under Section 11(3) and (5) of the MM(D&R) Act. The said recommendation was challenged by Geomin Minerals &

Marketing (P) Ltd. by filing a petition for amendment.

9. On hearing the parties, the High Court framed the following issues for consideration:

1. Whether the writ petition is maintainable due to availability of alternative remedy ?

2. Whether the writ petition is premature ?

3. Whether the writ petition is maintainable due to delay and laches ?

4. Whether the writ petition is barred by res-judicata ?

5. Whether the area in question was earlier reserved or it is a non-reserved area?

6. Whether the petitioner has any preferential right under Section-11 of the M.M. (D&R) Act ?

7. Whether recommendation made by the State Government under section 11 (5) of the M.M.(D&R) Act in favour of POSCO is valid ?

10. In the present case, the second issue is important as the respondents to the writ petitions raised the question of maintainability on one of the grounds that the application was pre-mature. The said issue was answered by the High Court in a

cryptic manner without any reason, as apparent from its finding which is produced below.

**"Issue no.2,
Whether the writ petition is
premature ?**

This issue is answered in favour of the petitioner as the petitioner has approached this Court at a time when its right to be considered along with POSCO has been threatened to be infringed by the action of the State, which, according to the petitioner, is illegal and contrary to the statutory provision. So the petitioner prayed for preferential right under Article 226 of the Constitution of India.

Hence the writ petition cannot be said to be premature as the petitioner could not have waited till the harm is caused to him (See **Bengal Immunity Co. Ltd., v. State of Bihar** and others, AIR 1955 SC-661)."

Issue Nos. 6 and 7 relate to preferential right of Geomin Minerals & Marketing (P) Ltd. under Section 11 of the MM (D&R) Act and validity of recommendation made by the State Government under Section 11(5) of the said Act in favour of POSCO. Both the issues were determined by the High Court in favour of Geomin Minerals & Marketing (P) Ltd., and against the POSCO. Referring to Section 11(2), (3) and (4) the High Court held that the Geomin Minerals & Marketing (P) Ltd. has preferential right for grant of licence and lease and that the recommendation made

by the State Government under Section 11 (5) in favour of POSCO is invalid.

11. The judgment aforesaid has been challenged by Geomin Minerals & Marketing (P) Ltd. by filing an appeal as no specific direction has been given for issuance of licence in its favour. The POSCO and the Government of Orissa have also challenged the judgment by filing their respective appeals. No separate appeal has been preferred by Kudremukh Company or Jindal Steel and Power Ltd. or any other, but some of them have filed intervention applications and petitions for impleadment. Accordingly, at the time of hearing of the appeals, respondents and interveners were heard and, therefore, we allow the applications for intervention and impleadment.

12. The learned counsel for the parties argued in detail for few days but in view of the nature of order we intend to pass it is not necessary to discuss each and every submission except the relevant one, as recorded hereunder:

Stand of POSCO India Pvt. Ltd.

13. Learned counsel Mr. K.K.Venugopal appearing on behalf of POSCO India Pvt. Ltd. made the following submissions:

13.1 The recommendation in favour of POSCO India has been made in accordance with the provisions contained in Section 11 (2), (3) and (5) of MM(D&R) Act and other relevant provisions of Mineral Concession Rules, 1960.

13.2 The POSCO was found to be the most meritorious applicant and "hence the State Government by exercising its power under Section 11(5) of MM(D&R) Act, 1957 has decided to recommend an extent of 2500 Hectares to Government of India for prior approval for grant of PL in their favour.

13.3 In the present case, there are at least two reasons as to why there cannot be any claim of priority on the part of Geomin. When the area in question was released from reservation and de-notified on 23.8.1991, no outside date before which applications had to be made had been fixed. The Government of India (Revisional Authority), in

exercise of its revisional jurisdiction, vide order 27.9.2007, had directed the State Government to consider all the pending applications simultaneously. This order was challenged by one Dhananjay Kumar Dagara, and the Writ Petition was dismissed by the High Court. The decision of the Central Government thus became final. If the applications were to be considered simultaneously, which means as if they were received on the same day, the proviso to Section 11(2) of the Act would apply. Indubitably, in any comparison based on the factors set out in the tabulated statements, POSCO would be far ahead of the other applicants, based on its experience, investment, technology used, integrated project, captive use of the iron ore, total employment (direct and indirect) and, above all, public interest. Thus, Section 11(3) of the Act wholly applies in POSCO's favour.

