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ARBITRARY ALLOCATION OF COAL BLOCKS – VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA 1950

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Allocation of coal blocks means to allocate coal blocks to private companies for captive use it initiated in 1993, after the Coal Mines (Nationalisation) Act, 1973 was amended.
The Coal Mining controversy or Coalgate Scandal (as popularly referred by the media) was one in which the Government of India allegedly allocated 142 national coal blocks arbitrarily to state-run and private companies from the period 2004-09. The Government deviated from the standard protocol of competitive bidding, resulting in an estimated loss of Rs.1, 86,000 crore. (According to Comptroller and Auditor General's report on an audit).
The Article deals with why the allocation was termed "arbitrary" and discretionary and whether it was violative of Article 14 which talks about right to equality. In this context the Article also talks about Article 39(b) which says that common good should be the sole guiding factor for allocation of natural resources. It would also deal with the stand of Government of India as well as the opposition on the issue .The Article also talks about the corrupt practices of the government. It also discusses the status of the issue in the parliament.

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INTRODUCTION

ABOUT THE SCAM

The Coalgate scam was one of the biggest scams in the history of India which lead to a loss of about Rs. 1,86,000Crore to exchequer. There were serious allegations against Dr. Manmohan Singh (Prime Minister) who was asked to resign from his office by NCP. The Prime Minister was alleged for not considering competitive bidding and for allocating the coal mines arbitrarily for personal benefits.

The PMO suspected for delaying a decision on competitive bidding which is under Regulation and Development Act 1957 which could have been implemented way back in 2006.[2]

WHO ALL WERE BENEFITED

One of the biggest beneficiary of the coal allocation is Anil Ambani"s Reliance Power Limited(RPL). Un November 2007, Madhya Pradesh Chief Minister Shivraj Singh Chauhan requested Prime Minister to RPL to use the surplus coal of captive blocks of Sasan Plant. The recommendation of Empowered group of Minister was considered and it was granted , the decision resulted in a benefit Rs 29,033 Crore with a net present value (NPV) 11,852 crore to the project developer. The reort says 25 firms including Essar Power, Hindalco, Tata Steel,

[1]Author is a student of Institute of Law, Nirma University.
[2] Amrita Patil , Coal Allocation Scam , http://www.civilserviceindia.com/

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Tata Power and Jindal steel and power gained Rs 1.86 crore from coal allocation. Advocate M.L Sharma have filed a Public Interest Litigation (PIL) in the supreme court seeing for cancellation of 194 blocks based on illegality and unconstitutionality. As a result of this litigation, the Supreme Court of India, in its September 2012 hearing has ordered the government in power on basis of not following policy of competitive bidding for coal allocation. The interminister group (IMC) has recommended de-allocation of 4 coal block.[3]

Since 1993, allocation of captive coal blocks was being done on the basis of recommendations made by an inter-Ministerial Screening Committee which also had representatives of State governments. Congress MP and director of Jindal Steel and Power Limited (JSPL) Naveen Jindal, along with former Minister of State for Coal DasariNarayanaRao, were also accused by the CBI of having entered into a conspiracy to obtain a Jharkhand coal block for his companies on false representations[4]

Thus not only politicians but also top industrialists were involved in the scam.

It was recommended that all 'personnel' who have been involved "directly or indirectly" in the allocation process "should be investigated for their role". There was no transparency in the allocation process and the exchequer did not get any revenue from allocation of the blocks.[5]

Plagued by a series of corruption scandals, none more than the coal block allocation scam with the Prime Minister‟s office directly involved in it, the party, sources said, is desperate to distance itself from the coal allocation controversy and save the PMO from the crisis.[6]

Advocate M.L. Sharma, alleged that private players have benefited due to illegal allocation of coal blocks to joint venture companies. The agency registered three preliminary enquiries in this

[3] Supra 1

[4] Agencies ,Coal scam: Full text of PM Manmohan Singh's statement in Parliament, The Economic Times, Aug 27, 2012

[5] Sanjay Dutta&MohuaChatterjee, All coal blocks awarded after 1993 illegal: Panel, The Times of India, Apr 23, 2013,

[6] GN Bureau, PMO likely to cancel allocation of 164 coal blocks,Governance Now, 11july 2012

