Karnataka High Court
Karnataka Emta Coal Mines Limited vs Union Of India on 4 October, 2017
Author: Subhro Kamal Kumar

: 1 :

IN THE HIGH COURT OF KARNATAKA
AT BENGALURU
Dated this the 4th day of October, 2017

: PRESENT :

HON'BLE MR. SUBHRO KAMAL MUKHERJEE,
CHIEF JUSTICE

AND

HON'BLE MR. JUSTICE P.S.DINESH KUMAR

WRIT PETITION NOs. 19823-24 OF 2015 (GM-RES)

BETWEEN:

1. KARNATAKA EMTA COAL MINES LIMITED
104, MARIELLE APARTMENTS
3 MAGRATH ROAD
BANGALORE - 560 025
THROUGH ITS MANAGING DIRECTOR
MR. UJJAL KUMAR UPADHAYA

2. EMTA COAL LIMITED
5B, NANDALAL BASU SARANI
KOLKATA-700 071
THROUGH ITS CONSTITUTED ATTORNEY
MR. C P SOMANATH PANTH

...PETITIONERS

(By Sri Shanthi Bhushan, Senior Advocate, for
Sri Reuben Jacob, Advocate.)

AND:

1. UNION OF INDIA
MINISTRY OF COAL
THROUGH ITS SECRETARY
A-WING, SHASTRI BHAWAN
DR. RAJENDRA PRASAD ROAD
NEW DELHI-110 001

2. OFFICE OF THE COAL CONTROLLER
1, COUNCIL HOUSE STREET
KOLKATA-700 001

3. COLLECTOR CHANDRAPUR
OFFICE OF THE COLLECTOR
CHANDRAPUR-442 401
MAHARASHTRA

4. KARNATAKA POWER
CORPORATION LIMITED
SHAKTI BHAVAN
NO 82, RACE COURSE ROAD
BANGALORE-560 001.

...RESPONDENTS

[Sri Prabhuling K Navadgi, ASG, for R1 & R2;
Sri Madhusudhan R.Naik, Senior Advocate for
Sri Ajay J.Nandalike, Advocate, for R4;
service on R3 is held sufficient.]

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO SET ASIDE THE EXPLANATION TO SECTION 3(1)(n) OF THE COAL MINES [SPECIAL PROVISIONS] ACT, 2015, PRODUCED AT ANNEXURE-AC, IS ULTRA VIRES THE CONSTITUTION OF INDIA AND ETC.

THESE WRIT PETITIONS, HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:-

: 3 :

ORDER

Per Subhro Kamal Mukherjee, CJ., These writ petitions are filed, inter alia, challenging the constitutional validity of the Explanation to Section 3(1)(n) of the Coal Mines (Special Provisions) Act, 2015, (hereinafter 'the said Act') for a declaration that Section 3(1)(n) refers to no party other than allottees, who have been allotted the mines by the Union as contemplated in the judgment in Manohar Lal Sharma Vs. Principal Secretary and others reported in (2014) 9 SCC 516 and the order of the Supreme Court of India in Crl.M.P. No. 24063 of 2014 filed by respondent No.4; for a declaration that the respondents are not entitled to recover the additional levy from any person other than the original allottees; restraining the respondents to recover the additional levy amount

from the petitioners, and for quashing of various orders of demand made by respondent Nos. 1 to 4.

2. The facts relevant to the case are as under :

(a) Karnataka Power Corporation Ltd. ('KPCL' in short), respondent No.4 in the present petitions, is a government of Karnataka Public Sector Undertaking, which is in the business of power generation. Among others, it owns and operates Thermal Power Stations in Raichur, Bellary and other places.

(b) As KPCL required a steady source of supply of coal for its intended Thermal Power Station ('TPS' in short) in Bellary, KPCL applied for allotment of a coal block for the specified end use in Bellary TPS in 2003 in terms of Section 3(3)(iii)(4) of the Coal Mines Nationalization Act, 1973 to the Central Government.

(c) By way of the allotment letter dated November 10, 2003, the Central Government allotted the coal blocks at Manoradeep, Kiloni and Baranj I to IV to KPCL prescribing that the coal blocks must be utilized only for Bellary TPS.

(d) As KPCL did not have any expertise in mining matters, it called for open tender for the purpose of identifying a competent entity to develop and operationalise the coal blocks. Pursuant to the transparent tender process, EMTA Coal Ltd. ('EMTA' in short) was selected as the entity, which would develop and operate the coal blocks on behalf of KPCL, for the captive consumption of KPCL.

(e) EMTA and KPCL, pursuant to the above tender process, constituted a Special Purpose Vehicle called Karnataka EMTA Coal Mines Limited ('KECML' in short), which was a joint venture between EMTA and KPCL, with equal representation in the Board of Directors and the nominee of KPCL being the Chairman of the Board and the casting vote with KPCL.

(f) The above said structure was intended to operate for 25 (twenty five) years wherein the mine would be explored and all the coal extracted from the mines would be supplied to KPCL at the tendered price. EMTA was to recover its investment made towards the development and the operationalisation of the mine over a period of 25 (twenty five) years, by supplying coal exclusively to KPCL.

(g) In the light of the above, KPCL, in the letter dated November 19, 2003, sought for the mining lease to be registered in favour of KECML with the condition that the entire coal extracted from the mines allotted to KPCL would be utilised for KPCL's Thermal Power Station at Bellary. Pursuant to acceptance of this condition, the Central Government notified on July 16, 2004 the coal blocks at Kiloni, Manoradeep and Baranj I to IV to KECML with the condition that the end use of the coal would be only to KPCL's Thermal Power Station at Bellary.

(h) After the mining lease dated September 25, 2006 was executed in favour of KECML, KECML got the mining plan approved and invested in the development and the operations of the mine. Once the mining operations commenced, KECML signed a Fuel Supply Agreement dated May 9, 2007 with KPCL under which the coal mines was exclusively supplied to KPCL at the pre- determined tendered

rate.

(i) This arrangement continued till the Supreme Court of India in Manohar Lal Sharma (supra) (for ease of convenience referred to as 'the 1st ML Sharma judgment') held that all coal block allotments were contrary to the Coal Mines (Nationalization) Act ('CMN Act' for short) and hence bad in law.

(j) The Supreme Court of India, in its judgment, inter alia, cancelled all coal block allotments except 4 (four), which were in accordance with the CMN Act. Subsequently, the Supreme Court of India, in Manohar Lal Sharma Vs. Principal Secretary and others reported in (2014) 9 SCC 615 (the 2nd ML Sharma judgment), directed that the allottees of coal blocks, whose allotments were now cancelled, pay an additional levy of Rs.295/- (Rupees two hundred ninety five only) per MT, for the quantum of coal mined by such allottees. The order, also, contained, in the form of an annexure, the specific names of the allottees upon whom the obligation to pay the additional levy of Rs.295/- (Rupees two hundred ninety five only) per MT was being imposed.

(k) In order to implement the judgment, the Central Government promulgated the Coal Mines (Special Provisions) Ordinance, 2014. The ordinance required all prior allottees to pay the additional levy in terms of the order of the Supreme Court of India.

(l) Pursuant to the ordinance, demand notices were issued to the allottee of the coal block in the present case, that is, KPCL. In the light of the said demand, KPCL sought a clarification in Crl.M.P. No. 24134 of 2014 before the Supreme Court of India, of its liabilities pursuant to the judgment in the 2nd ML Sharma case. KPCL sought for a direction to the effect that EMTA be made responsible and liable to pay the additional levy, on the ground that it was EMTA, which had physically mined the coal block in question and was consequently the beneficiary of the coal block. The said application being Crl.M.P. No. 24134 of 2014 was dismissed, thereby concluding the issue that pursuant to the 2nd ML Sharma judgment, it was the allottee of the coal block, which was liable to pay the penalties imposed.

(m) On 26th December 2014, the Coal Mines (Special Provisions) Second Ordinance, 2014 was promulgated, which inserted an Explanation to Section 3(1)(n), attempting to insert a deeming fiction. Although the judgment of the Supreme Court of India imposed the liability on allottees, the Ordinance attempted to transfer the liability upon the person in whose name the mining lease is executed. In effect, the liability was attempted to be transferred from the 'allottee' to the 'lessee'.

(n) This explanation in the Second Ordinance was continued in the Coal Mines (Special Provisions) Act, 2015 pursuant to which demand notices have been issued to KECML, on the strength of this explanation and on the basis that although KPCL was the allottee, the ultimate mining lease was executed in favour of KECML. These demands have prompted EMTA and KECML to mount the present challenge.

(o) Union of India has preferred Contempt Petition No. 2 of 2015 contending that KECML has wilfully disobeyed the orders of the Supreme Court of India by not paying the additional levy as determined by the Supreme Court of India.

3. Mr. Shanthi Bhushan, learned senior advocate for the petitioners, contended that the Explanation has been an attempt to nullify the judgments of the Supreme Court of India in the 1st and 2nd ML Sharma cases, for the following reasons:

(a) The Supreme Court of India had understood the term 'allottee' as the person to whom the Central Government issued the allotment letter as it has clearly laid down in the judgment.

(b) The Supreme Court of India, also, holds that the issuance of the mining lease is an empty formality and, therefore, the allotment letter is the basis for identifying the allottee.

(c) KPCL has been specifically identified as the allottee by the Central Government itself, as recorded in the 1st ML Sharma judgment.

(d) The 2nd ML Sharma judgment clearly imposed the additional levy on the allottees named in Annexure-2 of its judgment.

(e) The Central Government understood the judgment and the meaning of the term 'allottee' inasmuch as the first ordinance, that is, the Coal Mines (Special Provisions) Ordinance, promulgated on October 21, 2014 did not contain the impugned Explanation and this position was attempted to be changed by the Second Ordinance, subsequent to the order of the Supreme Court of India dated December 08, 2014 dismissing the application for clarifications filed by KPCL in Crl.M.P. No. 24134 of 2014.

(f) It was even the understanding of KPCL that it was liable to pay the additional levy and for that reason it preferred Crl.M.P.No. 24134 of 2014 before the Supreme Court of India seeking clarification. Upon dismissal of the application, the order became binding on the Union of India and KPCL and an attempt is being made to overcome the said order by immediately modifying the legislation to shift the burden of additional levy on KECML.

(g) The Coal Mines (Special Provisions) Act, 2015 does not have a charging section and it seeks to only 'collect the additional levy' from the persons identified in the order of Supreme Court of India. The legislation, therefore, cannot deviate and seek to collect the additional levy from the persons other than those identified in the judgment. Any provision of the legislation, which seeks to do so must be seen as an attempt to nullify the judgment of the Supreme Court of India in ML Sharma cases. This would be in violation of Article 141 of the Constitution inasmuch as once the Supreme Court of India has declared as to what has been the law, it is not open for the Central Government to sit in judgment over the same and legislate to annul the judgment as that would result in revisiting the ghosts of Bill of Attainder. Mr.Shanti Bhushan cited various authorities including S.T.Sadiq Vs. State of Kerala and others, reported in (2015) 4 SCC 400 in support of his aforementioned submissions.

(h) The Central Government will not have the legislative competence to collect the levy from any person other than the allottee identified in the ML Sharma judgments, inasmuch as it seeks to implement the judgments and cannot, therefore, go beyond the judgment of the Supreme Court of

India. A contrary intention seems to emanate from the Lok Sabha debates, which show the Hon'ble Minister clearly stating that the intention of inserting the Explanation, was to ensure that the State Public Sector Undertakings do not become liable for the payment of additional levy. This, despite the fact that such State Public Sector Undertakings were indeed allottees of coal blocks.

(i) Mr. Shanthi Bhushan, further, contended that KPCL was the beneficiary of the coal block allotments and, therefore, it would be liable to pay the levy as per the 2nd ML Sharma judgment. The Letter of Award issued by KPCL at Clause 19 clearly states that KPCL is the allottee of the coal blocks and that they must be utilized only for KPCL's benefits. The Letter of Allotment dated November 10, 2013 clearly states that the coal mines were allotted to KPCL and for its specific end use under Section 3(3)(c)(iii) of the Coal Mines Nationalization Act. Therefore, in the eyes of the Central Government, KPCL was the beneficiary.

(j) KPCL, in the letter dated November 19, 2003, has sought for the mining lease to be registered in favour of KECML. Along with this letter, two affidavits, one by the Managing Director of KECML and one by the Managing Director of KPCL, were enclosed. Those affidavits clearly provided that KPCL through its joint venture coal company KECML undertook that they would not seek to sub-lease or transfer the lease to any other party and that the coal produced would be exclusively used for thermal power stations fully owned and managed by KPCL.

(k) The gazette notification dated July 16, 2004, under which the allotment was made, clearly states that "Central Government specifies as an end use the supply of coal from the coal mines of Kiloni, Manoradeep and Baranj I to IV blocks by the Karnataka EMTA Coal Mines Ltd. on an exclusive basis to the KPCL for the generation of thermal power in their proposed 1000 MW thermal power station at Bellary subject to the condition that KPCL holds at least 26% (twenty six per centum) of the voting share capital in KECML".

(l) At Clause (7) Part III of the mining lease, it is clearly stated that this mining lease was executed only for the benefit of KPCL and the very same conditions mentioned in the allotment letter issued by Union of India are found in the mining lease as well.

(m) The Fuel Supply Agreement dated May 9, 2007 executed between KPCL and KECML, as evident from Recital (c), Clauses 2.3, 4.2, record unequivocally that it was coal block of KPCL and the very purpose of registering a mining lease in favour if KECML was to ensure that the mine development and operations are carried on by KECML and the coal extracted from the mines be exclusively supplied only to KPCL.