13.4 Apart from Section 11(3), the State Government has made the recommendation also under Section 11(5) for the simple reason that POSCO stood head and shoulders above the other applicants, in respect of

public interest. If the gap between POSCO and the other applicants, even in regard to the very considerations specified in Section 11(3) is so vast, then, in such a case, the very same factors, qualitatively and quantitatively, would attract Section 11(5) as well. In any event, in this case, there is one factor which beyond doubt attracts Section 11(5), and that is the sophisticated and advanced finex technology, which not only reduces pollution but is also able to utilize low grade ore to make steel. Section 11(5) would clearly be attracted on this ground alone, and, in whatever manner one approaches the issue, POSCO has rightly been recommended by the State Government for grant of the Prospecting Licence.

JUDGMENT

13.5 The recommendation dated 9.1.2009 made in favour of POSCO falls within the parameters of Sections 11(3) and 11(5) of the MM(D&R) Act. The State Government followed the direction of the Revisional Authority (Central Government) dated 27.9.2007, which was upheld by the High Court and had become final, and simultaneously considered

the inter se merits of all the applicants whose PL applications were pending disposal before the State Government. It was after a rigorous exercise of calling all the applicants for personal hearing and to make a presentation that the State Government took the considered view to hold that POSCO was the most meritorious applicant.

13.6 Once there was a direction of the Revisional Authority, which was affirmed by the Orissa High Court in the Dagara case (which order attained finality), that the State Government was required to consider all pending applications simultaneously and come to a decision after evaluating the inter se merits of all the applicants. An inter se comparison of multiple applicants for grant of a mineral concession is envisaged only under Section 11(3) of the MM(D&R) Act. This being so, in any inter se comparison (whether pursuant to Section 11(2) or not), the criteria on the basis of which a decision must be taken by the State Government is what is specified in Section 11(3).

13.7 The High Court has failed to point out as to what would amount to "special reasons". The Impugned Judgment also does not appreciate that the recommendation in favour of POSCO has been made by the State Government keeping in mind the larger interests of the State and its citizens. The basis of this decision was the economic and environmental benefit accruing to the State from POSCO's mining methods.

13.8 POSCO is a wholly owned subsidiary of M/s POSCO, which is a Korean company having more than 25 years experience in developing minerals in various countries in the world and is the world's second largest steel maker by market value and Asia's most profitable steel maker. M/s POSCO's operating profit margin is the top in the World Steel Industry, and it is the most competitive steel maker as per 2010 World Steel Dynamics. According to 2010 World Economic Forum M/s POSCO is one among the 100 companies to last the next 100 years. Geomin is a company which was incorporated in September, 1991, with an authorised share capital of Rs.1,00,000/-

(Rupees one lakh), obviously only with a view to take advantage of the notification dated 23.8.1991 issued by the State Government. Geomin did not have any experience of having undertaken any mining activities, and, therefore, cannot be said to have possessed any special knowledge or experience in mining operations. Further, sometime in the year 2007, control of Geomin, through acquisition of a majority of the share of the company, was taken over by one 'Navayuga Steel Limited'. In the submission of the appellant, the experience and/or qualifications of 'Navayuga Steel Limited' cannot be used in support of Geomin's application made in the year 1991, since the merit of an applicant for a prospecting license/mining lease would have to be judged as on the date of the application itself, as otherwise the process of selection would be rendered arbitrary if an applicant is permitted to add to its qualifications after knowing the relative qualifications of other applicants. If this is permitted, such a process of adding to one's qualifications would become never-ending. In any event, if in substance and in effect a totally new

entity has been permitted to be brought into existence, by transfer of substantial shares to another company, the original applicant can no more claim priority of its application as its character has undergone a substantial transformation.

13.9 The reliance by Kudremukh Company on Section 11(1) of the Act is wholly erroneous, as (admittedly) no reconnaissance permit was ever granted in its favour. Under Section 11(1) of the MM(D&R) Act, preference can be claimed if an applicant for the grant of a PL has already been granted a reconnaissance permit qua the said area; and the conditions prescribed in the first proviso to Section 11(1) are met. The reconnaissance work stated to have been carried out by the Department of Geology of the State Government, at Kudremukh's expense, also cannot attract Section 11(1) of the Act in its favour. Further, in any event, Kudremukh Company is bound by the aforementioned direction for simultaneous consideration of all applications given by the Central Government, as per the decision of

Revisional Authority, which was upheld by the High Court.

Stand of Geomin Minerals & Marketing (P) Ltd.

