

FINAL ORDER NO_9_____

Dated: _12.05.2008

(In Revision Application File No. 12(1)/07-RC-II)

M/s National Mineral Development Corporation Ltd. Applicant
(NMDC)

Versus

State Government of Chhattisgarh Respondent

M/s Tata Steel Ltd. Impleaded Party

ORDER

Under section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act) and Rule 55 of the Mineral Concession Rules, 1960 (MCR).

This Revision Application has been filed by M/s. NMDC Ltd., the Revision Applicant, to challenge the Order No. F-3-63/2006/12 dated 10.11.2006 passed by the State Govt. of Chhattisgarh (hereinafter referred to as the "Impugned Order").

In the impugned order the State Govt. has rejected the applications of all the applicants except for Tata Steel Ltd. on the ground that it was the only company who was desirous of setting up of a steel plant in the scheduled area of south Bastar, M/S NMDC has

already been granted Mining Lease over an area of 2696.014 hec. and had no plan to establish a steel plant in the area. All the other applicants who had the intention to set up a steel plant was for the area outside Bastar Distt.

2. In the grounds of revision, the Revision Applicant has stated as follows:-

M/s NMDC had applied for PL over 1130 ha in the area reserved for public sector undertaking on 15.4.91 for iron ore in Bailadila range in Bastar district, Madhya Pradesh and being first applicant it has preferential right under section 11(2) of MMDR Act, 1957 by virtue of seniority. Chhatisgarh govt. has no objection to reservation of other areas in favour of NMDC for its requirements. NMDC stated that it is agreeable to the proposal of forming a JVC on mutually agreeable terms and conditions so as to arrive at a common understanding for signing an MoU.

M/s NMDC submitted application under Rules 4 of FC Rules, 1981 for undertaking mineral exploration. CMDC vide their letter dated 27.12.2002 asked NMDC to intimate the action taken regarding proposal for JVC with CMDC. NMDC was to re-examine the proposal of JVC of CMDC with NMDC. NMDC was stated to be willing for having a JVC with CMDC for Bailadila Deposit No.1. Proposed JVC was to be limited to Bailadila Deposit No.1 only for the present. NMDC board at its 376th meeting accorded in principle

approval for the proposed JVC with CMDC for the exploration and mining of deposit-1.

NMDC vide its letter dated 18.7.2006 requested Government of Chhattisgarh to grant PL in favour of NMDC and to revive the proposal of forming JVC with CMDC for the mining of deposit-1 on similar terms and conditions as has been done in case of deposit-13. NMDC entered into an MoU with RINL for setting up sponge iron plant/pellitisation plant. NMDC also proposed to set up another sponge iron plant at Nagarnar on its own.

The subject area is reserved for CPSUs. No de-reservation notification in terms of the provisions of MMDR Act and MCR is yet issued. The effect of amendment to section 11 of MMDR Act is ignored by the State Government without granting PL since 15.4.1991 and kept NMDC waiting and also made NMDC to do everything for forest clearance. The State Government is estopped from rejecting its application.

3. In their written submission, the Revision Applicant has stated the following:-

The erstwhile state of Madhya Pradesh in purported exercise of power under the then Rule 58 of Mineral Concession Rules issued notification dated 2.12.1971 reserving all iron ore deposits in the entire state in favour of public sector except those deposits which were subject to mining lease or prospecting license held by M/s NMDC (present applicant) of M/s Hindustan Steel Ltd., Bhilai. The said notification dated 23.12.1971 was subsequently modified by

notification dated 2.12.1981 where by iron ore deposit in the state except those in Durg and Bastar District were de-reserved.

4. The Applicant submitted its application for prospecting license for iron ore in Bailadila deposit No.1, Bastar District, Chattishgarh on 15.4.1991. Admittedly on the date of the application and till this date no notification was issued by the state government inviting application for grant of prospecting licence for the said area.

5. The iron ore deposits in Bastar District are reserved for public sector vide notification dated 2.12.1971 and hence recommendation in favour of a private company i.e. M/s TATA STEEL LTD. is illegal and contrary to the notification issued under Rule 58 of MCR, 1960.

6. The applicant has a preferential right u/s 11(2) of the MMDR Act,1957. Such preferential right is unceremoniously circumvented y arbitrary exercise of power.

7. The recommendation by the State Government u/s 5 of the MMDR Act is contrary to the mandatory provisions of section 2 of the Forest Conservation Act, 1980.