(n) KPCL filed an application before the Supreme Court seeking to save the coal blocks claiming that it was directly affected by the cancellation of allotment as it is critical for power generation in Karnataka. If KPCL was not the beneficiary or the allottee, there would be no necessity to file such an application. The application filed by KPCL in Crl.M.P.No. 24134 of 2014 clearly establishes these facts and the commercial arrangement between the parties.

(o) The very fact that the Explanation reads that "in case a mining lease has been executed in favour of a third party, subsequent to such allocation of Schedule I coal mines, then, the third party shall be the prior allottee", that is, by virtue of a deeming provision, KECML and other similarly situated persons have been considered as a prior allottees. The Central Government is presuming them to be prior allottees for the purpose of the Act even though the judgment did not consider them as allottees.

4. Mr. Prabhuling Navadgi, learned Additional Solicitor General of India, submits as under:

(a) The Central Government had filed a contempt petition against the petitioners, which was pending in the Supreme Court of India, wherein the very same issues covered under these writ petitions are to be decided and it would be appropriate for this court to wait the decision of the Supreme Court of India.

(b) Even though KPCL may be the allottee, but the intent of the enactment and the intent of the orders of the Supreme Court of India ought to be examined and it would be seen that the intent of the Supreme Court of India was to ensure that the beneficiaries of the illegal allotment ought to be made liable to pay Rs.295/- (Rupees two hundred ninety five only) per metric ton as additional levy. The benefits of the allotment, that is, consideration from the sale of coal flew to KECML and hence they had to pay the additional levy.

(c) As this was a judgment in rem and KPCL and KECML were not parties before the Supreme Court of India and any particular factual situation as in the present case was not before the Supreme Court of India, any observations made by the Supreme Court of India cannot be directly held to be applicable. The Central Government has appropriately understood the observations of the Supreme Court of India vis-a-vis the entire process of allotment and inserted the Explanation to give effect to the judgment of the Supreme Court of India and not to nullify the same.

(d) One would, also, need to understand the backdrop of the case. There was a huge scam in coal block allotments resulting in crore of rupees of loss to the exchequer due to activities of mining landing in the hands of the private parties, which was uncovered by the CAG report. The chronology of events would show that though the coal blocks were allocated in favour of KPCL, there was a request made to the Union by KPCL, for the mining lease to be executed in favour of KECML (in which 74% shareholding is that of petitioner No.2 EMTA). The same demonstrates that right of mining went directly in favour of private mining company. In fact, a further arrangement would show that the operating company was EMTA, on which KPCL did not have any control. Mr.Navadgi highlighted the fact that lease was in favour of KMTA and the coal mines were under the actual control of KMTA. It is not disputed, however, by the learned Additional Solicitor General that the entirety of the coal mined from the coal blocks, were supplied exclusively to KPCL for use by KPCL in its thermal power generating stations.

(e) The present legislation under no circumstances deviates from any portion of the judgment of Supreme Court of India. On the contra, it gives effect to judgment through a comprehensive legislation as the judgment did not deal with individual cases, but the entire process of allotment.

The object of judgment was to undo the wrong done by flawed process as is clear from the observations made by the Supreme Court of India. In fact, the CAG report, which is taken into consideration by the Supreme Court of India, specifically refers to the Joint Venture Agreements.

(f) The learned Additional Solicitor General submits that the legislature is empowered to cure inadvertent defects. It is submitted that legislative power to make law with retrospective effect is well recognised. The legislature has power to remove the basis which led to the decision of the court. He cites the decisions in the cases of Virender Singh Hooda and others Vs. State of Haryana and others reported in (2004) 12 SCC 588 and Deepak Bajaj Vs. State of Maharashtra and another reported in (2008) 16 SCC 14 in support of his submissions.

(g) The order of the Supreme Court is both penal and compensatory in nature. Therefore, the persons, who got the mining lease, should be liable. The submission that the present amendment runs contrary to the judgment of Supreme Court of India is not correct for the reasons that:

i) The said order did not decide the rights of parties;

ii) The application was filed seeking direction against EMTA to pay the compensation amount, which is neither the prior allottee nor third party, in whose favour the lease was executed. The said order has no bearing on the present amendment.

(h) The amended definition of the term 'prior allottee' is integral for the working of the enactment. A bare perusal of the provisions of the Coal Mines (Special Provisions) Act, 2015, would show that the prior allottee is allowed to bid afresh subject to the payment of additional levy. The prior allottee is, also, entitled to compensation if he does not succeed in the bid. If the prior allottee does not succeed in the bid, he will be given an opportunity to negotiate with the successful bidder regarding any machinery, so as to ensure smooth operation of the mines. In many cases, the prior allottees are third parties in whose favour Joint Venture Agreements have been entered into. If by process of interpretation, as argued by the petitioner is accepted, the entire Act may become unworkable, resulting in standstill in the coal mines.

5. Mr. Madhusudan R.Naik, learned Advocate General, appears for KPCL and, inter alia, submits that:

(a) The second ML Sharma judgment proceeds on the legal basis of the doctrine of ultra vires and, therefore, once it is held that the allotment is bad in the eye of law as it is contrary to the CMN Act, the consequence of the same should be that the party, who was benefitted from the illegal allotment, must restore the benefits on the principle of restitution. Therefore, if 'mining rights' which resulted from the allotment gets nullified, the benefits from the 'mining rights' should, also, go. The Supreme Court of India, in its wisdom, has quantified the benefits at Rs.295/- (Rupees two hundred ninety five) only and termed/identified it as 'the additional levy'. On whom it must be imposed must follow from the judgment. The benefit/largesse that resulted from 'the allotment' was the 'grant of mining rights' to KECML. This 'mining rights' was passed on to KECML without payment of any consideration, which was held to be impermissible commercial mining in violation of CMN Act. The

very fact that the CAG recorded that, Government did not make any profit and, therefore, left out the government mines from the purview of the compensatory payment and, indicated that 'the private parties' have made windfall profits out of such arrangement and as this was the basis for imposition of the additional levy, it would follow that, the intent of the judgment was to impose the levy on the beneficiary of such allotment, which in the present case is KECML.

(b) The term 'prior allottee', which was introduced by the Act is to bring within its ambit the entire 'process of allotment' including issuing of the gazette notification in the name of KECML requiring 26% shareholding by KPCL and issuance of 'the mining lease' in the name of KECML. The term 'prior allottee' is a reference to 'the beneficiaries under the previous mode of allotment', which was held to be ultra vires. The previous mode of allotment, that is, by Government Dispensation Route, was found to be ultra vires, as 'the mining lease' was allotted to a Joint Venture Company and, not directly to KPCL, which was eligible in terms of/under Section 3(3) of the CMN Act. In such circumstances, to restrict the term 'allottee' to only KPCL defeats the purpose of the judgment, as the entire process was found fault with. The term 'allottee' must be understood as not only KPCL, but, also, those entering into 'the mining lease' by allottee and working it out, which in the present case is KECML. Therefore, the allotment cannot be understood as a 'standalone' allotment of coal block, but, also, 'the mining lease' granted by the State of Maharashtra, which gave the right to mine. The working of this arrangement, through a joint venture company was held to be impermissible in law. Therefore, to understand the judgment as referring to 'allottee' as only KPCL is a misconception. Because of such possible misconception, the Parliament has thought it fit to clarify by expressly providing for and pointing out to the additional levy would be paid by the beneficiary of the illegal arrangement that was worked out in the past. This will be in tune with the purpose of the judgment, which wanted to impose 'the levy' on the beneficiary, which was a private party. Hence, it cannot be said that, the judgment imposed the additional levy on KPCL and the argument relating to 'bill of attainder' would not apply in this particular case.

(c) Full effect must be given to 'the deeming fiction'. The Explanation to Section 3(1)(n) does not restrict itself to 'any one section'. It cannot be restricted to, not applying to 'the payment of additional levy' and, made applicable in other cases. A statute must be interpreted in a manner so as to give effect to all the provisions. If the argument of the petitioner is to be accepted, petitioner will be entitled to compensation payable to a prior allottee, but not liable to pay the additional levy that such an allottee was required to pay as per the judgment of the Supreme Court of India. Therefore, it is not possible to interpret and hold that the KECML will be 'the prior allottee' for the purposes of receiving compensation under the Act and, not 'the prior allottee' for the purposes of 'payment of additional levy'.

(d) Neither KPCL nor KECML were parties to the ML Sharma judgments and can claim 'any right' accrued under the judgments. KECML cannot assail a 'law' on the ground that a 'judgment to which it is not a party', is violated by an act of the Parliament, as no right has accrued to KECML under the orders of Supreme Court of India. Moreover, the application filed by KPCL, after the judgment for clarification of the person liable to pay and to permit the participation in the re-allocation of coal blocks, was dismissed summarily without providing reasons. The summary dismissal without recording reasons of the said applications, did not create 'any adjudicated right' in favour of the

petitioners. It did not alter the status quo inasmuch as it was, always, open for the Union of India, to frame an appropriate legislation and such a right was never taken away by the Supreme Court of India.

(e) The basis of the judgment was that 'improper allotment' was made. If KPCL were to be allotted 'the mine', then it would have been saved. Because KECML was allotted and 'mining lease' was granted, it came to be cancelled. Therefore, an explanation was inserted to achieve the clarity. If KPCL is considered as the 'prior allottee', we end up nullifying the basis of the judgment and order, penalising a non-beneficiary and in turn burdening the consumer public.

(f) KECML and EMTA have made 'profit' from sale of coal as they have sold the coal to KPCL. KPCL, although an 'allottee' had surrendered its rights to KECML without payment of any consideration. KECML has, therefore, indulged in 'commercial mining' of coal, and, therefore, requires to pay the additional levy.

(g) The root of the illegality, as identified by the Supreme Court of India was the Joint Venture Agreement, executed by the State PSUs such as Karnataka, Punjab and West Bengal, under which, they have carried out 'commercial mining' and are deemed illegal by virtue of the judgment in ML Sharma cases. As the CMN Act did not provide for such type of joint venture, the Supreme Court of India has annulled the same and has held that, the modus operandi of Joint Venture Companies operating coal mines has defeated 'the legislature policy' and has resulted in private companies mining for commercial use. The only person, who has benefitted from this arrangement is the mining operator.

(h) By insertion of explanation to Section 3(1)(n), the Parliament seeks to clarify that, 'additional levy' be paid by the 'actual beneficiaries' of coal blocks, bringing within its ambit, even those third parties in whose favour mining leases have been executed and which had actually exploited the coal blocks for commercial use.

(i) Additionally, it was argued that the term 'allottee' must be given a larger meaning given the scope and ambit of the judgment. The order shows that the very basis of cancellation of the allotment was the fact that the allotment was made in favour of the joint venture company and it was pointed out that if KPCL had applied and got the mining lease registered in its favour, the allotment would have been saved. Therefore, for that reason, it must be construed that KECML is the allottee. The illegality ensued due to the participation of KECML in the allotment process. Hence, KECML must pay the price of such illegality. It was, also, pointed out that KECML was selling the coal to KPCL, thus, implying a commercial transaction. All commercial mining benefits have gone to the private parties as stated in the CAG report and, therefore, it must be understood that KECML has reaped the benefits and hence must pay the additional levy.

6. Heard the learned senior counsel for the parties at length, perused the pleadings of the parties and, also, the judgments of the Supreme Court of India in ML Sharma cases.

7. The only question for consideration is whether the Explanation to Section 3(1)(n) of the Coal Mines (Special Provisions) Act, 2015 is liable to be struck down?

8. Before adverting to the contentions of the parties on merits, it would be necessary to examine whether the pendency of Contempt Petition No.2 of 2015 would require this court to defer the hearing of the matter. I am of the view that this court can go into the matter for the following reasons:

(a) The petition for contempt of court filed under Article 129 of the Constitution of India is a matter completely different and independent from testing the constitutional validity of any provision, which is a constitutional power and duty vested with the High Court under Article 226 of the Constitution of India. The power to punish for contempt is for any violation of the order of the Supreme Court of India and, to that extent, the Supreme Court will be concerned with whether the petitioner violated its judgment and impose punishment. Whereas, the scope of inquiry before the High Court is completely different as it would test the impugned provision on the basis of its constitutional validity.

(b) The challenge of constitutional validity is a right vested in the petitioners and the said right cannot be taken away merely due to pendency of the contempt petition.

(c) A perusal of the contempt petition produced before this court shows that the basis of the contempt petition is not the Explanation to Section 3(1)(n) of the Coal Mines (Special Provisions) Act, but only the judgment in second ML Sharma case. Therefore, the issues involved in the writ petitions and the contempt petition are different.

9. In the background of the contentions of the parties, an examination of the judgments in ML Sharma becomes necessary to examine whether the Supreme Court of India identified the allottee as KPCL as contended by KECML and EMTA or the Supreme Court of India intended that the beneficiary of the process be identified as allottee and saddled with the additional levy. The second aspect of consideration is whether KECML is the beneficiary of the allotment.

10. In the first ML Sharma's case, where the allotments made by the Central Screening Committee and the Government Dispensation route were impugned, the contention of the Central Government was that the mining lease is issued by the State Government under the Mines and Minerals (Development and Regulation) Act, 1957 ('MMDR Act' for short) and, therefore, the State Government allots the mines. This argument was rejected by the Supreme Court of India after examining the entire statutory scheme.