14. Learned counsel for the Geomin Minerals & Marketing (P) Ltd. made the following submissions:

14.1 A preferential right in the field of mining is an important right. The preferential right conferred under un-amended Section 11 upto 1999 cannot be curtailed under amended Section 11. Since Geomin Minerals & Marketing (P) Ltd. applied on 29th October, 1991 the law that was applicable on the said date of application i.e. an amended Section 11 shall be applicable for consideration of application filed by Geomin Minerals & Marketing (P) Ltd.

14.2 On the other hand if the amended Section 11 is applied, in that event the judgment of this Court in ***Sandur Manganese & Iron Ores Limited v. State of Karnataka (2010) 13 SCC 1*** will apply. The consequence will be as follows:-

(a) Section 11(4) of the amended Section will apply.

(b) Section 11(5) will not be available.

(c) If amended Section 11(4) applies, then all persons applied on 29th October, 1991 will be treated as first applicants. The choice between them will be governed by Section 11(3).

(d) Even if Section 11(5) is applied, special reasons referred to in Section 11(5) cannot be same that of the reasons to be recorded for the purpose of Section 11(3).

In the present case, the exercise which State Government has done mixes up the matter under Section 11(3) and 11(5) for recommending the name of M/s POSCO India Pvt. Ltd., therefore it is contrary to the provisions of Section 11 and recommendation in favour of the POSCO India Pvt. Ltd. is not bona fide.

14.3 Amended Section 11 is prospective in nature. It is the Rule on the date of application that would be applicable and not the Rule on the date of

consideration. In view of Rule 8(C) of Mineral Concession Rules it cannot be said that Section 11 will be applicable from the date of consideration. As per the ratio of the judgement in **Sandur Manganese & Iron Ores Limited v. State of Karnataka (2010) 13 SCC 1** if amended Section 11 is applied then Geomin Minerals & Marketing (P) Ltd. is entitled for benefit of the aforesaid judgment.

14.4 Memorandum of Understanding or the arrangements outside the provisions of the MM(D&R) Act cannot be used to trample on the rights of prior or same day applicants. This principle is to be followed irrespective of whether the unamended or amended Section 11 is applied.

14.5 First Day Applicant enjoys and is entitled to priority over all subsequent days applications including the POSCO application which was made on 27th September, 2005 i.e. after about 14 years from the date of the Geomin applications.

Stand of the State of Orissa:

15. Mr. Rakesh Dwivedi, learned senior counsel for the State of Orissa to the facts as noticed above contended as follows:

15.1 Initially a recommendation was made to the Central Government in favour of POSCO for an area of 6204.352 hectares by the State Government on 19th December, 2006. Pursuant to which the Revisional Authority after hearing the matter set aside the recommendation made in favour of POSCO and the State Government was directed vide order dated 27th September, 2007 to consider all pending applications simultaneously and to decide inter se merit and then pass an order as per law after affording an opportunity to all the applicants. Earlier the recommendation in favour of POSCO was made for an area which was partially notified and partially non-notified and other applications were not considered and hence the matter was remitted back by the Revisional Authority to the State Government.

15.2 The State Government had thereafter granted hearing to all the applicants and had considered the

inter se merit of the applicants. An overall holistic consideration and record shows that the Government had an inter se comparison of the applicants as directed by the Central Government and had also made recommendation in favour of POSCO by invoking Section 11(5) of the MM(DR) Act, 1957.

15.3 The case of Geomin had been considered. During the hearing, Geomin stated that it is a joint venture between Navyuga Group and T.P. Minerals Group and it wanted to set up one ore based steel complex of 12 MTPA capacity but at that time their project was under consideration by the High level clearance authority. The case of Kudremukh Company based on PL No.1991 dated 17/2/2002 was considered. This company proposed to invest Rs.100 Crores in mines and Rs.5,000 Crores in industry and its plant was in Mangalore, State of Karnataka. It was proposing some plants in Sundergarh District but there was no definite proposal received by the State. Jindal Steel and Power Limited (hereinafter referred to as the 'JSPL') had submitted four PL and one ML applications. The PL applications are dated