The iron ore deposits in Bastar District are reserved for public sector vide notification dated 2.12.1971 and hence recommendation in favour of a private company i.e. M/s Tata Steel Ltd. is illegal and contrary to the notification issued under the then Rule 58 of the Mineral Concession Rules, 1960.

8. The State government having reserved the iron ore deposits in favour of public sector as early as in 1971 and by consciously not de-reserving the iron ore deposits in the districts of Durg and Bastar in 1981 has categorically expressed its intent to regulate exploration of iron ore through government owned public sector companies.

9. The state government has not brought on record any subsequent notification issued with the prior approval of the Central Government, de-reserving the iron ore deposits in Durg and Bastar districts.

10. Under Rule 63A of MCR, 1960 the State Government shall dispose the application for PL in 9 months but kept NMDC's application pending for more than a decade.

11. The application for prospecting licence was filed by M/s Tata Steel Ltd. on 25.3.2006, i.e. 15 years after the application of M/s NMDC was filed. During the pendency of the present revision application, the Central Government accorded its approval under section 5 of the MMDR Act to the impugned recommendation made by the state government in favour of M/s Tata Steel Ltd. However the said approval is subject to the out come of the present revision application. The central government while granting its approval has removed the special condition imposed by the state government in its recommendation that a steel plant shall be set up in Bastar district. Once the special condition, which is the edifice of state government recommendation superseding statutory preferential right of the

applicant, is removed, the sanction under sub-section 5 of section 11 for considering a subsequent applicant ceases to exist and consequently the recommendation fails. Once the special conditions are removed the statutory preferential right shall have to prevail. The prior approval under section 2 of the Forest Conservative Act is a mandatory pre-condition before any order of direction relating to any of the matters mentioned in sub-cause (i) to (iv) can be passed. It needs to be emphasized that section 2 of the Forest Conservative (FC) Act, 1980 has an overriding effect over all other laws for the time being in force. The impugned recommendation by the state government to the central government seeking its approval under section 5 of the MMDR Act is an order passed by the state government communicating its decision to grant prospecting license over the deposit No.1 of Bailadila range which is a reserved forest. Hence, it is expressly covered under clause (iii) of section 2 of the FC Act, 1980. Infact the recommendation as can be seen from its tenor is not an in-principle recommendation and it is ipso facto a final decision by itself. The order passed by the State Government is an order directing use of forest land for non-forest purpose which is expressly prohibited under clause (ii) of section 2 of the FC Act, 1980. The impugned recommendation by the State Government u/s 5 must be preceded by the prior approval of the Central Government u/s 2 of the F.C. 1980 Act. In the absence of such prior approval the recommendation, being an order passed u/s 5, is without jurisdiction. According to the understanding of M/s Tata Steel Ltd. the impugned recommendation is an order/decision ipso facto, hence attracts the mandatory injunction u/s 2 of the Forest Conservation Act, 1980. A

letter dated 17.6.2002 issued by the department of Forest and Culture Government of Chhattisgarh categorically lays down the procedure to be adopted before undertaking any mineral exploration activities in forest lands. The manner in which State government acted in tandem with M/s Tata Steel Ltd.. clearly indicates a pre-determined mind to grant prospecting license to M/s Tata Steel Ltd. even before the application was filed on 25.3.2006 under the MMDR Act, 1957. The statutory injunction requiring a prior approval of the central government under section 2 of the Forest Conservation Act has been conveniently ignored by the state of Chhattisgarh for reasons not borne out of record. MOEF while referring to its earlier letter dated 23.11.2000 requested the Secretary of Forest, Government of Chhattisgarh not to recommend any forest land diversion proposal in Bastar area except for small site specific public utility projects. Before allowing grant of prospecting license, the State Government may kindly ensure the compliance.

12. In reply to the R.A by the Revision Applicant, Impleaded Party has stated the following:-

The revision application on the face of it cannot be entertained in as much as the same has been filed against the recommendation of the State Government to the Central Government for grant of Prospecting Licence in favour of the Impleaded Party. The literal meaning of the word “recommended” means that which procures a favourable reception or acceptance. The industrial policy of the new state of Chhattisgarh promises several incentives, concessions and

