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STATE OF KARNATAKA

v.

ARUN KUMAR AGARWAL AND ORS.

DECEMBER 13, 1999

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[S. SAGHIR AHMAD AND S. RAJENDRA BABU, JJ.]

Constitution of India, 1950—Article 226—High Court ordering criminal Investigation—Held, investigation can be initiated only when a crime is reported to have been committed or reasonable suspicion thereto arises—Not on mere conjectures and surmises—Investigation.

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In order to establish a power station near Manglore, foreign investors were invited when the project was dropped by NTPC due to dissolution of USSR with whose collaboration NTPC had earlier taken up the Project. The foreign investment for the project was inducted through Manglore Power Project and 'C', a foreign company was selected as sponsor of the Project. Various aspects of the matter were considered and examined by the Government of India. Several clearances were given by different agencies of the Government of India from stage to stage, viz. foreign investment, examination of financial, technical, and executing capability of 'C' as per Government rules and guidelines. It also stood the test of scrutiny of State Government under three consecutive Governments headed by three different Chief Ministers.

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Another foreign company 'C L' was permitted to acquire equity holding in the project by Government of India. All the matters were governed by specific approval of the Government of India. General breakdown of the project costs and Balance Sheet were also subject matter of consideration. Detailed Project Report was advertised; 838 representations raising objections were sent which were ultimately examined by Central Electricity Authority and also the comments of 'C' were examined before giving approval. None of the approvals were challenged before any court. The necessity for establishing the Thermal Power Project was already considered by the High Court in *Jana Jagruti Samithi* v. *Union of India,* [1991] 2 Kar. L.J. 524. The circumstances leading to invitation of foreign investors for the Power Plant was also considered by High Court in *Indian Council for Enviro- Legal Action & Anr* v. *Union of India & Ors.,* ILR [1997] Kar. 2956.

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Respondents filed a Writ Petition before High Court praying for setting aside the Power Project and seeking investigation into the matter through proper agency. The allegations in the Writ Petition were not against any individual or group of individuals. The facts and circumstances of the case relied on were opposed by the State. High Court without analysing the contentions put forth by either parties, formulated 13 points which appeared to it to be of suspicious nature and directed for registration of a case and for investigation against persons not known and who were likely to be identified after enquiry. Hence this appeal.

Allowing the appeal, this Court

HELD : 1.1. None of the circumstances noticed by the High Court can be characterised as giving rise to any suspicion much less a basis for investigation by a criminal investigating agency. The reference of the High Court to the liberalisation policy, reforms approved by amendment of Electricity Supply Act to enable induction of private sector to participate in power generation, to provide for level playing field for domestic and foreign companies in terms of the Government of India is a matter of policy and, therefore, the idea of foreign collaboration by itself cannot be a suspicious circumstance. [291-H; 292-A, 291-B-C]

1.2. It is difficult to visualise that when an agreement had been entered into with a foreign company, it has been done under suspicious circumstances, particularly when it had stood the test of scrutiny under three different Governments headed by at least three different Chief Ministers and when the examination of the project and its approval was considered by three different statutory and other agencies of the Government of India. [292-A-B]

2. Acts of persons will not be subject of criminal investigation unless a crime is reported to have been committed or reasonable suspicion thereto arises. On mere conjecture or surmises as flight of fancy that some crime might have been committed somewhere, by somebody but the crime is not known, the persons involved in it or the place of crime unknown, cannot be termed to be reasonable basis at all for starting a criminal investigation. [292-C-D]

Vineet Narain v. *Union of India,* [1996] 2 SCC 199, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7231 of 1999.

A WITH

C.A. No. 7232/99 (@ SLP (C) No. 6016/98), C.A. No. 7233/99 (@ SLP (C) No. 6012/98) and SLP (C) No. 12834/98.

From the Judgment and Order dated 27.2.98 of the Karnataka High Court
B in W.P. No. 10696 of 1997.

Altaf Ahmad Addl. Solicitor General , F.S. Nariman, Dushyant Dave, Shanti Bhushan, Arun Jaitely, K.G. Raghavan, Shishir Sharma, Ms. Vimla Pinto, Amaresh K. Singh, Subhash Sharma, S.C. Sharma, Rajiv Tyagi, Sanjiv Kapoor, Ms. Priya Kumar, Prashant Bhushan, Vijaya Shankar, K.K. Tyagi, K.R.
C Nagaraja, S.K. Kulkarni, Ms. Sangeeta Kumar, Ms. Kamini Jaiswal, Sanjeev Puri and K.L. Janjani for the appearing parties.

The Judgment of the Court was delivered by

RAJENDRA BABU, J. Leave granted in SLP(C) Nos. 5883/98, 6016/98
D and No. 6012/98.

Writ petition was filed in the High Court of Karnataka by Arun Kumar Agarwal and S.K. Kantha seeking for investigation by appropriate agencies into the various allegations made by them and to initiate criminal proceedings against the guilty persons as per law. It was also prayed to set aside the
E power project entered by Karnataka Electricity Board (KEB) with Mangalore Power Corporation (MPC) and reallot the power project through an open bidding process. The High Court by an order made on February 27, 1998 granted some of the reliefs sought for in the writ petition. Against this order, the petitioners in the writ petition as well as the respondents have come in two sets of appeals. The High Court formulated 13 points (though noted as
F 14 in the order under appeal) which appeared to it to be of suspicious nature leading to issue of the following direction :

"1. The respondent State (R-1) is directed to get a FIR registered with the CBI under the provisions of Delhi Special Police Establishment Act for various cognizable offences without naming
G any person or group of persons as accused.