22/2/2007. They did not submit sufficient documents as required under Rule 22(3)(i) of MC Rules and legally accepted Geological Prospecting Report for their ML application. This company is part of Jindal Group and was operating a steel plant at Raigarh, Chhattisgarh. It was considered to be a serious contender for the applied area. There applied area was 4930.57 hectares after clubbing the four PL applications. Out of this only 90 hectares are overlapping with the PL application of POSCO. Thus, their PL applications cover an area which is overwhelmingly distinct from the area recommended for POSCO. Consequently, JSPL had not filed any Writ Petition nor had applied for impleadment before the High Court. It has chosen to move an intervention application belatedly in the SLP filed by Geomin. This application has not been allowed and it is liable to be rejected. The PL Application No. 2122 dated 27/9/2005 for 6828.54 hectares filed by POSCO India was considered and they were considered to be a front runner and possessing outstanding merit in comparison to all other applicants. They proposed to set up a World's first steel plant project using

FINEX technology which was a next generation eco-friendly process which allows direct use of cheap iron ores fines and non-coking coal as feed stock and has consequently lower emissions as compared to blast furnace. They had assured captive consumption of the mineral at their plant at Paradip which was to be a port based steel plant. It was likely to create huge employment and generate huge revenue.

15.4 In Part-F, Summary, it has been noted that only two companies i.e. POSCO India Ltd. and Jindal Stripes have achieved the miles stones or the eligibility criteria laid down in the MOU for recommendation of raw-material linkage to their proposed steel plant. It mentions "as far as relevant merits are concerned in terms of proposed investment, financial resources capability for scientific mining and exploration of ore, it could be safely concluded that M/s. POSCO India (P) Ltd. stands out as the most meritorious among all the MOU signed applicants and as well as other applicants as narrated above, it mentions that application of Jindal Stainless was being considered for other areas. The "conclusion"

has been drawn and it has been specifically stated in sub-para (c) that Geomin Minerals and Marketing has some merit but they cannot be considered at par with POSCO India. Kudremukh Company was found to be highly meritorious but its merit was not comparable with M/s. POSCO India taking into account the comprehensive advantage of POSCO in terms of revenue and employment generation. In sub-para (f) it was concluded that on account of the ability to carry out scientific exploration and mining, capability to mobilize adequate financial resources for investment, setting up of value addition facilities including 12 MTPA steel plant based on eco-friendly and resource use efficient technology which will generate huge revenue and employment, the POSCO India deserves precedence over all other applicants and it stands out as the most meritorious.

15.5. While considering the extent of area to be recommended, it was noted that POSCO had applied for 6828.24 hectares in Kandhar region. Considering all relevant aspects the State Government decided to recommend an area of 4050 hectares only in favour of

POSCO to the Government of India for prior approval for grant of PL. Expressly invoking Section 11(5) of MMDR Act, 1957 in addition to the inter se comparison of merits, the comparative statement table prepared with the parameters under Section 11(3) in view and with table forms parts of the minutes. The minutes recorded that applications are to be disposed of in accordance with Section 11(2) & (3) and relevant provisions of Mineral Concession Rules. The State Government has complied with the directions of the Central Government and has applied its mind to all relevant factors and material produced by the various applicants and after making inter se comparison of minutes arrived at a conclusion that POSCO was more meritorious from the point of scientific exploration and mining, mobilization of financial resources, use of eco-friendly and resources - use efficient technology investments including the steel plant project and general of employment and revenue. In addition, the State Government has also invoked the provisions of Section 11(5) of the Act.

15.6 Further stand of the State of Orissa is that: Geomin's application PL No.1334 dated 29/10/1991 cannot be considered to be a prior application in view of the following facts:

Geomin had made 7 PL applications for different areas to the State Government of Orissa. An area of 186 hectares in Village Rantha, District Sundergarh applied vide application No.1334 dated 29.10.1991 is overlapping. Thus, the area recommended for POSCO includes about 186 hectares of area applied for by Geomin.

15.7 The order of the High Court dated 14th July, 2008 had been passed in the context of PL Application No.1338 in Malantoli Block. This has nothing to do with the area recommended for POSCO.

After the above High Court order, Geomin made a representation with respect to PL Application No.1337.