benefits to prospective investors who desire to set up industrial units in the State. Such incentives, benefits and concessions inter alia include subsidies of various nature and exemptions and/or deferred payment of taxes. In the Industrial Policy 2004-2009, the district of Bastar has been defined as the 'Most Backward Scheduled Tribe Dominant Area and for bringing the said area to the level of other parts of the state, private sector participation is being envisaged by the State Government. In order to establish the integrated steel plant in the State of Chhattisgarh, the Impleaded Party has already incurred an expense of approx. Rs.11 crores and is committed to incur further expense to establish the steel plant and simultaneously develop the area. The State Government has passed a reasoned order by virtue of the impugned recommendation, wherein detailed reasons are mentioned for the decision of State Government. The decision of the State Govt. in exercise of its power under Section 11(5) of the MMDR Act, 1957 read with Rule 35 MCR, 1960 after taking into consideration the various criteria mentioned in sub Section 3 of Section 11 of MMDR Act, 1957 is fully justified and deserves to be upheld. All the applications received by the State Government have been dealt with elaborately. An opportunity of hearing was granted to all the applicants, thereby the principles of natural justice have been followed. Before arriving at its conclusion, the State Government has examined in details the requisite criteria as stated in Section 11(3) of the Mines and Minerals (Development and Regulation) Act, 1957. In the case of Indian Metals and Ferro Alloys Ltd. , AIR 1991 SC 818, , the Hon'ble Apex Court has answered the question as to whether Section 11 (2) of MMDR Act, 1957 is

conclusive. In this context, it has been held by the Apex Court that for the interests of national mineral development it is clearly required in the case of major minerals that the mining lease should be given to that applicant who can exploit it most efficiently. A grant of Mining Lease in order of time, will not achieve this result. The applicant on its own showing, has the constraint of infrastructure. The State Government had reserved the area for State PSUs as far back as in 1971. The area was never reserved for the applicant. In-principle approval of the applicant to form the JVC does not per se entitle the applicant or the CMDC to any right over the area. Any application submitted by the applicant for compliance of the provisions of Forest(Conservation) Act, 1980 would not entitle the applicant to any privilege under Mines and Minerals(Development and Regulation) Act 1957. In the letter dated 12.6.02 the applicant did not have any plans to develop the Deposit-1. Besides, the applicant has been contending that it would not be possible for any other entrepreneur to carry out iron ore exploitation in Bailadila complex due to infrastructural limitations.

13. State Govt. in their reply has stated that 33 applications for mining lease and 34 applications for prospecting license for iron ore over Compartment No. 683 to 688, 691 to 703 and P105A (deposit 1) in Bailadila forest reserves of Dantewara division in south Bastar Distt. were received. All the applicants were heard and information pertaining to Section 11(3) of the Act was solicited. Under Section 5(2)(b) of the MMDR Act, 1957 a mining plan is required before grant of the mining lease and since data for preparation of mining plan was

not available, the State Govt. decided to grant prospecting license for the area. As per Notification dated 2.8.81 the area was not reserved in favour of NMDC and instead the area was reserved for exploitation of minerals by the State Govt. or its undertaking. It was also provided that applications of private investors would also be entertained who are desirous of setting up of mineral based industry. State Govt. has stated that NMDC merely being a first applicant can not claim for grant of mineral concession. In this connection, Hon'ble Supreme Court of India in [W.P No. 14116/1984] in the matter of Indian Metals and Ferro Alloys Limited. Vs Union of India, AIR 1991 SC 818, has examined Section 11 of the MMDR Act, 1957 and opined that keeping in view the financial status and experience in the field of mining priority can be ascertained under Section 11(5) of the Act. Rule 35 of the MCR, 1960 also provide for consideration of end use of mineral while according priority to the applicant. In the light of the Notification dated 2.8.1981, Mineral Resources Department letter dated 25.6.2001 and 25.2.2002 have no validity. No final decision was taken regarding the joint venture between CMDC and NMDC for the deposit No. 1. The area was never reserved for Central PSUs and therefore the question does not arise for dereservation of the area.

14. In their written submission, the impleaded party has stated as follow:-

At the time of hearing before the State Govt., there was no alive application of the Revision Applicant pending. Under the law the

power to grant prospecting License vests in the State Govt.. Although Section 11(2), of MMDR Act, 1957 envisages preferential consideration of the applicant who is prior in point of time, but the same does not confer any absolute right upon the Revision Applicant to obtain the license merely by reason of a fortuitous circumstance of having made prior application. In terms of Rule 35 of MCR, 1960, the State Govt. has applied an important and legal criteria of end use. The Central Govt., while according the approval did not incorporate the condition of setting up the steel plant. In this connection, it is submitted that mere non approval of the aforesaid stipulation to be incorporated as a condition of license does not mean that the aforesaid reason has ceased to be a special reason, which guided State Govt. under Section 11(5) of the Act. The effect of the letter of the Central Govt. granting approval is not that the very stipulation is waived off, but would only mean that the said condition would not be incorporated as statutory condition in the license, but nevertheless the State Govt. and the impleaded party by an agreement inter-se bind themselves with the said stipulation as that is the complete fabric of the enterprise of impleaded party and the decision of the State Govt. A binding and legal undertaking has been submitted by the impleaded party to the State Govt. and impleaded party stands committed to the establishment of the steel plant in the area.