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connection - related to allocation between 2006 and 2009, allocation between 1993 and 2004 and allocations to joint ventures.[7]

The Coal Minister criticised the Auditor stating that it‟s methods of loss calculation were flawed. His justification for the sudden increase in allocations was that "Coal India alone could not have met the demand" for coal production which is required in electricity generation. However, the fact is most of the „beneficiary‟ companies who were allocated the blocks were ineligible to receive them. Many of them got the allocations based on false representations and claims of tie ups with companies that don‟t even exist.[8]

The Coal block allocation scam and all events surrounding it bear a strong resemblance to the entire 2G scam . A senior Minister formulating or following a policy that resulted in three unfortunate and unwarranted implications: a massive loss to the exchequer; a windfall gain to private entities; and the plundering of a national resource.[9]

The scam was thus an example of actions of the constitutional head which were conflicting with the rights of the people. The manner in which it violated the constitutional provisions is dealt in the next section.

[7] MAIL TODAY REPORTER, CBI books city steel firm in Coalgate probe as total number of FIRs hits thirteen , The Economic Times ,20 June 2013
[8] Supra 3
[9] Supra 5

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ARBITRARY ACTIONS OF THE STATE AND ARTICLE 14

It is now a well established law that every action taken by the government has to go through the test of Article 14 of the Indian Constitution and should not be arbitrary because Arbitrariness is the very negation of the rule of law. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. The question that whether an action of the state is arbitrary or not depends upon facts and circumstances of the case. However, there have been landmark judgements that have defined how arbitrary actions of the state are violative of article 14 of the Contitution of India 1956.

Article 14 of the Constitution of India states that

"Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

In *Maneka Gandhi v. Union of India*[10], it was held that Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality.

In *Aeltemesh Rein, Advocate, Supreme Court of India v. Union Of India And Others*[11], the Honourable Court held that "It is important to emphasize that the absence of arbitrary powers is the first essential of the Rule of Law upon which our whole constitutional system is based. In a system administered by the rule of law, responsibility when conferred by upon executive authorities, must be confined within clearly defined limits Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14."

[10] (1978) S.C. 248,
[11] AIR 1988 SC 1768)

In E. P. Royappa v. State Of Tamil Nadu &Anr[12] *the court was of the view that* the sweep of Article 14 covers all state action .Non arbitrariness and fairness are the two immobile and irreversible cornerstone of a legal behaviour baseline. Every state action even a change of policy in any realm of state activity has to be informed fair and non arbitrary.

In NeelimaMisra v. HarinderKaurPaintal and Others [13] it was held that

"…An authority, however, has to act properly for the purpose for which the power is conferred. He must take a decision in accordance with the provisions of the Act and the statutes. He must not be guided by superfluous or irrelevant consideration. He must not act illegally, irrationally or arbitrarily. Any such illegal, illogical or arbitrary action or decision, whether in the nature of legislative, administrative or quasi-judicial exercise of power is liable to be quashed being violative of Article 14 of the Constitution. …"

In M/S Sharma Transport Rep.ByShriD.P.Sharma v. Government Of A.P. &Ors,[14]the court held that "The expression "arbitrarily" means: in an unreasonable manner, as fixed or at pleasure, without abundant determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone".

In*RamanaDayaramShetty v. International Airport Authority of India And Others*[15]the bench was of the opinion that "The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must analyze every state action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory."

[12] 1974 AIR 555, 1974 SCR (2) 348
[13](AIR 1990 SC 1402)
[14]AIR 2002 SC 322
[15](1979) AIR SC 1628

In ShrilekhaVidyarthi v. Union of India[16]the court stated that

"…It is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law."

In Mahesh Chandra v. Regional Manager, U.P. Financial Corporation AndOrs[17]it was held that "In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice .The decisions which are not fair are unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorized to be exercised. Dishonesty is discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason."

The Supreme Court in *S.G. Jaisinghani v. Union of India and Ors.*[18], held that it has been emphasized time and again that arbitrariness is abomination to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and

[16]1991 AIR 537, 1990 SCR Supl. (1) 625
[17] AIR 1993 SC 935
[18] [1967] 2 SCR 703

strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India.