15.8 Geomin's applications, in particular PL No.1334, all dated 29th October, 1991 were made on an individual basis as a Private Ltd. Company. The nature of business indicated was mining, processing

and sale of minerals and mineral products. The affidavit mentions that it is a new company and therefore there are no income tax/sales tax returns or clearance certificates. As regards financial resources the application simply says "sound" and refers to Articles of Association. In the experience column Geomin shows no experience and refers to qualified and experienced "people" in the company. No name or details are given. Geomin does not hold any PL or ML. There is no claim that any Director has any such experience. The application is highly deficient and there is no proposal for setting up any industry based on minerals. After 14 years from the notification under Rule 59 a letter dated 7.09.2004 for sympathetic consideration was made and order dated 15.7.2003 passed by the Central Government (Tribunal) was referred to Geomin, also wrote a letter dated 27.12.2005 requesting that they should be allowed to submit fresh proposal. Earlier on 20.12.2004 AXL also submitted a letter. Thereafter another letter dated 30.12.2006 was written. In this letter for the first time it was proposed that a 0.5 MTPA capacity steel plant in the State of Orissa

would be set up through our group company AXL Industries and PLs were required for that purpose. In the aforesaid letters, there is no claim for any preference under Section 11(2). The third letter dated 7.6.2007 refers to the proposal to set up 0.5 MTPA capacity steel plant in Orissa and also offers to consider setting up of the project through Geomin itself or to consider amalgamation of the two companies. Then by letter dated 6.10.2007 it informed that Geomin has now entered into a partnership with the Navyuga Group of companies who are a large conglomerate with interests in engineering, exports, mining, ports, power, real estate, I.T., etc. It further informed that Navyuga Group is planning to set up steel plant in Orissa with 12 MTPA capacity. By letter it was also informed that Navyuga has already acquired 50% equity stake in Geomin. Therefore the request was made to consider its application "keeping the above in mind". By the fifth letter dated 13.11.2007 they wished to know the status of Geomin's applications regarding the process of evaluation of applications over Khandhar Block. District Sundargarh.

15.9 If the provisions operating at the time of the applications are to be considered then Geomin's application would stand rejected in terms of Rule 24(3) of Mineral Concession Rules, 1960 which was omitted on 7.01.1993. Secondly, the Geomin's application was highly deficient and the deficiencies were partially removed which were provided after the notice issued. Moreover, Geomin first placed reliance on 0.5 MTPA steel plant being set up by its group company AXL Industries then offered to set up the said project by itself. Thereafter relied upon 12 MTPA steel plant being set up by Navyuga Group which acquired 50% equity stake was later increased to 70% of the equity share. Application was sought to be considered on this basis. Therefore, Geomin's application is effectively and substantively of October/December, 2007.

15.10 Section 11 as amended by Act 38 of 1999 w.e.f. 18th December, 1999, would apply. The contention of Geomin that the old provisions would apply is incorrect. This matter is not res integra.

In the case of *State of Tamil Nadu vs. Hind Stone, (1981) 2 SCC 205*, this Court has decided that the provisions of the Act and Rules as operating at the time of consideration would be applicable.

Stand taken by Kudremukh Company:

16. Learned senior counsel appearing on behalf the Kudremukh Company submitted as follows:

16.1 That the State Government vide letter dated 25.04.2009 has communicated the rejection of the applications of the Company, to the extent of an area of 2130 hectares, which was within the recommended area of POSCO of 2500 hectares. The applications of the Company were rejected on the ground that the M/s. POSCO was the most meritorious of all the applications. The rejection of the Company's ML/PL application had been challenged before the Id. Central Mines Tribunal by filing Revision Application No.22(6)/2009-RC-I & Revision Application No.22(7)/2009-RC-I respectively. The Revisional Authority vide final orders dated 23.8.2011, has been pleased to allow the revision applications and set

aside the orders dated 25.4.2009 passed by the State Government rejecting the ML and PL applications of the Company.

16.2. The State of Orissa has filed two Writ Petitions being W.P.(C) No.6429 of 2012 and W.P.(C) No.6431 of 2012 against the Final Order No.550/2011 & 549/11 dated 23.09.2011 passed by Government of India in Revision Application No.22(6)/2009-RC-I & Revision Application No.22(7)/2009-RC-I respectively. The same is pending adjudication before the Orissa High Court. The Company is not aware if M/s. POSCO has challenged the said order passed by the Ld. Revisional Authority.

16.3 The recommendation in favour of POSCO purportedly under Section 11(5) is not a valid recommendation as per the provisions of the Act. Section 11(5) would have no application in the present case where the applicants were being considered simultaneously and the same has to be granted to the applicant who satisfies the criteria under Section 11(3) when compared with the others.

The Revisional Authority vide order dated 27.09.2007 had directed to consider all applications 'simultaneously'. Therefore, all the applications had to be considered taking into consideration the parameters of Section 11(3). The State Government itself in its recommendation dated 9.01.2009 had stated that the applicants were evaluated and taken up for disposal in accordance with Section 11(2) and (3) of the Act. But ultimately made the purported recommendation in favour of POSCO under Section 11(5) of the Act, which is not applicable.