11. Section 2 of the MMDR Act deals with declaration as to expediency of Union Control. Section 5 provides for Central Government approval for grant of licence in respect of any mineral in the First Schedule. Coal is at Item 1 in Part A under the title 'Hydro Carbons Energy Minerals'. This unequivocally depicts that Central Government is the primary authority for allotment of coal block. The Supreme Court of India observes in Manohar Lal Sharma (supra) as follows:

> "51. The constitutional philosophy about law making in relation to mines and minerals and List I Entry 36 (Federal Legislative List) and List II Entry 23 (Provincial Legislative List) in Schedule VII of the Government of India Act, 1935 which correspond to List I Entry 54 (Union List) and List II Entry 23 (State List) in our Constitution has been noticed by this Court in Monnet [Monnet Ispat and Energy Ltd. V.

Union of India, (2012)11 SCC 1]. Speaking through one of us (R.M. Lodha, J., as he then was) in Monnet [Monnet Ispat and Energy Ltd. V. Union of India, (2012)11 SCC 1], this Court has noted the statement of the learned Solicitor General in the House of Commons made in the course of debate in respect of the above entries in the Government of India Bill that the rationale of including only the "regulation of mines" and "development of minerals" and that, too, only to the extent it was considered expedient in the public interest by a federal law was to ensure that the provinces were not completely cut out from the law relating to mines and minerals and if there was inaction at the Centre, then the Provinces could make their own laws. Thus, power in relation to the mines and minerals was accorded to both, the Centre and the States. The Court in Monnet [Monnet Ispat and Energy Ltd. V. Union of India, (2012)11 SCC 1] said:

"130. .....The management of the mineral resources has been left with both the Central Government and the State Governments in terms of List I Entry 54 and List II Entry 23. In the scheme of our Constitution, the State Legislatures enjoy the power to enact legislation on the topics of "mines and minerals development". The only fetter imposed on the State Legislatures under Entry 23 is by the latter part of the said entry which says, "subject to the provisions of List I with respect to regulation and development under the control of the Union". In other words, the State Legislature loses its jurisdiction to the extent to which the Union Government had taken over control, the regulation of mines and development of minerals as manifested by legislation incorporating the declaration and no more. If Parliament by its law has declared that regulation of mines and development of minerals should in the public interest be under the control of the Union, which it did by making declaration in Section 2 of the 1957 Act, to the extent of such legislation incorporating the declaration, the power of the State Legislature is excluded. The requisite declaration has the effect of taking out regulation of mines and development of minerals from List II Entry 23 to that extent. It needs no elaboration that to the extent to which the Central Government had taken under "its control" "the regulation of mines and development of minerals" under the 1957 Act, the States had lost their legislative competence. By the presence of the expression "to the extent hereinafter provided" in Section 2, the Union has assumed control to the extent provided in the 1957 Act. The 1957 Act prescribes the extent of control and specifies it. We must bear in mind that as the declaration made in Section 2 trenches upon the State legislative power, it has to be construed strictly. Any legislation by the State after such declaration, trespassing 34 the field occupied in the declaration cannot constitutionally stand."

52. The declaration made by Parliament in Section 2 of the 1957 Act states that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent provided in the Act. The legal regime relating to regulation of mines and development of minerals is, thus, guided by the 1957 Act and the 1960 Rules. In addition

to the above declaration in 1957 Act, a further declaration has been inserted by Section 1-A of the CMN Act, insofar as coal mines are concerned. By this provision, it is declared that it is expedient in the public interest that the Union should take under its control regulation and development of coal mines to the extent provided in sub-sections (3) and (4) of Section 3 and sub-section (2) of Section 30 of the CMN Act. "53. The two declarations - Section 2 of the 1957 Act and Section 1-A of the CMN Act - have to be conjointly read insofar as the control and regulation of coal mines is concerned. As a consequence, the States have lost their jurisdiction to legislate to the extent to which the Union had taken over control, regulation and development of coal mines as manifested by the two enactments. When the Parliament by its law contained in 1957 Act has declared 35 that regulation of mines and development of minerals should, in the public interest, be under the control of the Union and by an additional declaration in the CMN Act declared that regulation and development of mines to the extent provided in sub-sections (3) and (4) of Section 3 and sub-section (2) of Section 30 of the CMN Act should, in the public interest, be under the control of the Union, the power of the State legislature to legislate on the subject covered by these two enactments is excluded. In other words, the field disclosed in the declarations under the 1957 Act and the CMN Act is abstracted from the legislative competence of the State Legislature. The requisite declarations have the effect of taking out regulation and development of coal mines from List II Entry 23. To that extent, the States have lost their legislative competence."

12. The Central Government had complete and overall supervision of the allotment process as envisaged in Sections 13, 17, 18, 18-A, 19 of the 1957 Act and the 1960 Rules. In this regard, reference may be made to para 59 of Manohar Lal Sharma (supra) wherein the limited scope of the MMDR Act was explained.

> "59. The 1957 Act provides for general restrictions on undertaking prospecting and mining operations, the procedure for obtaining reconnaissance permits, prospecting licences and mining leases and the rule making power of regulating the grant of reconnaissance permits, prospecting licences and mining leases. Clause (a) of sub-section (3) of Section 3 of the CMN Act enables persons specified therein only to carry on coal mining operation. In clause (c), it is provided that no lease for winning or mining coal should be granted in favour of any person other than the Government, Government company or corporation referred to in clause (a). Under clause
>
> (b) of sub-section (3), excepting the mining leases granted before 1976 in favour of the Government, Government company or corporation referred to in clause (a) and any sub-lease(s) granted by any such Government, Government company or corporation, all other mining leases and sub-leases in force immediately before such commencement insofar as they relate to the winning or mining of coal stand terminated. When a sub-lease stands terminated under sub-section (3), sub-section (4) of Section 3 provides that it shall be lawful for the Central Government or the Government company or corporation owned or controlled by the Central Government to obtain a prospecting licence or a mining lease in respect of whole or part of the land covered by mining lease which stands so terminated.

The above provisions in the CMN Act, as inserted in 1976, clearly show that the target of these provisions in the CMN Act is coal mines, pure and simple. CMN Act effectively places embargo on granting the leases for winning or mining of coal to persons other than those mentioned in Section 3(3)(a). Does CMN Act for the purposes of regulation and development of mines to the extent provided therein alter the legal regime incorporated in the 1957 Act? We do not think so. What CMN Act does is that in regard to the matters falling under the Act, the legal regime in the 1957 Act is made subject to the prescription under Section 3(3)(a) and (c) of the CMN Act. The 1957 Act continues to apply in full rigour for effecting prescription of Section 3(3)(a) and (c) of the CMN Act. For grant of reconnaissance permit, prospecting licence or mining lease in respect of coal mines, the MMDR regime has to be mandatorily followed. The 1957 Act and so also the 1960 Rules do not provide for allocation of coal blocks nor do they provide any mechanism, mode or manner of such allocation."

13. Having held that the States have no power to grant mining leases under the MMDR Act under the constitutional and the legislative scheme of things, the Supreme Court of India addressed two alternative arguments raised to sustain the validity of the coal block allotments. One of the arguments was that Centre was competent to allot mines under the CMN Act as it vested the entire aspect of regulation of coal blocks to Centre by virtue of the declarations in the MMDR Act and the CMN Act. This would mean that the State does not have any legislative competence to formulate any scheme for allotment of coal block. This argument was accepted partly inasmuch as the Supreme Court of India held that the entire process of allotment of coal block by Centre would only be made to either Central PSU or to any company involved in generation of power, washing of coal, manufacture of steel and cement and other notified purposes and that allocation of coal blocks for purposes other than those was not permissible.

14. In order to save these coal blocks, the second argument was that the States under Section 11 of the MMDR Act allot the mines and the Centre only recommends. The attempt was to play down the allotment letter issued by the Centre and portray that the mining lease was the actual allotment. The Supreme Court of India rejected this argument in toto and held that the issuance of a mining lease, after the allotment, was a formality and the States had no say in the matter. This would have particular relevance to the contention that because KECML had a mining lease, it became the allotee. The relevant paragraphs from Manohar Lal Sharma (supra) discussing the entire issue is extracted herein below:

> "60. The learned Attorney General submits that an application for allocation of a coal block is not dealt with by the 1957 Act and, therefore, consideration of proposals for allocation of coal blocks does not contravene the provisions of the 1957 Act. The submission of the learned Attorney General does not merit acceptance for more than one reason:

"60.1 First, although the Central Government has pre-eminent role under the 1957 Act inasmuch as no reconnaissance permit, prospecting licence or mining lease of coal mines can be granted by the State Government without prior approval of the Central Government but that pre-eminent role does not clothe the Central Government with the power to act in a manner in derogation to or

inconsistent with the provisions contained in the 1957 Act."

(emphasis supplied) "60.2 Second, the CMN Act, as amended from time to time, does not have any provision, direct or indirect, for allocation of coal blocks.

60.3 Third, there are no rules framed by the Central Government nor is there any notification issued by it under the CMN Act providing for allocation of coal blocks by it first and then consideration of an application of such allottee for grant of prospecting licence or mining lease by the State Government.

60.4 Fourth, except providing for the persons who could carry out coal mining operations and total embargo on all other persons undertaking such activity, no procedure or mode or manner for winning or mining of coal mines is provided in the CMN Act or the 1960 Rules or by way of any notification.

60.5 Fifth, even in regard to the matters falling under CMN Act, such as prescriptive direction that no person other than those provided in Sections 3(3) and 3(4) shall carry on mining operations in the coal mines, the legal regime under the 1957 Act, subject to the prescription under Sections 3(3) and 3(4), continues to apply in full rigour."

(emphasis supplied) "62. The submission of the learned Attorney General that the seven States - Maharashtra, Madhya Pradesh, Chhattisgarh, Odisha, Jharkhand, Andhra Pradesh and West Bengal - which have coal deposits, have accepted and acknowledged the source of power of the Central Government with regard to allocation of coal blocks is not fully correct. Odisha has strongly disputed that position. Odisha's stand is that the system of allocation of coal blocks by the Central Government is alien to the legal regime under the CMN Act and the 1957 Act. It is true that many of these States have taken the position that allocation letter confers a right on such allottee to get mining lease and the only role left with the State Government is to carry out the formality of processing the application and for execution of lease deed, but, in our view, the source of power of the Central Government in allocation of coal blocks is not dependant on the understanding of the State Governments but it is dependant upon whether such power exists in law or not. Indisputably, power to regulate assumes the continued existence of that which is to be regulated and it includes the authority to do all things which are necessary for the doing of that which is authorized including whatever is necessarily incidental to and consequential upon it but the question is, can this incidental power be read to empower the Central Government to allocate the coal blocks which is neither contemplated by the CMN Act nor by the 1957 Act? In our opinion, the answer has to be in the negative. It is so because where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden [Nazir Ahmad v. King Emperor, (1935-36) 63 IA 372 : (1936) 44 LW 583]. This is uncontroverted legal principle."

(emphasis supplied) "63. It is argued by the learned Attorney General that the allocation letter does not by itself confer the right to work mines and the identification of the coal block does not impinge upon the rights of the State Government under the 1957 Act. The learned Attorney General argues

that allocation of coal block is essentially an identification exercise where coal blocks selected by the CIL for captive mining were identified by the Screening Committee for development by an allocatee, after considering the suitability of the coal block (in terms of exercise and quality of reserve) vis-à-vis the requirements of the end-use plan of the applicant. It is submitted by the Attorney General that a letter of allocation is the first step. It entitles the allocatee to apply to the State Government for grant of prospecting licence/mining lease in accordance with the provisions of the 1957 Act. The right to apply for grant of prospecting licence/mining lease does not imply that with the issuance of allocation letter the allocatee automatically gets the clearances and approval required under the 1957 Act, the 1960 Rules, the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986, etc."

...

"65. There seems to be no doubt to us that allocation letter is not merely an identification exercise as is sought to be made out by the learned Attorney General. From the position explained by the concerned State Governments, it is clear that the allocation letter by the Central Government creates and confers a very valuable right upon the allottee. We are unable to accept the submission of the learned Attorney General that allocation letter is not bankable. As a matter of fact, the allocation letter by the Central Government leaves practically or apparently nothing for the State Government to decide save and except to carry out the formality of processing the application and for execution of the lease deed with the beneficiary selected by the Central Government. Though, the legal regime under the 1957 Act imposes responsibility and statutory obligation upon the State Government to recommend or not to recommend to the Central Government grant of prospecting licence or mining lease for the coal mines, but once the letter allocating a coal block is issued by the Central Government, the statutory role of the State Government is reduced to completion of processual formalities only. As noticed earlier, the declaration under Section 1-A of the CMN Act does not take away the power of the State under Section 10(3) of the 1957 Act. It is so because the declaration under Section 1-A of the CMN Act is in addition to the declaration made under Section 2 of the 1957 Act and not in its derogation. The 1957 Act continues to apply with the same rigour in the matter of grant of prospecting licence or mining lease of coal mines but the eligibility of persons who can carry out coal mining operations is restricted to the persons specified in Section 3(3)(a) of the CMN Act."

(emphasis supplied)

15. The contention of the learned Advocate General that the expression 'allotment' must be given a broader meaning to include the mining lease cannot be accepted as the Supreme Court of India held that the issuance of the mining lease was only a processual formality. Therefore, in the eyes of the Supreme Court of India, once the allotment was made by the Central Government, the question of going beyond and behind the allotment letter of the Central Government did not arise. The Supreme Court, also, in Manohar Lal Sharma (supra) went into the aspect of whether the allotment letter was the grant of largesse or not and held as under:

> "73. Assuming that the Central Government has competence to make allocation of coal blocks, the next question is, whether such allocation confers any valuable right

amounting to grant of largesse?

"74. The learned Attorney General argues that allocation of coal blocks does not amount to grant of largesse since it is only the first statutory step.