In Budhan v. State of Bihar[19] the court was of the view that any state action executive , legislative or judicial is void if it contravenes Article 14. A statute may expressly make discrimination between persons or things or may confer power on an authority who would be in a position to do so. Official arbitrariness is more contradictory to the doctrine of equality than statutory discrimination.

In Som Raj v. State of Haryana[20] it was stated that "The absence of arbitrary power is the first postulate of rule of law upon which out whole Constitutional edifice is based. In a system governed by Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the contrast of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority."

In AP Agarwal v. Government of NCT of Delhi[21]it was held that "A case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to encourage the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual."

[19]AIR 1995 SC 191

[20]AIR 1990 SC 1176

[21]AIR 2000 SC 3689

The above case laws clearly prove that any action taken by the government has to go through the test of Article 14 and if they are violative of Article 14 they can be termed as unconstitutional and can be said to be arbitrary.

ALLOCATION AND CONSTITUTIONAL VIOLATIONS

The allocation lead to constitutional violations and violated the fundamental rights enshrined in the Indian Constitution. There have been cases where while giving judgments on allocation of natural resources the Supreme Court was of the view that while these allocations are made

The underlying object of Article. 14 of the Constitution of India is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to Constitution. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Art.14 uses the word "State" which as per Art.12, includes the executive organ. Besides, Art.14 is expressed in absolute terms and its effect is not curtailed by restrictions like those imposed on Art.19(1) by Arts.19(2)- (6). However, notwithstanding the absence of such restrictions, certain tests, e.g. classification test, 'arbitrariness' doctrine have been devised through judicial decisions to test if Art.14 has been violated or not.[22]

In a landmark judgement of *Raja Ram Pal V..Hon'ble Speaker, LokSabha&Ors*[23]*the court said that* Art.39(b),mandates that the ownership and control of natural resources should be so distributed as to best subserve the common good. Art.37 provides that the provisions of Part IV shall not be enforceable by any court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. The legislature and the Executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Art. 14 and Art.39(b).

[22] [2012] 9 S.C.R. 311
[23] (2007) 3 SCC 184

Justice Kehar in his judgement pointed out that when natural resources are made available by the state to private persons for commercial exploitation exclusively for their individual gains, the state‟s endeavour must be towards maximisation of revenue returns. This alone would ensure, that the fundamental right enshrined in Article 14 of the Constitution of India (assuring equality before the law and equal protection of the laws), and the directive principle contained in Article 39(b) of the Constitution of India (that material resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country,"[24]

In *State of A.P. &Ors.v.. McDowell & Co. &Ors.*[25]it was held that Art.39(b) in a sense, is a restriction on 'distribution' built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But for the From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Art.14. A law may not be struck down for being arbitrary without pointing out a constitutional infirmity. Therefore, a State action has to be tested for constitutional infirmities qua Art.14. The action has to be fair, reasonable, nondiscriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Art.14. This is the mandate of Art.14.

Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the

[24]VivekKaul, Sibal jumped the gun:SC may well see Coalgate as a scam, The Times of India, September 28,2012
[25] (1996) AIR 1627, 1996 SCC (3) 709

Constitution. Therefore, rather than prescribing or proscribing a method, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles culled out in the instant opinion. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Art. 14 of the Constitution .[26]

The bench comprising justices D K Jain, J S Khehar, DipakMisra and RanjanGogoi.[27]that auctions may be the best way of maximizing revenue but revenue maximisation may not always be the ultimate motive of the policy and natural resources can be allocated to private companies by other methods for the purpose to subserve public good.

"Common good is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the common good and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in the Article,"

In *Common Cause, A Registered Society V.. Union of India &Ors*[28]it was heldthatwhen natural resources are made available by the State to private persons for commercial exploitation exclusively for their individual gains, the State's endeavour must be towards maximization of revenue returns. This alone would ensure, that the fundamental right enshrined in Art.14 (assuring equality before the lawand the equal protection of the laws), and the directive principle contained in Art.39(b) (that material resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country. Article 14 does not permit the State to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice amongst those belonging to the same class or category is based on reason, fair play, and non-arbitrariness. If the participation of private persons is for commercial exploitation exclusively for their individual gains, then the State's endeavour to maximize revenue alone, would satisfy the constitutional mandate contained in Articles 14 and 39(b) of the Constitution.