16.4 Section 11(5) would be applicable only if the area is 'non-notified' and the State Government has for 'special reasons' wants to give preference to a later applicant to an application which was received earlier. The 'special reasons' need not be other than what has been mentioned in Section 11(3) but may be over and above the reasons mentioned in Section 11(3). Section 11(5) will have no application where applications are considered simultaneously for areas which are notified, which is the present case. The

recommendation dated 9.01.2009 made by the State Government is not sustainable.

17. As far as the contentions raised by Geomin Mienrals claiming priority by virtue of being an earlier applicant, it was submitted that the said contention no longer holds force after the amendment of Section 11(2) of the Act. As per the amended Section 11(2), all applications which were made during the period of notification and all applications received prior to the publication and had not been disposed of shall be deemed to have been received on the same day for the purpose of assigning priority. Therefore, a prior applicant has no preferential right to be considered over a later applicant. It is submitted that the right, if any, under the pre-amended provisions stands obliterated after the amendment came into force and cannot be construed as a 'vested' right.

18. It was further contended that the Court, if it so deems fit may direct the Central Government to consider all applications while deciding grant of

prior approval under Section 5(1) of the Act, after giving the parties a right to represent and decide the same taking all factors into consideration that Kudremukh Company is a public sector undertaking and the substantial area of the proposed recommended area was prospected at the cost of Kudremukh Company. The same may be decided uninfluenced by any observations made in the impugned judgment and the recommendation made under Section 11(5).

19. The contentions of the Kudremukh Company was summarised as follows:

- (i) The Kudremukh Company is a public sector undertaking which is best suited to protect national resources of the country.
- (ii) The Company may be allotted at least the portion of the area which was prospected by the Department of Geology at the cost of more than 1 crore;
- (iii) Based on the assurances of the State Government at the highest level, the Company has altered its position to its detriment and the Government ought to have granted the Pl/ML to the petitioner;
- (iv) The Company is more meritorious as compared to others, as it has special knowledge in mining operations, the nature and quality of the technical staff and adequate financial resources, which are the

prescribed considerations in Section 11(3) of the Act. As far as the so-called proposed investment in Industry based on mines by POSCO is concerned, it is still illusory and nothing tangible has been invested on the ground. The Company's merit has also been recognised by the State Government, but it erroneously claimed that POSCO is more meritorious on the ground of the so-called proposed steel plant which is yet to take off and the work on the plant has not yet commenced.

20. In the aforesaid factual background and rival contentions made in the appeals, intervention petitions as well as counter affidavits, the main issue emerges for consideration is **whether the writ petition was premature and in the case of applicants whether pre amended Section 11 or amended Section 11 of the MM(D&R) Act is applicable.**

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21. Before deciding the aforesaid issues it is relevant to note that the issue relating to competence of the State Government to make reservation and the 1962 notification issued by the State Government reserving certain areas fell for consideration before this Court in **Monnet Ispat and Energy Limited v. Union of India & Ors. (2012) 11**

SCC 1. In the said case, this Court held that the authority of the State Government to make reservation of a particular mining area within its territory for its own use is the offspring of ownership, and it is inseparable therefrom unless denied to it expressly by an appropriate law. By MM(D&R) Act that has not been done by Parliament. Setting aside by a State of land owned by it for its exclusive use and under its dominance control, is an incident of sovereignty and ownership.

In the light of aforesaid observation made by this Court in **Monnet Ispat Energy v. Union of India & Ors. (2012) 11 SCC 1** and in view of the relevant facts of the present case, it is to be determined as to whether the writ petition preferred by Geomin was pre-mature.

22. Under Section 5 of the MM(D&R) Act, the State Government cannot grant a reconnaissance permit, prospective licence or mining lease to any person unless previous approval of the Central Government has been obtained. The proviso to Section 5(1) expressly prohibits grant of PL except with previous approval of Central Government as quoted hereunder:

Further, where Section 11(5) is invoked, there also prior approval of the Central Government is also required. The proviso to Section 11(5) prescribes that prior approval of Central Government shall be obtained "before passing any order under the sub-section". In the present case the State Government has only made recommendations and has sought approval of Central Government under proviso to Section 5(1) and proviso to Section 11(5) but no final decision has been taken. The State Government can pass final order granting mining licence only if approval is granted by the Central Government under Section 5(1) or Section 11(5) which reads as follows:

"5(1). A State Government shall not grant a reconnaissance permit, prospecting licence or mining lease to any person unless such person—

- (a) is an Indian national, or a company as defined in sub-section (1) of section 3 of the Companies Act, 1956 (1 of 1956); and
- (b) satisfies such conditions as may be prescribed:

Provided that in respect of any mineral specified in the First Schedule, no reconnaissance permit, prospecting licence or mining lease shall be granted except with the previous approval of the Central Government.

