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Shri Anup K. Pujari, July 3, 2014

Secretary to the Govt. of India,

Ministry of Mines,

Shastri Bhawan, New Delhi.

Dear Shri Pujari,

This is in continuation of the discussion in our meeting on June 9 and the subsequent telephonic conversation on the issue of compatibility of competitive bidding/auction for grant of mining leases with the provisions of the MMDR Act.

There is no dispute that the Government is the custodian of the country’s natural resources, which belong to the people of this country. The intention must be that the people must get the full benefit out of these resources, either in cash or in kind. Where the intention is to receive the benefit in cash, the method of auction is used. For instance, in the case of spectrum now, the eligible companies that agree to abide by the onerous telecom license conditions participate in an auction and get the allocation by paying the market price upfront. Here, the public exchequer is enriched by an enormous amount of revenue, which can be used for providing essential services like health care, education and infrastructure. Thus, the people get the full benefit of the natural resource, first through the increased public revenue, and then through the provision of essential telecom services. The rental charged by telecom companies is not dependent on the prices paid for the spectrum, but on the state of competition in the sector. While making their bids, the telecom companies factor in the price that can be charged from the customers in the prevailing market scenario.

In other kinds of legally sustainable allocations, the exchequer does not get the price of the resource upfront, but the people receive the full benefit of the resource in the long run. In these cases also, the method of competitive bidding can be followed. For instance, the Government has introduced the concept of power tariff-based bidding for captive coal blocks in the case of Ultra Mega Power Plants. The bidder, who undertakes to supply power from a coal block at the lowest price, gets the coal block. Here, the exchequer does not realise the full price for the coal block at the time of allocation, but the people benefit from the low power tariff. The Government also operates a telecom scheme, in which a telecom company that undertakes to provide universal telephony in rural areas at the lowest subsidy from the Universal Service Obligation Fund gets the telecom licence and the network. In both these examples, the people are benefitted in the long run, provided the allocation is fairly made and the allocation conditions are enforced.

Regrettably, mining is one sector where the system of allocation of natural resources continues to be mired in controversy for the last two decades. It has given rise to serious concerns, conflicts, protests and corruption scandals. The unconscionable profit margins in the sector act as an incentive for corruption. A precious resource that mining companies get virtually for free is sold at the going market rate, which is many times the cost of extraction and transportation, while the royalty rate continues to be abysmally low. This results in windfall gains for the companies.

In the 2G case, the contention of the petitioners, viz. Centre for Public Interest Litigation (CPIL),Common Cause and Others, was that it was unconstitutional on the part of the government to allocate spectrum at 2001 prices in the year 2008, by which time the market conditions had radically changed.This contention found favour with the Supreme Court, which struck down the allocation of licences bundled with spectrum mainly on the ground that it had caused a huge loss to the public exchequer. It was in this context that the Court held that it is the duty of the State to follow the process of auction for alienation of scare natural resources.

In the Presidential Reference, which the Government then filed, they posed the question whether auction was the only method of allocation for all natural resources under all circumstances. The answer to this rhetorical question was an obvious ‘No’. Interestingly, no one had argued before the Supreme Court in that case that all natural resources must be auctioned under all circumstances. Obviously, if water has to be supplied to households for domestic use, no one would suggest that it ought to be auctioned. The CPIL’s contention before the Court, which was duly recorded in the judgment, was that if valuable and scarce natural resources are being alienated for commercial exploitation (not for domestic use) to profit maximizing private companies (not to government undertakings), then these must be alienated at the prevailing market price through a transparent process of competitive bidding/auction.

The Supreme Court judgment reiterates the obvious proposition that all resources need not be auctioned in all circumstances and states that the Court would not lay down a method of alienation of natural resources as a policy prescription. However, in the concluding paragraphs, the Court states that it can test the validity of the methods after the allocation and strike down any method inconsistent with Constitutional principles (of non-arbitrariness and people’s ownership of natural resources). And finally, the 5-judge bench of the Supreme Court endorsed the CPIL’s argument that whenever precious and scarce natural resources are alienated for commercial exploitation to profit maximizing companies, then the only method consistent with the Constitution is the one that is competitive and maximizes the revenue of the State.

In order to address the issue of compatibility of competitive bidding/auction for grant of mining leases with the provisions of the MMDR Act, one needs to appreciate the conditions obtaining in the mining sector in the year 1957 when the MMDR Act was enacted. At that time, most of the mineral deposits in India had been not explored; natural resources were not so scarce; there were not much competition in the mining sector; and the prices of minerals were low. The scenario today has changed dramatically. The entire mineral map of India is known to all; mineral reserves are close to depletion; and the profit margins in the mining industry are huge. In short, the MMDR Act has become outdated.

Nonetheless, the extant MMDR Act has a built-in flexibility in the method of allocation. In respect of virgin non-explored areas, Section 11(1) provides that an entity that gets a prospecting licence would have the preferential right to the mining lease. But in so far as non-virgin explored or already mapped mineralized areas, such as the bauxite bearing districts of Odisha and the iron ore rich tracts of Goa, Karnataka and Odisha, are concerned, Section 11(2) mandates that the State Government must notify the areas for allocation, call for applications, and select an applicant as it deems fit. The Act does not prohibit the State Government from conducting competitive bidding for the selection. In fact, the very fact that a selection has to be made implies that the manner of selection be consistent with the Constitutional principles elucidated by the Supreme Court.

It should not be too difficult to devise a method of selection that is consistent with Constitutional principles as well as the express provisions of the MMDR Act. One can envisage a two-stage bidding procedure in which the factors enumerated in Section 11(3) of the Act are incorporated in the eligibility criteria and the minimum standards for each of the criteria are notified in advance. All those who qualify are treated at par. The mining lease is put to auction amongst these shortlisted entities and the highest bidder gets the lease. This method of selection would be consistent with the judgment of a 2-judge bench of the Supreme Court in Sandur Mining case.

It may also be recalled here that in the context of a series of major corruption scandals involving alienation of natural resources, the Government of India had appointed an Expert Committee on Allocation of Natural Resources to advise on appropriate methods of allocation. The high level Committee, which was chaired by Shri Ashok Chawla, former Finance Secretary, and comprised the Secretaries of all the Ministries concerned, submitted its report in 2011. It unanimously recommended that the method of auction be followed for the allocation of natural resources like minerals, coal, oil and natural gas, spectrum and land. The Ministry of Mines subsequently appointed the Justice M. B. Shah Commission of Inquiry in the light of major mining scandals erupting in the country, as noted in its terms of reference. The Shah Commission in its various reports strongly recommended the auction of mining leases.

It is imperative that the considered recommendations made by the Ashok Chawla Committee and the Shah Commission are implemented without further delay.

With best regards,

Kamal Kant Jaswal

Director, Common Cause