15. So far as the preferential right of the Revision Applicant is concerned, the application of the Applicant dated 15.4.1991 suffered deemed rejection and since there was no live application at the time of passing the impugned order, there is no question of any

preferential right in favour of the Applicant. Further, the preferential claim of an application, which accrues on account of being a prior applicant is provided in Section 11(2) of the MMDR Act. However, the said claim is not an absolute one. Section 11(5) of the Act creates an exception to the rule of prior applicant and opening with a non-obstante clause empowers the State Govt. to over look the priority and grant the license to a later applicant for special reasons to be recorded in writing. While examining the provisions of Section 11 of MMDR Act, 1957 in the case of Indian Metal & Ferro Alloys, the Hon'ble Apex Court has answered the question as to whether Section 11(2) of MMDR Act, 1957 is conclusive. The Hon'ble Apex Court held that for the interest of national mineral development it is clearly required in the case of major minerals that the mining lease should be given to that applicant who can exploit it most efficiently. It was recorded by the State Govt. that out of all the applicants only Tata Steel Limited and Essar Steel have proposals to establish steel plants in Baster region. It was further recorded that Tata Steel Limited had the proposal to establish a steel plant with capacity of 5 M.T per annum for which site has been earmarked and rehabilitation & resettlement plan has been finalized. The claim for priority of NMDC has been recorded in para 11(3) of the impugned order, wherein it has been recorded that NMDC has a proposal to establish a steel plant using slime as raw material(which does not require iron ore) with a capacity of 0.5 M.T per annum and that there is no other concrete proposal for establishing any other steel plant in the region of Baster. If NMDC wants to set up steel plant, then the raw material requirement of NMDC plant can be fulfilled by increasing production

in its existing mines and deposit No. 13(354 million tones) of Bailadila for which mining lease has been proposed to be granted in favour of JVC between NMDC and CMDC. It is stated that merely because the Central Govt. has at the time of granting approval waived off the condition, does not mean that the State Govt. is restrained from reaching an understanding with the Impleaded Party that it shall establish such a plant or that while executing the prospecting license, the state Govt. cannot impose it as a condition in the license deed. The State Govt. vide letter no. F3-99/2003/12 dated 14.3.2007 has requested the impleaded party to give consent for using the iron ore obtained from the concerned area captively in its proposed steel plant in Baster. In response to such request , the impleaded party has already given an undertaking to the State Govt. on 15.3.2007 that it shall establish a steel plant in the Baster region.

16. It has been contended by the Revision Applicant that the Notification dated 2.12.71 was issued by the Respondent. State Government under Rule 58 of MCR, 1960 and under Section 17A of MMDR Act, 1957. The Revision Applicant submits that at the time of issuance of notification dated 2.12.71, Rule 58 did not vest the State with any power to make reservation for its own exploitation. Such power has been vested only vide notification dated 16.1.80. Moreover, Section 17A was not even in existence when the said notification was issued. The notification dated 1.12.71 has been superceded by the Notification dated 2.2.1981. The Notification dated 2.2.1981 does not only provide that the iron ore deposits in the State, except those in Durg and Baster, were dereserved, but further

provide that with regard to the area in distt. Durg and Baster, the State Govt. may consider the application of such private entrepreneurs which are interested in obtaining lease for establishing a mineral based plant. Vide Notification dated 2.12.71 makes any reservation, such reservation would not enable the Revision Applicant to claim prospecting license since a bare [erisa; pf the Notification dated 2.12.1971 would show that it has specifically been reserved for prospecting by the State Govt. or the PSUs established by the State Govt. The Revision Applicant has raised an objection in its counter comments that the State Govt. has passed the impugned order without observing the mandatory requisites under S.2 of the Forest Conservation Act, 1980. Since the Revision Applicant had raised the very same contention before the Hon'ble Delhi High Court in W.P No. 8004 of 2007, and in which judgment has been reserved. The Revision Applicant cannot be permitted to raise the same contention in multiple proceedings.