11(5). Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or a mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier:

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

23. Iron ore is a major mineral specified in Para C of the First Schedule. In matters of such major mineral, even State Government itself cannot undertake prospective or mining operations without having prior consultation with the Central Government as per Section 4(3) of the Act, and if prospecting licence or mining lease is to be granted to any other person, then previous approval of Central Government is to be obtained under proviso to Section 5(1). The consideration of recommendation made by the Central Government for grant of prior approval is an exclusive jurisdiction of the Central Government under the MM(D&R) Act, 1957 and there is no good

reason for pre-empting the Central Government from considering the merits of the recommendation.

24. Until the Central Government has passed an order either granting or refusing approval under Section 5(1) and Section 11(5) of the Act, it would not be permissible for any person to file a writ petition under Article 226 of the Constitution of India and any such petition if filed would be premature. In the instant case, the High Court committed a grave error of law in proceeding to observe that 'special reasons' did not exist on invoking Section 11(5) and that there was no comparison of merits in the record. The record has been shown to this Court and it is apparent that the State Government has tabulated and evaluated the inter se merits and has concluded that POSCO is more meritorious. All applications were given a hearing. In the circumstances, the High Court's observations are not justified and in fact the High Court appears to have usurped the jurisdiction of the Central Government in proceeding to make these remarks. The scrutiny of the merits was premature and the High Court should have refrained from entering into the merits.

25. The second proviso to Rule 63A also provides that the disposal of the applications by the State Government in case of minerals listed in the First Schedule to the Act shall mean either recommendation to the Central Government for grant of mineral concession, and in all other cases disposal shall mean refusal to grant the mineral concession. This is also an indication that the recommendation made by the State Government does not constitute an order as envisaged by Section 30 of the Act.

26. The next issue relates to application of Section 11 i.e. whether pre-amended Section 11 or post amended Section 11 shall apply.

We have noticed that by amending Act, First Proviso to Section 11(2) was inserted. Pre-amended non obsente clause i.e. sub Section 4 of Section 11 was re-numbered as sub Section 5 to Section 11 and a new sub Section 4 to Section 11 was introduced by amending Act.

The pre amended provisions of Section 11(2), (3) and (4) and the post amended provisions of Section 11(2), (3), (4) and (5) read as follows:

Pre-amended provisions of Section 11(2), (3) and (4) are as follows:-

11(2). Subject to the provisions of sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier shall have a preferential right for the grant of the licence or lease, as the case may be, over an applicant whose application was received later:

Provided that where any such applications are received on the same day, the State Government, after taking into consideration the matters specified in sub-section (3), may grant the prospecting licence on mining lease, as the case may be, to such one of the applicants as it may deem fit.

11(3). The matters referred to in sub-section (2) are the following:-

- (a) any special knowledge of, or experience in, prospecting operations or mining operations, as the case may be, possessed by the applicant;
- (b) the financial resources of the applicant;
- (c) the nature and quality of the technical staff employed or to be employed by the applicant;
- (d) such other matters as may be considered.

11(4). Notwithstanding anything contained in subsection (2) but subject to the provisions of sub-section (1), the State Government may for any special reasons to be recorded and with the previous approval of the Central Government, grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier.

Post amended provisions of Section 11(2), (3), (4) and (5) are as follows:

11(2). Subject to the provisions of subsection(1), where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospecting licence or mining lease, as the case may be, and two or more persons have applied for a reconnaissance permit, prospecting licence or a mining lease in respect of any land in such area, the applicant whose application was received earlier, shall have the preferential right to be considered for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, over the applicant whose application was received later:

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day, for the purposes of assigning priority under this sub section.

Provided further that where any such application are received on the same day, the State Government, after taking into consideration the matter specified in subsection(3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

11(3). The matters referred to in sub-section (2) are the following: -

- (a) any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;
- (b) the financial resources of the applicant;
- (c) the nature and quality of the technical staff employed or to be employed by the applicant;
- (d) the investment which the applicant proposes to make in the mines and in the industry based on the minerals;
- (e) such other matters as may be prescribed.