According to him, the question whether the allocation amounts to grant of largesse must be appreciated not from the perspective whether allocation confers any rights upon the allocate, but whether allocation amounts to conferment of largesse upon the allocatee. An allocatee, learned Attorney General submits, does not get right to win or mine the coal on allocation and, therefore, an allocation letter does not result in windfall gain for the allocatee. He submits that diverse steps, as provided in Rules 22-A, 22-B, and 22(5) of the 1960 Rules and the other statutory requirements, have to be followed and ultimately the grant of prospecting licence in relation to unexplored coal blocks or grant of mining lease with regard to explored blocks entitles the allocatee/licensee/lessee to win or mine the coal. "

"75. We are unable to accept the submission of the learned Attorney General that allocation of coal block does not amount to grant of largesse. It is true that allocation letter by itself does not authorize the allottee to win or mine the coal but nevertheless the allocation letter does confer a very important right upon the allottee to apply for grant of prospecting licence or mining lease. As a matter of fact, it is admitted by the interveners that allocation letter issued by the Central Government provides rights to the allottees for obtaining the coal mines leases for their end-use plants. The banks, financial institutions, land acquisition authorities, revenue authorities and various other entities and so also the State Governments, who ultimately grant prospecting licence or mining lease, as the case may be, act on the basis of the letter of allocation issued by the Central Government. As noticed earlier, the allocation of coal block by the Central Government results in the selection of beneficiary which entitles the beneficiary to get the prospecting licence and/or mining lease from the State Government. Obviously, allocation of a coal block amounts to grant of largesse.

(emphasis supplied)

76. The learned Attorney General accepted the position that in the absence of allocation letter, even the eligible person under Section 3(3) of the CMN Act cannot apply to the State Government for grant of prospecting licence or mining lease. The right to obtain prospecting licence or mining lease of the coal mine admittedly is dependent upon the allocation letter. The allocation letter, therefore, confers a valuable right in favour of the allottee. Obviously, therefore, such allocation has to meet the twin constitutional tests, one, the distribution of natural resources that vest in the State is to sub-serve the common good and, two, the allocation is not violative of Article 14."

(emphasis supplied)

16. From the above, it is evident that the Supreme Court of India considered the allottee as the person in whose name the allotment letter was issued. The Supreme Court of India has, also, considered the issue relating to mining lease and held that it is a formality. Therefore, even if the mining lease was issued in the name of KECML, it was at the request and behest of KPCL. This does

not change the status of KPCL as the allottee of the coal mine. The argument that the grant of mining lease should be considered as allotment of coal block and, therefore, KECML, as the mining lease holder, must be liable to pay the additional levy is clearly contrary to the judgment of the Supreme Court of India. Any implication to that effect would effectively nullify the judgment of the Apex Court, as aforesaid.

17. It has been submitted that the transaction resulted in a private mining arrangement inasmuch as the mining arrangement resulted in an illegality as a private party was entrusted with mining operations and that as private parties have made the gains from the sale of coal, they must pay the additional levy. This argument is not acceptable inasmuch as the Supreme Court of India has clearly identified the 'specified end use' allotments as a different category than the commercial mining of coal. The Supreme Court of India went into the genesis of the enactments. The Coal Mines (Taking over of Management) Act, 1973, provided for vesting of management of the mines pending nationalization of the coal mines, which paved the way for the Coal Mines (Nationalization) Act, 1973, which vested the right, title and interest in all coal mines with the Central Government with effect from the vesting date. This Act was amended by the 1976 Amendment Act, which introduced a new Section 3 in place of the existing section. This amended section provided for allotment of coal blocks to private companies, which were involved in the manufacture of steel and for certain other purposes as specified by the Central Government. The Act was, further, amended in 1993, with the specific objective of allowing private companies engaged in the generation of electricity to be allotted coal mines. Section 3(3)(iii) was amended to include 'generation of power'.

18. The aspect regarding generation of power is of particular importance in this particular case to understand whether an allotment made for a specified end use for generation of power can be construed as a commercial arrangement for sale of coal merely because the parties create a joint venture vehicle and assign it the mining rights and call it a commercial or private mining as sought to be asserted by KPCL and Union of India in this particular case based on the fact that the mining lease was assigned for no other purpose than to supply the coal exclusively to KPCL so that it could generate power. The background in which the amendment to the CMN Act was done to include generation of power is explained by the Apex Court in Manohar Lal Sharma (supra) as under:

> "41. The background in which Section 3(3) of the CMN Act was amended to permit private sector entry in coal mining operation for captive use has been sought to be explained by the Central Government. It is stated that nationalization of coal through the CMN Act was done with the objective of ensuring "rational, coordinated and scientific development and utilization of coal resources consistent with the growing requirements of the country" and as a first step in 1973, 711 coal mines specified in the Schedule appended to CMN Act were nationalized and vested in the Central Government. By the 1976 Nationalisation Amendment Act, the Central Government alone was permitted to mine coal with the limited exception of private companies engaged in the production of iron and steel. In 1991, the country was facing huge crisis due to (a) the situation regarding balance of payments; (b) the economy being in doldrums; (c) dismal power situation; (d) shortage in coal production; and (e) inability of Coal India Limited (CIL) to produce coal because of lack of necessary

> resources to maximise coal production amongst other reasons. There was a huge shortage of power in the country. The State Electricity Boards were unable to meet power requirements. Post liberalization, in the Eighth Five Year Plan (1992-1997) a renewed focus was placed on developing energy and infrastructure in the country. CIL was not in a position to generate the resources required. It was in this background that in a meeting held by the Deputy Chairman of the Planning Commission on 31.10.1991, it was decided that "private enterprises may be permitted to develop coal and lignite mines as captive units of power projects". The approval of Cabinet was consequently sought vide a Cabinet note dated 30.1.1992 for "allowing private sector participation in coal mining operations for captive consumption towards generation of power and other end use, which may be notified by Government from time to time". The Cabinet in the meeting held on 19.2.1992 considered the above Cabinet note and it was decided that the proposal may be brought up only when specific projects of private sector participation in coal mining come to the Government for consideration.

Subsequently, another Cabinet note dated 23.4.1992 was placed before the Cabinet containing references to certain private projects like the two 250 MW thermal power plants of RPG Enterprises, which had been recommended by the Government of West Bengal. The proposal contained in the Cabinet note dated 23.4.1992 was approved by the Cabinet on 5.5.1992. On 15.7.1992, the Bill for amendment of Section 3(3) of the CMN Act was introduced in Rajya Sabha and the same was passed on 21.7.1992. The Bill was passed in Lok Sabha on 19.4.1993 and got assent of the President on 9.6.1993."

19. From the above discussions, it is crystal clear that the 'specified end use' allotment, which is made in the present case, cannot be considered as a commercial mining of coal. More particularly, in the present case, the Letter of Allotment, the Gazette Notification and all other related documents, through which the allotments are made and mining lease was executed, clearly demonstrate that it is KPCL is the allottee. They, further, demonstrate that at the allottee's behest a mining lease was executed in favour of KECML. Further, the very documents contain the stipulations that coal extracted from the mines had to be necessarily and compulsorily used exclusively by KPCL, that is, the allottee, in its thermal power stations. No question, therefore, arose of any third party commercially exploiting the mine or using any coal therefrom, for commercial purposes.

20. I am substantiated in this conclusion by the judgment in first ML Sharma (supra), which clearly noticed that the scheme of allotment for commercial mining is wholly different from 'specified end use' allotment as evident from para 162 of the judgment.

> "162.10 Moreover, the State PSUs, besides having been allocated coal mines for commercial purpose, have also been allowed to form joint venture companies, i.e., 51% shareholding of State PSUs and 49% of private company. However, in the joint venture agreements between the State PSUs and the private companies, mining operations have been given to private company. For example, the notice inviting offer

dated 2.7.2008 issued by Chhattisgarh Mineral Development Corporation (CMDC) for selection of partner for formation of a joint venture company for exploration, development, mining and marketing of coal from coal blocks provided that the Joint Venture Company (JVC) to be formed by CMDC and the selected offerers/bidder will explore, develop and operate such coal deposits and the coal produced by JVC will be sold commercially to various consumers in the open market. CMDC was allocated Sondiha coal block and coal blocks Bhatgaon-II and Bhatgaon-II (Extension). Similarly, the Joint Venture Agreement between the Madhya Pradesh State Mining Corporation Limited and Monnet Ispat and Energy Limited reveals that Joint Venture Company has been further allowed to enter into mine development operation agreements with other private partner or sister concern. This modus operandi has virtually defeated the legislative policy in the CMN Act and winning and mining of coal mines has resultantly gone in the hands of private companies for commercial use."

...

"164. The allocation of coal blocks through Government Dispensation Route, however laudable the object may be, also is illegal since it is impermissible as per the scheme of the CMN Act. No State Government or public sector undertakings of the State Governments are eligible for mining coal for commercial use. Since allocation of coal is permissible only to those categories under Section 3(3) and (4), the joint venture arrangement with ineligible firms is also impermissible. Equally, there is also no question of any consortium/leader/ association in allocation. Only an undertaking satisfying the eligibility criteria referred to in Section 3(3) of the CMN Act, viz., which has a unit engaged in the production of iron and steel and generation of power, washing of coal obtained from mine or production of cement, is entitled to the allocation in addition to the Central Government, a Central Government company or a Central Government corporation."

21. An attempt was made to connect the joint venture arrangements, which were frowned upon in para 162.10 of the judgment with those in para 164 of the judgment. They are different. The most critical difference that I find in the para 162.10 of the judgment, which looks into Joint Ventures for commercial mining such as the ones entered into between Chattisgarh and Madhya Pradesh specifically use the word 'marketing of coal', which is indicative of commercial mining. Whereas the letter of Award issued to KECML, the Fuel Supply Agreement clearly stipulate that the coal was to be exclusively supplied to KPCL at the pre-determined tendered rate fixed even before the allotment of the coal blocks. Moreover, the Central Government itself has stipulated that the end use of the coal should necessarily be for the thermal power stations of KPCL. It is found that the allotment made for 'specified end use' under Section 3(3) as in the present case to be at a completely different pedestal, inasmuch as the statutory scheme would clearly indicate the same. Therefore, there is no basis for holding that the allotments made to KPCL and the subsequent lease in favour of KECML was a 'private mining arrangement' when it was clearly a 'captive mining arrangement' exclusively in favour of KPCL.

22. I find that this conclusion is supported by the facts of the case. I also, find that KPCL was the beneficiary of the allotment process and not KECML for the following reasons:

(a) The allotment letter dated November 10, 2003 is issued in the name of KPCL and was required to be utilized only exclusively for KPCL's Thermal Power Stations at Bellary for the purpose of 'power generation'. If KPCL were to sell the coal to any third party, the allotment would stand cancelled. Therefore, the allotment letter was for 'captive mining' and not 'commercial mining'. It is not anyone's case that KPCL or KECML violated that arrangement by selling or diverting coal to any private party. There is no mention of KECML or EMTA in the allotment letter. Therefore, in the eyes of Central Government, as on the date of allotment of coal block, KPCL was the sole beneficiary of the coal block.

(b) KPCL understood itself to be the allottee and wanted to appoint a person for 'development and operation of the coal mines'. In order to ensure that KPCL is insulated from all financial risks of mining operations, it created the vehicle of joint venture company wherein it held 26% (twenty six per centum) shareholding. There could be no cost to KPCL (except the mining and excavation cost, which was to be recovered over a period of 25 (twenty five) years by fixing the tendered price as the price of coal supplied) that could be attached to the coal as it was mined and supplied to KPCL directly. This is evident from the clauses in the Letter of Award to EMTA:

"12.0 LIMITATION OF KPCL LIABILITIES :

EMTA shall not prefer any financial or other claims against KPCL in case the allotted mining block is found to be financially unviable or any other reasons during the currency of the contract. KPCL shall be absolved of all financial and legal responsibilities/liabilities."

...

"19.00 RIGHTS OF KPCL : The coal produced from the blocks allotted in favour of KPCL shall not be at any time supplied, diverted, transported, delivered or sold to any person/entity other than KPCL."

(c) KPCL, by letter dated November 19, 2003, sought for the mining lease to be registered in favour of KECML with the condition that the entire coal extracted from the mines allotted to KPCL and registered in favour of KECML would be utilized for Thermal Power Stations of KPCL at Bellary. Therefore, it was at the instance of KPCL that the mining lease was registered in favour of KECML.

(d) The Central Government specified as an end use the supply of coal from the coal blocks at Kiloni, Manoradeep and Baranj I to IV by the KECML on an exclusive basis to KPCL for generation of thermal power in their proposed 1000 MW TPS at Bellary subject to the condition that KPCL holds at least 26% (twenty six per centum) of the voting share capital of KECML as recorded in Gazette Notification dated July 16, 2004. Therefore, the allotment was to KPCL and KECML was to 'supply the coal' from the coal blocks. Hence, the allotment never accrued in favour of KECML at any point of time.

(e) The mining lease, which was in the name of KECML, also, carried the same conditions as the allotment letter at Clause 7 of the Mining Lease, which stated that allotment was made to KPCL and it can only be used for KPCL's purposes and no coal mined from the allocated coal blocks can be sold, delivered, transferred or disposed of, except for the captive mining purposes of KPCL. Therefore, KECML had no right to sell the coal in the open market.