[26]Supra 21
[27]*Auction not the only permissible method of allocating natural resources: Supreme Court* , The Economic Times, Sep 27, 2012
[28]1996 (6) Suppl. SCR 719 ; (1996) 6 SCC 530

Justice Khekar in his recent Judgment on the scam pointed out that "No part of the natural resource can be dissipated as a matter of largesse, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to „best subserve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable."[29]

"Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the court will not hesitate in striking it down," the bench added.[30]

The SC clarified that the Constitution does not mandate an auction-only policy in allocation of natural resources. It added that the 2G case order of an auction-alone policy cannot be applied to other natural resources, and that revenue maximisation is not the object of the policy of allocation of natural resources.[31]

The Apex Court also emphasized that it respects the mandate and wisdom of the executive in such matters, but all such allocations have to be guided by common good and that courts will not hesitate in striking down any arbitrary allocation. The process of evolution of a policy has taken too long to crystallise. Surely, there are lessons to be learnt. In the wake of disclosures highlighting crony capitalism aided by the prevailing opaque processes, dubious pricing,

[29] Supra 21

[30] DhananjayMahapatra, Coalgate: Mines can't be doled out as largesse, says Justice JS Khehar ,*The Hindustan Times*, Sep 28, 2012,

[31] Pradeep Mehta ,Policies to allocate natural resources should be dynamic and transparent, *The Economic Times*,Nov 26, 2012

suboptimal utilisation of such resources and corrupt practices, the Ashok Chawla Committee on Allocation of Natural Resources submitted its report back in May 2011.[32]

Centre for *Public Interest Litigation &Ors. v.. Union of India &Ors.*[33] The court was of the opinion that For an action to be able to withstand the test of Art.14, it has already been expressed in the "main opinion" that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments of this Court endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the said parameters.

While Art.14 permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, a criteria or procedure has to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency.[34]

Thus the actions taken by the State in the present case were arbitrary and hence violative of Article 14 and also the distribution was not done keeping in mind common good , hence the provisions of Article 39(b) were also violated. The allocation thus not only caused loss to the government but was also against the Constitutional provisions of the country.

[32]Supra 21
[33](2012) 3 SCC 1
[34]SCR 721 = (1996) 3 SCC

CONCLUSION AND SUGGESTIONS

CONCLUSION

The Union government had abused power and handed out natural sources to a few fortunate ones without following a transparent system, the Parliamentary Standing Committee on Coal has said. It demanded an investigation into the screening committees‟ decision-making process in coal blocks allocation and penal action against those involved in such arbitrary process.[35]

The actions taken by the government in the allocation were clearly violative of the fundamental rights of the citizens of India. The actions were violative of Article 14 as well as Article 39(b) of the Constitution of India 1956.

It is clear that even though being the Constitutional Head to the country the Prime Minister was involved in constitutional violations. The Indian society has in my view become “accustomed” to the ever growing scams and scandals of the country. The 2G scam created a much larger outbreak of people than the coalgatescam , even though the latter involved more monetory loss to the exchequer than the former. Hence it is clear the country is becoming tolerant towards these scams .The society as a whole has to learn how to fight with corruption and not accept things as they are.

SUGGESTIONS

According to the researcher the method of coal allocation adopted by the government i.e. auction though is the most profitable method may not always lead “common good” . Thus alternative methods must be considered.

[35] SujayMehdudia,Coal blocks allocation arbitrary, says parliamentary panel , NEW DELHI, April 24, 2013, The Times of India

Moreover allocation of natural resources should be done in a more transparent manner. The people involved in the allocation must be accountable to the public. Such scams can only be stopped if a more transparent system of allocation is adopted. The allotment and other such natural resources must be done in a manner consistent with the doctrine of equality. The Court in its judgments has time and again been of the view that while allocation of land or while entering into a contract the executive must adopt a fair method. The method adopted must be such that all the people belonging to the same category get an equal opportunity of getting the land or the contract. The Court while deciding the 2G spectrum case also was of the opinion that for the allocation of natural resources the executive is duty-bound to adopt practices which are "non-discretionery".

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