17. The Revision Applicant is not justified in raking up the issue of violation of FC Act in its rejoinder especially when it has not urged the same in its Revision Application as one of the grounds of challenge to the impugned recommendation. Section 2 of the FC Act interalia requires that without approval of the Central Govt., no State or other authority can pass an order or direction permitting use of the forest land for non forest purpose. The State is yet to pass any "order" permitting Tata Steel to use the forest land for prospecting operation. Only after the recommendation is approved by the Central Govt. that the State Govt. can pass any order permitting use of forest land for

prospecting operation and consequently the stage of compliance of Section 2 of Forest Conservation Act. would come only after the Central Govt. has given approval on the recommendation of the State in favour of the applicant. Forest Conservation Rules contain sufficient machinery to enable a user agency to obtain required clearance under FC Act, 1980 and any executive instructions issued by the State cannot over ride the provision of FC Act, 1980 and FC Rules. The Central govt. while approving the recommendations of the Respondent State in favour of the Impleaded Party vide letter dated 14.2.2007 has categorically approved of invocation of Section 11(5) by the Respondent State in favour of the Respondent Company. The recommendation made in favour of Tata Steel Limited is completely in tune with the industrial Policy 2003-2004 of the State Govt. as Baster region is the most backward area of the State of Chhattisgarh and if, the State Govt., with a view to bring some parity between the developed and the undeveloped area of the State, decide to grant the license or lease to a party which undertakes to establish an industrial unit in the backward region and thereby bring huge investments and vast employment opportunities to the people of that area, no fault can be found with such a decision.

18. The case was listed for final hearing on 13.12.2007. The applicant NMDC was represented by Mr. Parag Tripathy, Sr. Advocate along with Mr. P. Sridhar, Advocate. The State Government was represented by Smt. Y. Agnihotri, Advocate along with Sri S.K. Trivedi, Jt. Director DGM, Govt.of Chhattisgarh .The impleaded party M/S Tata Steel Ltd. was represented by Mr. Ravindra Srivastava, Sr.

Advocate alongwith Ms. Nandini Gore and Mr. Naveen of Karanjawala & Co., Advocates. We heard the arguments made by all concerned parties and have carefully perused the record of the case. The Revision Applicant has raised the issue of the notification issued by the State Govt. and contested that the area was reserved for PSUs and not for private parties, the State Govt. has granted the area in favour of the impleaded party without obtaining/seeking the statutory approval of the Ministry of Environment and Forest under the Forest Conversation Act, 1980. The Revision Applicant had applied for PL on 15.4.91 i.e 15 years prior to the application of the impleaded party and thus should have been accorded priority in grant of mineral concession under Section 11(2) of the Act. and State Govt. kept the application of the Applicant pending instead of disposing of the same within the timeframe prescribed under rule 63A of MCR, 1960.

19. State Govt. had issued notification in 1971 and 1981 for the subject area reserving it for PSUs. In 1981 notification it was provided that the State Govt. may also grant mineral concession in favour of the private party who is desirous of establishing an industry based on iron ore and accordingly State Govt. considered the proposal of the impleaded party and recommended the same to the Central Govt. for seeking prior approval before actual grant of the prospecting license. As regard seeking prior approval under FCA,1980 before sending it to the Central Govt., the same was not required prior to sending it to Central Govt. and all the statutory requirements under the MMDR Act and other related Acts can be complied with before the grant and

execution of the license deed. As regard the priority claimed by the Revision Applicant being the first applicant, the State Govt. has examined the relative merits of the applicants in terms of Section 11(3) of the Act and recommended the case under Section 11(5) of the MMDR Act. The Revision Applicant has also contested that the impleaded party was recommended PL under Section 11(5) of the MMDR Act with the condition that it will set up a steel plant in the Baster Distt. and since Central Govt. has not accepted the said condition in the interest of national mineral development, the said condition in the recommendation of the State Govt. has no sanctity in terms of section 11(5) of the MMDR Act. It is true that Central Govt. while according prior approval has not agreed to the condition of setting up of the steel plant but M/S Tata Steel Ltd. is still agreeable for setting up of the steel plant in the south Baster Distt.. and has reiterated its commitment to the State Govt. and also initiated action in the matter.

20. The impugned order of the State Government are accordingly upheld and the revision application is dismissed. This Final Order shall be subject to the out come of the decisions of Hon'ble High Court of Delhi in W.P. No. 8004 of 2007. This order is also subject to the out come of LPA 135/2008 and CM NO. 3741-42/2008 and other connected Writ Petition before Hon'ble High Court of Delhi.

Sd/-

(T.N. Tiwari)
Addl. Govt. Counsel (Law)

Sd/-

(Nawal Kishore)
Director (Mines)