23. The Fuel Supply Agreement entered into between the parties, also, indicated that KPCL was the allottee and KECML was only assigned the lease for the purpose of development and operationalization of the coal mines and supply the coal exclusively to KPCL at the tendered price. It was, only, on those terms was the coal mine assigned to KECML. The relevant extracts from the recitals and the Clauses 2.3 and 4.1 of the Fuel Supply Agreement are extracted herein below:

> "(c) AND WHEREAS pursuant to the policy of Government of India of leasing out coal mines to power generating agencies for use as captive coalmine(s) for their own consumption, the Purchaser has been allocated mining block(s) identified as Baranj I-IV Manoradeep & Kalani vide allotment Letter No. 47011/1(1)2002-CPAM/CA dated 10.11.2003. The Purchaser has assigned and entrusted the responsibility to develop and operate the said coal mines to the Supplier. For this purpose, the Purchaser has entered into a Joint Venture Agreement dated 13.9.2002 with M/s Eastern Minerals & Trading Agency (in short EMTA hereinafter) to form a joint venture company (hereinafter called the "supplier") for development and operation of such coal mines. The entire amount of coal produced from such coal mines shall be sold, transported and delivered by the Supplier exclusively to the Purchaser for use at BTPS in accordance with the provisions of this Agreement."
>
> (emphasis supplied) "2.3 Warrants of Quantity:

The Supplier warrants and undertakes that it shall sell the coal from the Designated Coal Mines exclusively to the Purchaser."

"4.1 The respective obligations of the parties under this agreement shall be subject to the satisfaction in full of each of the following conditions precedent prior to commencement date.

i) The Purchaser has assigned the mining rights in favour of the Supplier.

ii) The Supplier has obtained all the necessary clearances and approvals required from the concerned authorities regarding operation of the Designated Coal Mines and submitted a copy of same to the Purchaser.

iii) The Supplier has registered this Agreement with the relevant authority at the time and in the manner stipulated in the Monopolies and Restrictive Trade Practices Act, 1969 as amended from time to time to the extent the provisions are required to be registered.

"4.2 Allocation of responsibilities:

The Purchaser shall assign the mining rights in respect of the designated mines. As regard any other mine(s) to be allotted in future the Purchaser shall be responsible at its own expense for satisfying the condition precedent mentioned under Clause 4.1(i)."

24. KPCL filed an affidavit before the Supreme Court of India seeking exemption from cancellation before the 2nd ML Sharma judgment. If the allotment was in favour of KECML, there was no reason for KPCL to seek for exemption from cancellation. The financial benefits that KPCL received from the entire allotment is made evident in the affidavit as well. Hence, I find no reason to accept the contention of KPCL and the Central Government that the benefits from the allotment process accrued to KECML and for that, the additional levy has to be borne by KECML.

25. I am unable to accept the submission of Mr.Navadgi that the entire benefits of the mining was reaped by KECML, as it is contrary to the stated position of the Central Government. The Centre, in the ML Sharma cases, argued, by citing the specific example of KPCL, that by allotting coal mines to State PSUs, that the State has enjoyed benefits of power generation, increased industrialization, etc. Therefore, it was the Centre's unequivocal view that the ultimate beneficiary of the allotment of coal blocks to KPCL, was the State Government and KPCL itself. This stated position of the Centre is recorded in paras 81 and 84 of the 1st ML Sharma judgment, which is extracted below, for immediate reference.

> "81. With regard to Government Dispensation Route whereby public sector corporations and undertakings were allocated coal blocks, it is submitted by Mr. Prashant Bhushan, learned counsel for the Common Cause and Mr. Manohar Lal Sharma, petitioner-in-person, that such allocations were violative of Section 3 of the CMN Act. The State Government undertakings are not included in Section 3 and in any case allocation to them could have been made only if they were engaged in any of the end-uses specified under Section 3(3)(a)(iii) of the CMN Act. The State PSUs have signed agreements with private companies under which substantial benefits or interest from the coal blocks had accrued to the private companies thereby causing huge loss to the public exchequer and windfall gain to the private companies. The PIL petitioners, therefore, vehemently argued that the allocation of coal blocks deserves to be quashed being non-transparent, arbitrary, illegal and unconstitutional."

...

"84. Moreover, it is the submission of the learned Attorney General that allocation of coal blocks by the Central Government has brought significant benefits and investment to the States in which these coal blocks and the associated end-use plants are located. Due to substantial investment and employment opportunities generated in various States, the State Governments have accepted, participated and made recommendations in the meetings of the Screening Committee. A number of blocks have been allocated in accordance with the recommendations of the State Governments. Besides the benefits and investment to the State in which coal blocks and the associated end-use plants are located, the learned Attorney General also submits that there are number of States where coal blocks are not located, which have got benefits due to the substantial investment in associated

end use plants. For instance, it is submitted that blocks in Maharashtra, namely, Baranj - I to IV, Kiloni and Manoradeep were allocated to Karnataka Power Corporation for captive use in its power generation plants. The end-use is the supply of coal to Bellary Thermal Power Station (in Karnataka) which is supplying 1000 MW power to the State grid."

26. The view that KPCL is the beneficiary is echoed by KPCL themselves in their affidavit before the Hon'ble Supreme Court. The relevant extracts from the affidavit dated September 5, 2014 filed by KPCL are extracted below:

> "7. KPCL has generated 18725 MUs upto end of August 2014 from the Bellary Thermal Power Station out of the coal supplied from the designated coal mine."
>
> "8. KECML has been supplying coal to KPCL's thermal power station at Bellary to the tune of 2 million MT per year. KECML is supplying the coal from the captive coal mine with a 5% discount over the CIL (Coal Indian Ltd.) price. Whenever there is a variation in the CIL price, discount at 15% is considered for the differential price instead of 5%. KPCL is utilizing the said coal for the purpose of generation of electricity. This electricity is being supplied throughout Karnataka. This supply of coal is crucial and critical to the State of Karnataka inasmuch as the generation of electricity in Karnataka will be impacted drastically if the coal supply is stopped. KECML cannot supply or sell coal to any third party and all the coal generated is directly supplied to KPCL at BTPS."
>
> "10. In view of the above facts and circumstances it is submitted that since the coal allocation is to a wholly owned State entity namely, Karnataka Power Corporation Ltd., and since the entire production of coal is for electricity generation by the Bellary Thermal Power Station and distributed across Karnataka, any cancellation of the same will have catastrophic consequences on the generation of power in the State of Karnataka which is already reeling under a power crisis. Hence it is humbly prayed that the allocation of coal to KPCL may be exempted from cancellation."
>
> (emphasis supplied)

27. In the light of the above, I proceed to consider the contention of the Centre and KPCL before this court in the present proceedings. It has been contended that the mining operations were passed on to a private party EMTA/KECML and all benefits were enjoyed by EMTA/KECML. On the other hand, before the Supreme Court of India, the Centre specifically contended that the very coal blocks in question were allotted in tune with the recommendations of the State Government and in particular, the coal blocks allotted to KPCL, a wholly State owned entity, for captive use have actually resulted in the benefits to the State, by the end use of such coal being exclusively for the Bellary Thermal Power Station in Karnataka. This position is crystallized in para 84 of the first ML Sharma judgment (supra).

In addition, it has been the specific contention of KPCL before the Supreme Court of India that the coal collocation was in fact in favour of a wholly State owned entity, that is, KPCL. Further, it contended that both KPCL and whole State of Karnataka were benefitted from the allocation of the coal blocks, since the coal was used for generating electricity at Bellary Thermal Power Station and distributed across Karnataka. KPCL, further, emphatically contended that KECML could not, under the present arrangement, have supplied or sold any coal to any third party and in fact that all coal generated was directly supplied to KPCL alone, for use at the Bellary Thermal Power Station. In this light of the matter, the contentions of the Centre and KPCL before this court enjoy little merit.

28. Another argument was that KECML is the beneficiary inasmuch as it was 'selling' the coal to KPCL. A perusal of the mining lease, the Fuel Supply Agreement and other contractual documents would indicate that the crux of the arrangement was that, KPCL did not have the expertise to develop and operate the mines and, therefore, in order to ensure that a sustainable supply of coal is made available to it and the benefits of allotment of the coal mine is retained, the present arrangement was entered into. The various documents reveal that KECML invested monies to develop the mine and make it operational, such that the mine could be operated so as to provide a sustainable supply of coal to the thermal power projects of KPCL. The documents, further, reveal that the underlying consideration for KPCL to permit KECML to mine the coal blocks was the fact that KECML would invest monies and make the coal blocks operational. Further, the consideration that was paid by KPCL to KECML for undertaking the mining operations was at a subsidised rate, as a net result of which KPCL received the coal at its power stations, at a subsidised cost. This was the underlying consideration for KPCL to have KECML denoted as the mining leaseholder. I, therefore, cannot agree with the contentions of Mr.Naik that KPCL, although an 'allottee', had surrendered its rights to KECML without any consideration.

29. The arrangement by KPCL was simply to identify and partner with a developer and operator of the mine, which in fact was allotted to KPCL. The execution of the mining lease in favour of KECML was merely to facilitate a structure whereby KECML could undertake the mining activity, purely subject to the condition that the entire coal mined is supplied to KPCL.

30. It is informed by Mr. Shanthi Bhushan that the Mine Development Operator structure is what the Centre now prefers in the interest of transparency. To my mind, the structure adopted by KPCL vis-a-vis KECML/EMTA, is merely a contractual structure quite similar to the Mine Development Operator structure, which is now being propounded by the Centre, inasmuch as the substratum of the commercial arrangements in both cases are similar. KECML is only a mine operator having no right to the coal so mined. The coal mine is allotted to KPCL and the entitlement of all coal mined therein is, also, that of KPCL exclusively. Whether KECML receives consideration for its mining activity as 'mining charges' or christened as 'sale of coal' is irrelevant to the consideration as no question of sale of coal to a third party arises in the present structure.

31. This is, further, substantiated by the Official Memorandum No. 13016/25/2008-CA-I dated September 23, 2008, wherein Central Government stated that captive coal mining by formation of a Joint Venture Company or Special Purpose Vehicle and consequent transfer of coal to the Joint Venture Partner would not attract sales tax inasmuch as it is not a transaction of sale and it does not

amount to trading of coal. Thus, it nullifies the argument that there was 'sale of coal' by KECML and that the structure constituted commercial mining or trading of coal.

32. In the light of the fact that both KPCL and Union of India had identified KPCL as the allottee and the beneficiary of the coal block allotments, I reject the contention that KECML can be construed to be the beneficiary under the allotment as per the first ML Sharma judgment.

33. On the strength of second ML Sharma judgment (supra), which actually imposes the additional levy on the allottees, it was argued that the said judgment identifies the beneficiaries of the allotment as private parties. The relevant extract of the judgment is as under: (page 620 of Supreme Court Cases) "10. To put the suggestions of the learned Attorney General in perspective, they are summarized below: 10.1 All coal block allotments (except those mentioned in the judgment) may be cancelled.

10.2 Alternatively,

(a) extraction of coal from the 40 functional and 6 "ready" coal blocks may be permitted and the remaining coal blocks be cancelled;

(b) the allottees of all 46 coal blocks be directed to pay an additional levy of Rs.295/- per metric ton of coal extracted from the date of extraction; and

(c) the allottees of coal blocks for the power sector be also directed to enter into PPAs with the State utility or distribution company as the case may be."

...

"31. There are two categories of coal block allotments: the first category being allotments other than those mentioned in Annexure 1 and Annexure 2; the second category being the 46 coal blocks mentioned in Annexure 1 and Annexure 2 that could possibly be "saved" from cancellation on certain terms and conditions, as submitted by the learned Attorney General."

"32. As far as the first category of coal block allotments is concerned, they must be cancelled (except those mentioned in the judgment). There is no reason to "save" them from cancellation. The allocations are illegal and arbitrary; the allottees have not yet entered into any mining lease and they have not yet commenced production. Whether they are 95% ready or 92% ready or 90% ready for production (as argued by some learned counsel) is wholly irrelevant. Their allocation was illegal and arbitrary, as already held, and therefore we quash all these allotments."

"33. The learned Attorney General identified 46 coal blocks that could be "saved" from the guillotine, since all of them have commenced production or are on the verge of commencing production. As these allocations are also illegal and arbitrary they are also liable to be cancelled. However, the allotment of three coal blocks in Annexure 1 is not disturbed and they are Moher and Moher Amroli Extension allocated to Sasan Power Ltd. (UMPP) and Tasra (allotted to Steel

Authority of India Ltd. (SAIL), a Central Government public sector undertaking not having any joint venture).

"34. As far the 6 coal blocks mentioned in Annexure 2 are concerned, the allottees have not yet commenced production. They do not stand on a different or better footing as far the consequences are concerned. These allotments are also liable to be cancelled. The allocation of the Pakri Barwadih coal block (allotted to National Thermal Power Corporation (NTPC), being a Central Government public sector undertaking not having any joint venture) is not liable to be cancelled.

"35. Except the above two allocations made to the UMPP and the two allocations made to the Central Government public sector undertaking not having any joint venture mentioned above, all other allocations mentioned in Annexure 1 and Annexure 2 are cancelled.

"36. It was submitted by the learned Attorney General that on the cancellation of the coal block allotments, CIL would require some breathing time to manage its affairs. The Central Government is keen to move ahead but some time would be required to manage the emerging situation. Similarly, breathing time is also required to be given to the allottees to manage their affairs on the cancellation of the coal blocks.

"37. In view of the submissions made, although we have quashed the allotment of 42 out of these 46 coal blocks, we make it clear that the cancellation will take effect only after six months from today, which is with effect from 31.3.2015. This period of six months is being given since the learned Attorney General submitted that the Central Government and CIL would need some time to adjust to the changed situation and move forward. This period will also give adequate time to the coal block allottees to adjust and manage their affairs. That CIL is inefficient and incapable of accepting the challenge, as submitted by learned counsel, is not an issue at all. The Central Government is confident, as submitted by the learned Attorney General, that CIL can fill the void and take things forward.