11(4). Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

11(5). Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or a mining lease, as the case may be, to an applicant whose application was received later in

preference to an applicant whose application was received earlier:

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

27. The State of Orissa and some others have taken plea that amended Section 11, as amended by Act 38 of 1999 w.e.f. 20th December, 1999, would apply.

28. According to the State of Orissa the preferential right envisaged in Section 11(1) is considerably distinct from the preference envisaged by Section 11(2). It is only in the case of Section 11(1) where a person has already held a reconnaissance permit or a prospective licence that he gets a preferential right for obtaining a prospecting licence or mining lease. It may be seen that Section 11(5) is subject to the provisions of sub-section (1) and, therefore, the State Government has no authority to give special reasons for overriding the preference. Further, Section 11(5) is notwithstanding Section 11(2), thus the preference under Section 11(2) can be overridden by special reasons.

29. Another distinction is that while Section 11(1) uses the expression "shall have a preferential right for obtaining", Section 11(2) uses the expression "shall have the preferential right to be considered for grant". Thus, under Section 11(2), the preferential right is only in relation to consideration. The preference envisaged under Section 11(2) does not mean that the other applicants are not to be considered. It could only mean that if on an inter se consideration, the applicants are at par, then the prior application may be given a preference.

30. On the other hand learned counsel for the Geomin has submitted that pre-amended Section 11(2) shall be applicable.

31. In ***State of Tamil Nadu v. M/s Hind Stone, (1981) 2 SCC 205*** similar question fell for consideration before this Court. That was a case relating to renewal of lease for mining minerals. The argument was that Rule 9 itself laid down the criteria for grant of renewal of lease and therefore, Rule 8-C should be confined, in considering applications for grant of leases in the first instance. This Court

held that an application for the renewal of a lease is, in essence an application for the grant of a lease for a fresh period and, therefore, the Rule 8C is attracted.

32. Amended Section 11(2) is applicable where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospective licence or mining lease and two or more persons have applied for reconnaissance permit, prospective licence or mining lease in respect of any land in such area, the applicant whose application was received earlier, shall have the preferential right to be considered for grant of reconnaissance permit, prospective licence or mining lease, over the applicant whose application was received later.

However, as per First proviso to Section 11(2) where an area is available for grant of reconnaissance permit, prospecting licence or mining licence, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications which had been

received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day for the purposes of assigning priority under said sub-section. Thus under amended Proviso to Section 11(2), even those applications received prior to the publication but had not been disposed of, shall be deemed to have been received on the same day for the purpose of assigning priority under the said sub Section.

33. According to us, this is not the stage to decide as to whether in the present case the pre-amended or amended Section 11(2) shall be applicable and thereby priority should be assigned under pre-amended or amended Section 11(2) as the matter has already been considered by the State Government and recommendation is required to be considered by the Central Government under Section 5(1) of the Act.

The Central Government is required to go through the relevant facts of each case to determine whether the recommendation is to be approved or not. While deciding the question the Central Government will

keep in mind the order which was passed by the Revisional Authority(Central Government) in the case of Dagara on 2nd May, 2008.

34. It is well settled that no applicant has statutory or fundamental right to obtain prospecting licence or a mining lease. In this connection one may refer to this Court decision in **Monnet Ispat (supra)**. Therefore, the High Court before interfering with the recommendation, ought to have looked into the nature of recommendation.

35. In view of the finding as recorded above, we are of the view that the High Court committed a grave error of law in deciding the case on merits and deciding the question of legality of the recommendation made by the State Government. In fact they should have left the matter to the Central Government to pass an appropriate order in accordance with law instead of entertaining a pre-mature writ petition. The State Government by its recommendation having forwarded the tabulated chart showing inter se merit of each applicant, it was not for the High Court to sit in appeal to decide who amongst all is

more meritorious and is entitled for preferential right.

36. We, accordingly, set aside the impugned judgment dated 14th July, 2010 passed by the Division Bench of the Orissa High Court and remit the matter to the Central Government to consider the question of approval under Section 5(1) taking into consideration the recommendations made by the State Government. While deciding the question it will keep in mind the objections raised by the parties as noticed in the preceding paragraphs. It is expected that the decision will be taken on an early date and shall be communicated to the State Government. The appeals are allowed with the aforesaid observation and direction, but there shall be no order as to costs.

JUDGMENT

.....J.

(R.M. LODHA)

.....J.

(SUDHANSU JYOTI
MUKHOPADHAYA)

NEW DELHI,
MAY 10, 2013.