"38. In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order must pay an amount of Rs. 295/- per metric tonne of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature, it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric tonne of coal is, therefore, accepted for the purposes of these cases. The compensatory payment on this basis should be made within a period of three months and in any case on or before 31.12.2014. The coal extracted hereafter till 31.3.2015 will also attract the additional levy of Rs. 295/- per metric tonne."

(emphasis supplied)

34. The Schedule to the order refers to the allottee as KPCL (at serial nos. 7 to 12). It was asserted by the learned Additional Solicitor General that the Schedule must not be given much importance as it was only a list of coal blocks, which could be saved. Mr. Shanthi Bhushan would argue that, the Central Government, KPCL and the Supreme Court of India were of the same view that the allottee would refer to KPCL and not KECML. This is, further, established by the fact that KPCL filed an application for clarification of the order dated September 24, 2014 (produced as Annexure N) in which it laid down the relevant facts to contend that the additional levy must be paid by EMTA and not by KPCL and for permission to participate in the allotment process without payment of additional levy. Union of India, EMTA and KPCL were parties to the said application.

35. This application was dismissed by the Supreme Court of India. It was contended by Mr. Shanti Bhushan that this order would bind the parties and insertion of an Explanation was done after this order of dismissal and, therefore, it is an attempt to nullify the judgment of the Supreme Court of India both in ML Sharma as well as the order of dismissal in Crl.M.P. No. 24134 of 2014. Mr.Shanti Bhushan cited S.T.Sadiq (supra), to contend that the moment the law as declared by the Apex Court is sought to be altered by an act of Parliament, the same has to be struck down as unconstitutional.

> "13. It is settled law by a catena of decisions of this Court that the legislature cannot directly annul a judgment of a court. The legislative function consists in "making" law [see Article 245 of the Constitution] and not in "declaring" what the law shall be [see Article 141 of the Constitution]. If the legislature were at liberty to annul judgments of courts, the ghost of bills of attainder will revisit us to enable legislatures to pass legislative judgments on matters which are inter parties. Interestingly, in England, the last such bill of attainder passing a legislative judgment [R.V.Fenwick, (1696) How 13 St Tr 538] against a man called Fenwick was passed as far back as in 1696. A century later, the US Constitution expressly outlawed bills of attainder [see Article 1 Section 9]."
>
> "14. It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court, and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then legislation which trenches upon the judicial power must necessarily be declared to be unconstitutional."

36. Per contra, the learned Additional Solicitor General would contend that the Supreme Court of India rightly dismissed the application inasmuch as the attempt was made to saddle the burden on EMTA, which had no connection with the allotment process. He, further, contended that it was a general law framed as the entire process of allotment of coal blocks was found fault with and it was necessary to frame a new law to ensure that the coal blocks are allotted in a transparent and non-arbitrary manner. It is open for the legislature to remove the basis of the judgment, that is, to cure the legislative deficiencies, which resulted in nullification of the allotment. Learned Additional

Solicitor General referred to the decision in Virender Singh Hooda (supra), and specifically drew our attention to the following:

> "45. It is well settled that if the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law."

"46. It is equally well settled that the legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary power conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based."

...

"47. There is a distinction between encroachment on the judicial power and nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the legislature but the latter is within its permissible limits (Tirath Ram Rajindra Nath v. State of U.P. [(1973)3 SCC 585]. The reason for this lies in the concept of separation of powers adopted by our constitutional scheme. The adjudication of the rights of the parties according to law is a judicial function. The legislature has to lay down the law prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law [I.N. Saksena case (1976)4 SCC 750]."

"48. The legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers. [Cauvery Water Disputes Tribunal, Re [1993] Supp. (1) SCC 96(II)]."

"49. When a particular Rule or the Act is interpreted by a court of law in a specified manner and the law-making authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly iniquitous and accordingly a new set of rules or laws is enacted, it is very often challenged on the ground that the legislature has usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the legislature and to find out whether in fact the legislature has exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislature has altered and changed the character of the legislation which ultimately may render the judicial decision ineffective [S.S.Bola v. B.D.Sardana, (1997)8 SCC 522]."

37. The learned Advocate General reiterated the submissions of the learned Additional Solicitor General and, further, contended that the application was dismissed without reasons and did not bar the Centre from framing the law in any manner it deemed fit. Further, Section 16(4) was pressed into service to contend that one would not be eligible for compensation without payment of additional levy. Therefore, the entire scheme of the Act was such that it has clearly earmarked a process for allotment of coal blocks and the entire process would get disturbed if the Explanation were to be struck down.

38. In the light of the contentions of the parties as aforesaid, it would be necessary to examine the provisions of the Coal Mines (Special Provisions) Act, 2015. The preamble of the Act makes the intention of the Central Government very evident, that is, to implement the order of the Supreme Court of India. The preamble is extracted herein below:

> "An Act to provide for allocation of coal mines and vesting of the right, title and interest in and over the land and mine infrastructure together with mining leases to successful bidders and allottees with a view to ensure continuity in coal mining operations and production of coal, and for promoting optimum utilisation of coal resources consistent with the requirement of the country in national interest and for matters connected therewith or incidental thereto.
>
> WHEREAS the Supreme Court vide judgment dated 25th August, 2014 read with its order dated 24th September, 2014 has cancelled the allocation of coal blocks and issued directions with regard to such coal blocks and the Central Government in pursuance of the said directions has to take immediate action to implement the said order;
>
> AND WHEREAS it is expedient in public interest for the Central Government to take immediate action to allocate coal mines to successful bidders and allottees keeping in view the energy security of the country and to minimise any impact on core sectors such as steel, cement and power utilities, which are vital for the development of the nation;
>
> AND WHEREAS Parliament is competent to legislate under entry 54 of List I of the Seventh Schedule to the Constitution for regulation of mines and mineral development to the extent to which such regulation and development under the control of Union is declared by Parliament by law to be expedient in the public interest."

39. The important sections are extracted herein below: "3. Definitions: (1) In this Act, unless the context otherwise requires,--

(a) "additional levy" means, the additional levy as determined by the Supreme Court in Writ Petition (Criminal) No. 120 of 2012 as two hundred and ninety-five rupees per metric tonne of coal extracted;

(c) "appointed date" in relation to--

(i) Schedule I coal mines excluding Schedule II coal mines, shall be the 24th day of September, 2014 being the date on which the allocation of coal blocks to prior allottees stood cancelled; and

(ii) Schedule II coal mines shall be the 1st day of April, 2015 being the date on which the allocation of coal blocks to prior allottees shall stand cancelled, in pursuance of the order of the Supreme Court dated the 24th September, 2014 passed in Writ Petition (Criminal) No. 120 of 2012;

(e) "coal mining operations" means any operation undertaken for the purpose of winning coal;

(k) "nominated authority" means the authority nominated by the Central Government under section 6;

(n) "prior allottee" means prior allottee of Schedule I coal mines as listed therein who had been allotted coal mines between 1993 and 31st day of March, 2011, whose allotments have been cancelled pursuant to the judgment of the Supreme Court dated the 25th August, 2014 and its order dated 24th September, 2014 including those allotments which may have been de-allocated prior to and during the pendency of the Writ Petition (Criminal) No.120 of 2012.

Explanation.--In case a mining lease has been executed in favour of a third party, subsequent to such allocation of Scheduled I coal mines, then, the third party shall be deemed to be the prior allottee;

(o) "Schedule" means a Schedule appended to this Act;

(p) "Schedule I coal mines" means,--

(i) all the coal mines and coal blocks the

allocation of which was cancelled by the judgment dated 25th August, 2014 and its order dated 24th September, 2014 passed in Writ Petition (Criminal) No.120 of 2012, including those allotments which may have been de-allocated prior to and during the pendency of the said Writ Petition;

(ii) all the coal bearing land acquired by the prior allottee and lands, in or adjacent to the coal mines used for coal mining operations acquired by the prior allottee;

(iii) any existing mine infrastructure as defined in clause (j);

(q) "Schedule II coal mines" means the forty-two Schedule I coal mines listed in Schedule II which are the coal mines in relation to which the order of the Supreme Court dated 24th day of September, 2014 was made;

(r) "Schedule III coal mines" means the thirty-two Schedule I coal mines listed in Schedule III or any other Schedule I coal mine as may be notified under sub-section (2) of section 7;

CHAPTER III TREATMENT OF RIGHTS AND OBLIGATIONS OF PRIOR ALLOTTEES

10. Utilisation of movable property used in coal mining operations.

(1) A successful bidder or allottee in respect of Schedule I coal mines, may negotiate with prior allottee to own or utilise such movable property used in coal mining operations on such terms and conditions as may be mutually agreed to by them.

...

11. Discharge or adoption of third party contracts with prior allottees.

(1) ...

(2) In the event that a successful bidder or allottee elects not to adopt or continue with existing contracts which had been entered into by the prior allottees with third parties, in that case all such contracts which have not been adopted or continued shall cease to be enforceable against the successful bidder or allottee in relation to the Schedule I coal mine and the remedy of such contracting parties shall be against the prior allottees.

12. Provisions in relation to secured creditors (1) The secured creditors of the prior allottees which had any security interest in any part of the land or mine infrastructure of a Schedule I coal mine shall be entitled to--

(a) continue with such facility agreements and security interest with the prior allottee if such prior allottee is a successful bidder or allottee; and

(b) in the event that the prior allottee is not a successful bidder or allottee, then the security interest of such secured creditor shall only be satisfied out of the compensation payable to such prior allottee, to the extent determined in accordance with such rules as may be prescribed and the outstanding debt shall be recoverable from the prior allottee.

14. Liabilities of prior allottees.

(1) Notwithstanding anything contained in any other law for the time being in force, no proceedings, orders of attachment, distress, receivership, execution or the like, suits for the recovery of money, enforcement of a security or guarantee (except as otherwise provided for under this Act), prior to the date of commencement of this Act shall lie, or be proceeded further with and no remedies shall be available against the successful bidder, or allottee, as the case may be, or against the land and mine infrastructure in respect of Schedule I coal mines.

(2) The proceedings as referred to in sub-section (1), shall continue as a personal remedy against the prior allottee but shall not be maintainable or continued against the land or mine infrastructure of Schedule I coal mine or the successful bidder or allottee, pursuant to this Act.

(3) Every liability of any prior allottee in relation to a Schedule I coal mine in respect of any period prior to the vesting order or allotment order, shall be the liability of such prior allottee and shall be enforceable against it and not against the successful bidder or allottee or the Central Government.

(4) All unsecured loans shall continue to remain the liability of the prior allottee.

(5) The additional levy imposed against the prior allottees of Schedule II coal mines shall continue to remain the liability of such prior allottees and such additional levy shall be collected by the Central Government in such manner as may be prescribed. (6) For the removal of doubts, it is hereby declared that-- (a) no claim for wages, bonus, royalty, rate, rent, taxes, provident fund, pension, gratuity or any other dues in relation to a Schedule I coal mine in respect of any period prior to the date of vesting order or allotment order, as the case may be, shall be enforceable against the Central Government or the successful bidder or the allottee, as the case may be; (b) no award, decree, attachment or order of any court, tribunal or other authority in relation to any Schedule I coal mine passed prior to the date of commencement of this Act, in relation to the land and mine infrastructure of Schedule I coal mines, shall be enforceable against the Central Government or the successful bidder or the allottee, as the case may be; (c) no liability for the contravention of any provision of law for the time being in force, relating to any act or omission prior to the date of vesting order or allotment order, as the case may be, shall be enforceable against the successful bidder or allottee or the Central Government.

...

16. Valuation of compensation for payment to prior allottee (1) ... ...

(2) ... ...

(3) If the successful bidder or allottee is a prior allottee of any of the Schedule I coal mines, then, the compensation payable to such successful bidder or allottee shall be set off or adjusted against the auction sum or the allotment sum payable by such successful bidder or allottee, as the case may be, for any of the Schedule I coal mines.

(4) The prior allottee shall not be entitled to compensation till the additional levy has been paid.

....

22. Realisation of additional levy If a prior allottee of Schedule II coal mine fails to deposit the additional levy with the Central Government within the specified time, then, such additional levy shall be realised as the arrears of land revenue."

40. It was contended by Mr. Shanthi Bhushan for the petitioners that to avoid payment of the additional levy, KPCL had filed Crl.M.P. No. 24134 of 2014 and, in the said application, it has been made clear that attempts were made to force EMTA to pay the additional levy, which was refused and attempts were made to amend the law by approaching the Central Government. The relevant

portions of the application filed by KPCL are extracted herein below:

> "13. Using this model, KPCL has supplied low cost power to the state owned ESCOMs from the BTPS at the tariff determined by the Regulatory Commission, utilizing the coal mined from the captive blocks. Even in this scenario, it has not sold one unit of power in the market but only fed the ESCOMs to meet the state requirements.

Regulated capital cost, fuel cost and sale of power have ensured that KPCL has not in any manner profited as a company from the use of captive blocks."

...

"17. On 10.11.2014, the Applicant made a representation to Respondent No.1 seeking a

clarification regarding the payment of additional levy. In the said representation, the Applicant stated that since it is a Public Sector Undertaking and that since the Applicant has not derived any profit from the allocation of coal, it would not be covered under the report of the CAG. That Respondent No.1 has till date not replied to the said representation made by the Applicant."

"18. KPCL, vide letter dated 24.10.2014, has written to EMTA and KECML requesting them to bear the liability of additional levy of Rs.295/- per metric tonne imposed by this Hon'ble Court, as KECML is responsible for mining operations and the profits have accrued to EMTA. To the aforesaid letter, EMTA and KECML have replied with identical letters dated 13.11.2014 informing the Applicant herein that EMTA and KECML are not liable to pay the additional levy as per the order of this Hon'ble Court."

"19. It is submitted that several rounds of meetings were held between the officials of KPCL, Government of Karnataka and officers of the Ministry of Coal to see whether the aforementioned could be sorted out at the administrative level, but the same were not successful."

(emphasis supplied)

41. Additionally, it was argued that, in the Lok Sabha Debate, the Hon'ble Minister has made it clear that the amendment was introduced to protect States such as West Bengal, Punjab and Karnataka. The relevant portion of the debate is quoted below:

> "SHRI PIYUSH GOYAL : Sir, I will just explain both the things very briefly.
>
> As regards washing of coal, it is not an end-use but it is a process in between. The Coal Mines Nationalization Act identified washing as an end- use. Therefore, it has come in here also. We have no intention to give only washeries the coal. It will go to the end-use and then it will be ..... (interruptions) SHRI BHARTRUHARI MAHTAB (CUTTACK) : Then, delete it.

SHRI PIYUSH GOYAL : It is continuing from nationalization, 1973. But, I am giving you an assurance that there is no plan to give any mines to washeries. The mines are given for the end-use and the end-users may go through the washery for washing.

As regards your point on third party, in some cases the States have done joint ventures, where a new company has got created. That becomes a third party and the mining lease is in their name. Therefore, we have included them so that they are bound to pay the additional levy, as per the Supreme Court direction. Otherwise, the State Governments would have a problem. It is to protect the State Governments."

(emphasis supplied)

42. The sequence of events was emphasized inasmuch as KPCL made attempts to get the law clarified from the Supreme Court of India and when the Supreme Court of India dismissed the application dated December 8, 2014, on December 26, 2014, the law is modified by insertion of the Explanation, which resulted in a situation wherein KECML would be saddled with the liability to pay the additional levy. Financial burden on KPCL and other States is saved and they could get the coal blocks allotted without the payment of additional levy.

43. This contention was strongly repelled by the learned Advocate General, who argued that the Lok Sabha debate clearly says that it was done to comply with the direction of the Supreme Court of India. The entire scheme of the Act, particularly Sections 10, 14 and 16 were referred to contend that it was absolutely essential to bring parties such as KECML, who had the mining lease in their name within the ambit of the Act as they would be eligible for compensation for their equipment, land acquisition costs, etc. Furthermore, there would be security interests created by various banks and financial institutions, which would suffer immeasurably if the Explanation was not given its full effect. Unfortunately, the justification being offered in favour of the legislation, seems to be an after-thought.

44. I have, already, held that the Supreme Court of India did not intend for the persons with mining leases such as KECML to be saddled with the additional levy. In that background of the matter, if the Act is analysed, the following conclusions emerge:

a) The Act is framed to implement the judgment of the Supreme Court of India which will include collection of additional levy from the persons, who are liable to pay them. The Schedule to the Act, also, identifies KPCL as the allottee.

b) The structure of the Act, clearly, demonstrates that it is to achieve an immediate purpose, that is, to re-allot the coal blocks cancelled by the Supreme Court of India and to collect the additional levy as determined and imposed by the Supreme Court of India.

c) The definition of additional levy clearly states that it is the 'levy as determined by the Hon'ble Supreme Court'. Therefore, it has to be collected from only those persons as determined and

identified by the Supreme Court of India.

d) There is no charging section for 'additional levy', therefore, even the Central Government realises that it has no legislative competence to impose additional levy.

e) The Act identifies the 'prior allottee' as the person liable to pay the additional levy. The mode of collection of additional levy is under Section 22 of the Act, which also provides the consequence of non-payment.

45. The prior allottee has various duties, rights and obligations as enumerated in the Act. Some of them have no reference to the additional levy. However, by virtue of striking down of the Explanation, the functioning of the Act to that extent will be impeded.

46. The Explanation, to the extent that it requires that KECML be liable to pay the additional levy, is bad in the eye of law and ought to be read down. Whilst the Legislature may be competent to create a legal fiction, in other words, to enact a deeming provision for the purpose of assuming existence of a fact, which does not really exist, it cannot, however, in construing the legal fiction, extend it beyond the purpose for which it is created. The legal fiction should be interpreted narrowly to make the statute workable. If citations are necessary for such well established proposition, reference may be made to the decisions of the Apex Court in the cases of State of Bombay v. Pandurang Vinayak and others, reported in AIR 1953 SC 244; State of Travancore-Cochin and others v. Shanmuga Vilas Cashewnut Factory, reported in AIR 1953 SC 333; Nandkishore Ganesh Joshi v. Commissioner, Municipal Corporation of Kalyan and Dombivali and others, reported in (2004)11 SCC 417; Ali M.K. and others v. State of Kerala and others, reported in (2003)11 SCC 632; and Sudha Rani Garg v. Jagdishkumar (dead) and others, reported in (2004)8 SCC 329.

47. One cannot lose sight of the fact that the coal mines were admittedly allotted to KPCL and KPCL entered into the agreement with EMTA only for exploitation of the said mines for its own captive use. The joint venture agreement that was entered into for the purpose, which led to the formation of KECML, was only to facilitate such mining of coal from mines allotted to KPCL for exclusive supply to the thermal power plant of KPCL. The mining lease that was granted in favour of KECML was clearly at the instance of KPCL and was clearly granted to facilitate the mining of coal through KECML. KECML was, as such, only a device to achieve the aforestated object. Inasmuch as neither the mines nor the coal mined from the mines were, at any point of time, the property of KECML, there can be no question of KECML being the prior allottee of the same, either for the purposes of Section 11 of the Act or otherwise, particularly as KECML derived no benefit from the operation of the mines or supply of coal therefrom, except the payment of the agreed mining charges to it.

48. I am of the view that the Explanation to Section 3(1)(n) of the Coal Mines (Special Provisions) Act, 2015 must be read down so as to not apply to the petitioners herein insofar as collection of additional levy is concerned. To that extent, prayers (a) and (b) to the writ petitions cannot be granted, that is, the Explanation need not be struck down. However, prayers (c) to (h) deserve to be granted.

49. The writ petitions are accordingly allowed in part, declaring that respondent Nos.1 to 3 are not entitled to recover from the petitioners, any additional levy at the rate of Rs.295/- (Rupees two hundred ninety five) only per MT of coal extracted. The respondents are restrained from making any such recoveries. The Letter of Demand dated October 14, 2014, issued by respondent No.3; Letter of Demand dated December 30, 2014, issued by respondent No.2; the consequent Letter of Demand dated December 31, 2014, issued by respondent No.4, and the Show Cause Notice dated March 19, 2015, issued by respondent No.2, are hereby quashed. As a natural corollary, recoveries or withholds, if any, already made by the respondents, shall be refunded to the petitioners.

50. There will be no order as to costs.

Sd/-

CHIEF JUSTICE ckc/-

W.P.Nos.19823-24 of 2015 PER DINESH KUMAR J.

These two writ petitions are jointly filed by two distinct Corporate entities inter alia with a prayer to set aside the explanation to Section 3(1)(n) of the Coal Mines (Special Provisions) Act, 2015 (the '2015 Act' for short).

2. Finite, but relevant facts of the case are, by an agreement dated September 13, 2002, Karnataka Power Corporation Limited ('KPCL' for short), a State owned Power generating Company, and M/s. Eastern Mineral and Trading Agency ('EMTA' for short) entered into a joint venture agreement ('JV agreement' for short), inter alia, for ensuring assured coal supply at reasonable price to KPCL. The agreement provided for incorporating a Public Limited Company, with KPCL holding 26% shares, EMTA holding 49% shares and the balance 25% shares to be offered to Public/financial institutions or mutual funds. It was proposed to have a Board of Management consisting of equal number of directors from both joint venture companies, with the chairman being a nominee of KPCL and the Managing Director, a nominee of EMTA. Initial authorised share capital was ` 5 Crores. KPCL's right on Coal Mines was valued at ` 1.30 Crores.

3. Under the JV Agreement, among other things, the obligation of EMTA included;

> identification of Coal Blocks;
>
> arranging necessary finance required for the operations, capital investments; and to arrange to fund all losses incurred by the Company.

4. In pursuance of the JV Agreement, on December 5, 2002, the company by name Karnataka EMTA Coal Mines Limited ('KECML' for short) was incorporated.

5. By a communication dated on November 10, 2003, the Ministry of Coal, Government of India, conveyed allotment of Coal Blocks at Baranj I-IV, Manoradeep and Kiloni, all situated in

Maharashtra to KPCL. By a letter dated November 18/19, 2003, the KPCL requested the Ministry of Coal to grant the mining lease of these coal blocks in the name of KECML and accordingly, the mining lease was executed by the Government of Maharashtra, in favour of KECML on September 25, 2006.

6. On May 9, 2007, KECML and KPCL entered into a 'Fuel Supply Agreement'. Under Article 5, thereof, KECML was required to supply 2 Million Tonne coal [(+)(-) 10%], per annum at the agreed price of `1650.47 per tonne.

7. By the judgment rendered by the Supreme Court of India, in a public interest litigation, in the case of Manohar Lal Sharma Vs. Principal Secretary and Others reported in (2014) 9 SCC 516 (for short, 1st ML Sharma Case), the allotments of Coal Blocks were held as illegal. Union of India pleaded for saving 46 coal blocks allotted to various allottees. But, the Supreme Court of India, quashed 42 out of 46 allotments including those allotted to the KPCL, by its judgment in the case of Manohar Lal Sharma Vs. Principal Secretary and Others reported in (2014) 9 SCC 614 (for short, 2nd ML Sharma Case); and also directed recovery of `295/- per metric tonne from the allottees of the coal blocks.

8. In furtherance of 2nd ML Sharma case, an ordinance dated October 10, 2014, was promulgated to provide for allocation of coal mines and vesting of the right, title and interest, in and over the land and mine infrastructure together with mining leases to successful bidders and allottees with a view to ensure continuity in coal mining operations and production of coal. The Coal Mines (Special Provisions) Bill 2014, was introduced in the Parliament, to replace the Ordinance, and the same was passed. Resultantly, the '2015 Act' came into force with effect from October 21, 2014. The petitioners are aggrieved by the explanation to Sec. 3(1)(n) of the said Act.

9. The gravamen of petitioners' case as canvassed by Mr.Shanti Bhushan, learned senior advocate, is;

> a. that the Supreme Court of India has directed the 'allottees' to pay `295/- per metric tonne of Coal extracted, as an additional levy, exercising powers under Article 142 of the Constitution of India to do complete justice;
>
> b. that the explanation to Section 3(1)(n) of the '2015 Act' is ultra vires the Constitution of India, as the Central Government have resorted to legislative subterfuge to undo the judicial pronouncement.

10. The sum and substance of the arguments advanced on behalf of the Union of India, by Mr.Prabhuling K. Navadgi, learned Additional Solicitor General, are;

> a. that the '2015 Act' is a piece of special legislation to deal with the aftermath of cancellation of coal blocks by the Supreme Court of India as described in the preamble;

b. that the explanation to Section 3 (1)(n) of the '2015 Act' was inserted with an object to ensure that additional levy be paid by the actual beneficiaries of the coal blocks;

c. that, KPCL moved an application before the Supreme Court of India, praying inter alia, for a direction to EMTA to pay the additional levy. The said application has been dismissed;

d. the order of the Supreme Court of India is both penal and compensatory in nature. The object of the judgment was to undo the wrong done by the flawed process in allotment of coal blocks;

e. under Section 4 of the '2015 Act', a prior allottee shall become eligible to participate in the auction process subject to payment of additional levy. In the event, a prior allottee is unsuccessful in his bid, he shall be entitled for compensation. Further, he shall also have an opportunity to negotiate with the successful bidder regarding the machinery etc., to ensure smooth operations of the mines; and f. therefore, the petitioners are bound to compensate the State exchequer for the undue benefits, which accrued to them out of JV Agreement.

11. It was mainly argued by Mr.Madhusudhan R.Naik, learned Advocate General, appearing for KPCL, that the entire judgment in 1st ML Sharma's case was on the assumption that any kind of joint venture in which a private party would carry on the mining activity, was illegal. The person, who has been the beneficiary of 'windfall profit' must be held liable to pay the additional levy.

12. I have carefully considered the submissions of learned senior advocates for the parties.

13. The principal argument advanced by Mr.Shanti Bhushan is that, the inclusion of explanation to Section 3(1)(n) of the '2015 Act' is contrary to the judgment rendered by the Supreme Court of India, particularly, paragraph No. 65 of 1st ML Sharma case, wherein, the Apex Court has expressly rejected the argument advanced by the learned Attorney General with regard to the allotment letter. Therefore, the allottee is liable to pay the additional levy and in this case, KPCL, being the allottee, is alone, liable to pay the additional levy. The passage relied upon by Mr.Shanti Bhushan reads as follows:

"65. There seems to be no doubt to us that allocation letter is not merely an identification exercise as is sought to be made out by the learned Attorney General. From the position explained by the State Governments concerned, it is clear that the allocation letter by the Central Government creates and confers a very valuable right upon the allottee. We are unable to accept the submission of the learned Attorney General that allocation letter is not bankable. As a matter of fact, the allocation letter by the Central Government leaves practically or apparently nothing for the State Government to decide save and except to carry out the formality of processing the application and for execution of the lease deed with the beneficiary selected by the Central Government. Though, the legal regime under the 1957 Act imposes

> responsibility and statutory obligation upon the State Government to recommend or not to recommend to the Central Government grant of prospecting licence or mining lease for the coal mines, but once the letter allocating a coal block is issued by the Central Government, the statutory role of the State Government is reduced to completion of processual formalities only. As noticed earlier, the declaration under Section 1-A of the CMN Act does not take away the power of the State under Section 10(3) of the 1957 Act. It is so because the declaration under Section 1-A of the CMN Act is in addition to the declaration made under Section 2 of the 1957 Act and not in its derogation. The 1957 Act continues to apply with the same rigour in the matter of grant of prospecting licence or mining lease of coal mines but the eligibility of persons who can carry out coal mining operations is restricted to the persons specified in Section 3(3)(a) of the CMN Act."
>
> (emphasis supplied)
>
> 14. A careful reading of the above passage shows that, there was no issue with regard to determination of the 'entity', liable to pay the additional levy. On the other hand, it would lead to an inference that, an allotment letter would lead to execution of the lease deed. In the instant case, the lease deed is admittedly executed in favour of KECML.

15. Mr. Navadgi is right in his submission, that a judgment cannot be read as an Euclid theorem. To fortify his submission, he relied upon the judgment of the Apex Court in the case of Deepak Bajaj Vs. State of Maharashtra and another [(2008) 16 SCC 14]; and particularly on a passage from Quinn Vs. Leathem (reported in 1901 AC 495) quoted therein which reads as follows:

> 7. It is well settled that the judgment of a court is not to be read mechanically as a Euclid's theorem nor as if it were a statute.
>
> "14. On the subject of precedents Lord Halsbury, L.C., said in Quinn v. Leathem [1901 AC 495 : (1900-03) All ER Rep 1 (HL)] :

(All ER p.7 G-I) '[Now before] discussing Allen v. Flood [1898 AC 1:(1895-99) All ER Rep 52 (HL)] and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before--that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.'

16. Admittedly, the liability of payment of additional levy by a particular entity was not determined in the 1st ML Sharma judgment. Therefore, the argument of Mr. Shanti Bhushan, that, the explanation to Section 3(1)(n), is contrary to the judgment of the Supreme Court of India, is untenable and must fail.

17. Now, let me examine the challenge independently. The public interest litigation in 1st ML Sharma, was filed challenging the allotment of coal blocks between 1993 and 2010 mainly on the following grounds:

> "2.1. Non-compliance with the mandatory legal procedure under the Mines and Minerals Development and Regulation) Act, 1957 (for short "the 1957 Act");
>
> 2.2. Breach of Section 3(3)(a)(iii) of the Coal Mines (Nationalisation) Act, 1973 (for short "the CMN Act");
>
> 2.3. Violation of the principle of trusteeship of natural resources by gifting away precious resources as largesse.
>
> 2.4. Arbitrariness, lack of transparency, lack of objectivity and non-application of mind.
>
> 2.5. Allotment tainted with mala fides and corruption and made in favour of ineligible companies tainted with mala fides and corruption."

18. In the 1st ML Sharma judgment, the Hon'ble Supreme Court has held, that allotment of coal blocks to State Public Sector Undertakings were in violation of law by recording thus:

> "162.9. Having carefully examined the Circular dated 12-12-2001, in light of the provisions of the CMN Act, as amended in 1976, it appears to us that the circular is not in conformity with the provisions of the CMN Act and, consequently, has no legal sanction. The CMN Act and further amendments therein carried out in 1976 do not allow the State Government or State PSUs to mine coal for commercial use. The problem seems to have arisen because of the 2001 Circular which permits the State Government companies or undertakings to do mining of coking and non-coking coal reserves but, as noted above, the legislative policy in the CMN Act does not permit that. The recommendation for allocation by the Screening Committee to the State PSUs and also the allocation made to the State PSUs through Governmen. Dispensation Route are, therefore, in violation of the provisions of the CMN Act, as amended from time to time."
>
> (Emphasis supplied)
>
> 19. So far as the joint venture agreements between the Public Sector and the private parties are concerned, the Apex Court has held that, such modus operandi has

virtually defeated the legislative policy, and that, the very process of allotment of a coal block to a State Owned PSU was impermissible under the Coal Mines (Nationalisation) Act, 1973 (for short 'CMN' Act). In the final analysis, the Apex Court has held as under:

"163. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14-7-1993 in 36 meetings and the allocation through the Government Dispensation Route suffers from the vice of arbitrariness and legal flaws. The Screening Committee has never been consistent; it has not been transparent; there is no proper application of mind; it has acted on no material in many cases; relevant factors have seldom been its guiding factors; there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal."

(Emphasis supplied)

20. Thus, the sequitur of the 1st ML Sharma judgment is, faulty approach in allotment of coal blocks, has resulted in 'unfair distribution of wealth' and 'sufferance of common good and public interest.

21. As noticed earlier, the KPCL, entered into a JV Agreement with EMTA, on September 13, 2002, almost an year prior to the date of allotment, on November 10, 2003, in anticipation of allotment of coal blocks.

22. Interestingly, in Article 3 of JV Agreement, the consideration payable by the KPCL for allotment of 26% shares to KPCL is shown as non-existent Coal Block/s valuing them at `1.35 Crores. Under Article 7 of the JV Agreement, raising of capital and other finances for the business is the obligation of EMTA. Significantly, under Article 9, identification of coal blocks is also the obligation of EMTA.

23. KECML agreed to supply coal worth `3,300 Million per annum under the fuel supply agreement dated May 9, 2007. On the very day, KECML entered into an agreement with EMTA, to give effect to the responsibilities, in terms of the JV Agreement. Significantly, under clause 17 of the said agreement, extracted hereunder, all revenue expenditure incurred by KECML, was required to be reimbursed by EMTA:

"17. The revenue expenditures, including interalia, remuneration to the statutory work personnel to be appointed on the roll of KECML, Board Meeting expenses, licence fees, fees payable to Registrars of Companies, depreciation/amortization of the assets of KECML and any other expenditures as may be required to conduct the

> business etc. which will be accounted for in the books of KECML shall be reimbursed by EMTA/adjusted against charges of EMTA for mining operation at actual."

24. Thus, in substance, KPCL acted only as a name lender and the entire business was handled by and for the benefit of EMTA.

25. KECML, the lease holder, is an independent corporate entity, in which EMTA holds 49% stakes. It has agreed to supply coal valued at `3300 Million per annum. Obviously, EMTA shall be entitled for commensurate profits. As, held by the Apex Court, the faulty procedure followed in allotment of coal blocks, has resulted in unfair distribution of wealth. As a logical corollary, the lessee should be held liable to pay the additional levy.

26. It is settled that, the Courts normally, lean against any construction which tends to reduce a statute to futility. It may be profitable to note that a Constitution bench of the Supreme Court of India, speaking through Hon'ble Mr.Justice M.N.Venkatachaliah (as he then was), in the case of Tinsukhia Electric Supply Company Limited vs. State of Assam, reported in 1989(3) SCC 709, has held as follows:

> "118. The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of a statute must be so construed as to make it effective and operative, on the principle "ut res magis valeat quam pereat". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co. v. Manchester Racecourse Co. [(1904) 2 Ch 352 : 16 TLR 429 : 83 LT 274] Farwell J. said: (pp. 360-61) "Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty."
>
> 119. In Fawcett Properties Ltd. v. Buckingham County Council [(1960) 3 All ER 503] Lord Denning approving the dictum of Farwell, J., said:(All ER p. 516) "But when a Statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute to bear rather than reject it as a nullity."
>
> 120. It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and the nothing short of impossibility should allow a court to declare a statute unworkable. In Whitney v. IRC[1926 AC 37] Lord Dunedin said: (AC p. 52) "A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

(Emphasis supplied)

27. Further, .the Courts have generally opted to give purposive construction to a statute and save them. Useful reference may also be made to the observations of Lord Staughton in BBC Enterprises Vs. Hi-Tech Xtravision reported in 1990(2) All ER 118 @ 123, holding that - Courts should now be very reluctant to hold that "the Parliament has achieved nothing by the language it used, when it is tolerably plain what Parliament wished to achieve". This view has been quoted with approval by the Hon'ble Supreme Court of India in the case of Balram Kumawat v. Union of India, reported in (2003) 7 SCC

628.

28. If the impugned '2015 Act' is viewed in the backdrop of the ML Sharma judgments, there remains no ambiguity, that the explanation to Section 3(1)(n) is added to give effect to the judgment of the Hon'ble Supreme Court to recover the additional levy from those, upon whom 'windfall profits' were showered. The portion of legislation under challenge, is certainly in consonance with the letter and spirit of the 1st ML Sharma judgment holding that the faulty procedure of allotment has resulted in unfair distribution of the national wealth and sufferance of common good and public interest. Therefore, in my considered view, it is intra vires the Constitution of India.

29. In view of my finding that, Section 3(1)(n) is intra vires Constitution of India, other prayers do not survive for consideration.

30. There is yet another aspect which requires serious attention of this Court. Admittedly, KPCL holds 26% stakes in KECML and shall always have equal representation in the Board. In addition, the Chairman of the company shall also be a nominee of KPCL. In such circumstances, it is not only surprising, but appalling to note that a joint venture company, KECML, has joined hands with the private entity EMTA, and filed these writ petitions jointly. It is reasonable to construe that, KPCL's nominees on the board of KECML have consented to file these joint petitions, seeking a judicial pronouncement against KPCL. Thus, prima facie, they have acted adverse to the interest of KPCL, of which they are the nominees. Such conduct on the part of the Chairman and Nominee Directors, is regrettably, reprehensible.

31. It is pleaded by the KPCL in their statement of objections that, the entire commercial arrangement between KECML and KPCL, was towards sale of coal. It is also the specific case of KPCL, that the petitioners have made windfall profits. KPCL has precisely pleaded as follows:

"2. The averments in paragraph 1 to 9 are admitted in so far as they relate to matter of record. In addition to the same, the following facts becomes relevant. The petitioner No.2 was appointed pursuant to a tender process and the selection of Petitioner No.2 was on the basis of furnishing price of coal on FOR basis. The Petitioner was to supply coal and would be paid price of coal so supplied. The petitioners are trying to characterize this arrangement as if they were carrying on

> mining activities on behalf of the Answering Respondent. However, the same is not the case inasmuch as Clause 12 of the Tender Document clearly indicated that the entire risk of the mining activity was open to the bidder. A copy of the Tender Document as signed by the Petitioner No.2 is produced herewith as Annexure-R1. Furthermore, the Answering Respondent was only a customer who was required to purchase the coal from the petitioners. Such purchase was on commercial basis and the petitioners have made windfall profits from sale of such coal to the Answering Respondent. In such circumstances, it is not open to the petitioner to characterize such sale of coal "as carrying on mining activity on behalf of the Answering Respondent".

(Emphasis supplied)

32. By a communication dated October 4, 2014, as per Annexure-S, the Collector of Chandrapur District, called upon KECML to deposit `417.95 crores as additional levy. In its reply dated October 13, 2014, KECML took a specific stand that the coal mines were allotted to KPCL and the allottee is required to pay the additional levy.

33. KPCL also, by a communication dated December 30, 2014, called upon the KECML to deposit the additional levy. However, on the very following day, namely, December 31, 2014, KPCL further conveyed to the KECML that it had deposited a sum of `110.43 crores being 26% of the additional levy, to facilitate itself to participate in the auction/allotment process. But, KECML, reiterating its earlier stand, advised KPCL to arrange for funds to pay the additional levy. Thus, in substance, the stand of KECML has been that KPCL is liable to pay the additional levy, whereas the understanding of KPCL is that it is liable to pay 26% of the additional levy, which is commensurate with the shareholding pattern. Conspicuously, the stand taken by the KPCL, if implemented, would bleed KPCL by another 74%, resulting in the entire additional levy to be borne by the State owned Public Sector Unit, obviously, from out of public funds, which is directly contrary to the judgment of the Hon'ble Supreme Court in 1st ML Sharma's case.

34. The exchange of communications placed on record in these proceedings disclose that the stand taken by KECML has been well within the knowledge of KPCL from October 2014. Yet, KPCL, which is a public sector unit, does not appear to have taken any remedial measures to protect its interests in the Board of Management of KECML.

35. The conspectus of mutual attitude between KPCL and KECML, speaks volumes about their unholy nexus. This, prima facie, appears to be a scam by itself. It is time, the State Government took appropriate action in the matter. Therefore, exercising jurisdiction under Article 226 of the Constitution of India, and following the judgment of the Hon'ble Supreme Court in the case of Vineet Narain v. Union of India, reported in (1998) 1 SCC 226, appropriate directions need to be issued to the State Government.

36. In the result,

i) the writ Petitions are dismissed with costs of `10,00,000/- (Rupees Ten lakhs only) payable by 2nd petitioner, EMTA Coal Limited, to the Prime Minister's National Relief Fund;

ii) registry shall send a copy of this order to the Chief Secretary to the Government of Karnataka forthwith;

iii) the Chief Secretary is requested to hold an inquiry by himself or by an officer not less than the rank of Additional Chief Secretary with regard to:

a) valuation of non-existent coal blocks at `1.35 Crores in the JV agreement between EMTA and KPCL;

b) conduct of nominee directors of KPCL on the board of KECML, in acting adverse to the interest of State owned KPCL including filing of these petitions against KPCL; and

c) complicity of KPCL in permitting legal action by its own nominees.

iv) after completion of enquiry, appropriate disciplinary and criminal action shall be initiated against nominees of KPCL/officers, found guilty by the State Government; and

v) action taken by the Chief Secretary shall be placed in the form of a report before this Court from time to time for further directions, and the first of such report shall be filed with the Registrar General of this Court, within eight weeks from the date of receipt of a copy of this order.

Sd/-

JUDGE Yn.