2. Upon registration of the FIR, the Director General of the CBI shall direct the investigation to be conducted by an officer under the supervision and control of an official not below the rank of Deputy Director General of the CBI. The investigation
H shall not be influenced by any of the observation made by us

for determining the desirability of the registration of FIR and investigation into the allegations. A

3. Such investigation shall be commenced without any delay and completed within one year from the date of the registration of the FIR. In case the investigation is not completed within the time aforesaid, the CBI shall be under an obligation to seek extension of time from the Court by satisfying the Court regarding the existence of valid reasons. B

4. Monthly progress report of the investigation shall be submitted by the Investigating Officer to the Registry of this Court in a sealed cover. C

5. All the parties herein, the Central Government and the State Government shall furnish all necessary information to the Investigating Agency. It is hoped that the foreign companies and persons shall also render all possible assistance in the completion of the investigation. In case of any difficulty, the Investigating Officer shall be at liberty to pray for and seek such instructions or directions or assistance from the Court as may be needed. The allegations made in the petition and the facts noted by us in this judgment shall be made the basis of recording the FIR. D

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6. That the petitioners may be associated with the investigation as and when required.

7. The petitioners are held entitled to payment of costs of Rs. 20,000 to be paid by R-3 and R-5."

The High Court in paragraph 45 of its judgment observed that as to F whether the facts alleged, the documents produced and the circumstances brought to the notice of the court are *prima facie* sufficient to warrant a further probe, enquiry or investigation. Having said that, it sets out a few facts which are stated to be either admitted or proved facts, but the appellants challenged the correctness of the same. At paragraph 48 the High Court G stated that some of the circumstances relied upon by the writ petitioners in support of their submissions have vehemently been opposed and those circumstances are referred to for the purposes of ascertaining as to whether any case is made out for the purposes of further probe, enquiry or not. The High Court also notices that the allegations and counter-allegations made in the pleadings and that the writ petitioners have not referred to any individual H

A or group of individuals who could be alleged to be the beneficiaries of an amount of 191 Million Hong Kong dollars but it may be desirable to ascertain as to whether actually any part of that amount was spent in India or not. It is also to ascertain even if the aforesaid amount was allegedly incurred with respect to the projects being carried on by the appellant outside Hong Kong but not in India as to whether actually such amount was incurred in any other B country or the entry which was subsequently written off is a camaflouge to hide the alleged kick backs and bribes paid for the alleged favours shown to M/s Cognetrix in connection with the setting up of thermal power plant of 1000 MW capacity at Mangalore.

C The writ petitioners had referred to various other circumstances in support of their cases which were vehemently denied by the respondents therein, but the High Court did not venture to refer to such circumstances and scrutinise them on the basis of the allegations and counter-allegations made by the parties. The High Court noticed that the circumstances noted could not be termed as frivolous, baseless, concocted or characterised as *malafide* D made only for the purpose of defaming the appellant and in a very characteristic way proceeded to observe as follows:

> "The petitioners have referred to various other circumstances in support of their contention which have been refuted and vehemently denied E by the respondents. We do not make a venture to refer to all such circumstances and scrutinise them on the basis of the allegations and counter allegations made by the parties. We, however, feel that the circumstances noted therein above cannot be termed to be frivolous, baseless, concocted or referred to *mala fidely* only for the purpose of defaming the respondent foreign company. The fact that tons of F papers and tanks of ink have been utilised in the pleadings of the case which was argued by distinguished Advocates of national eminence for days before us and in the light of rival contentions regarding the circumstances enumerated herein above, also persuades us to have a *prima facie* view that all, many or any of the Respondents along with others may on probe and investigation be ultimately found trible for G many, any or few of the offences referred to and highlighted by the petitioners. No benefit of doubt can be given to the respondents at this stage. Investigation cannot be shut or facilitated to be closed on technical pleas couched in sweet, attractive and glittering capsules of artful advocacy. Both the sides of the coin are required to be tested H by the experts in the field. Judicial ceasarian is necessary for diagnosing

the disease noticed in the beginning, for protecting, safeguarding and nourishing the developing democracy and the Rule of Law in this great country known as 'Bharat'. We are satisfied that a *prima facie* case has been made out requiring further probe and investigation for allaying the apprehensions conceived by the Petitioners and other citizens." A B

The High Court in paragraph 50 of its judgment observed as follows :

"We only feel that a case may be required to be registered and investigated against persons presently not known but are likely to be identified after probe and enquiry by a competent investigating agency. The respondents have further submitted that as the respondents cannot even *prima facie* be held to be guilty of any of the cognizable offence, no report can be directed to be registered. We do not agree with such submissions made on behalf of the respondents as we find that apparently and *prima facie* the facts noted herein above may lead to the circumstances relate to the commission of cognizable offence. Upon investigation the real culprits may be found to have committed offences not only under the Prevention of Corruption Act but also under various provisions of Penal Code such as offences u/s. 120-B, 406, 408, 409, 419, 420, offences under Chapter XVIII of the I.P.C., offences under the Companies Act, under the FERA and various other statutes. Reference to various offences is only illustrative and neither conclusive nor indicative." C D E

The learned counsel on either side have referred to various decisions as to when a complaint can be made or court can order investigation but in our view it is not necessary to refer to any of them as we propose to examine whether any legal or factual basis existed for the High Court to make order under appeal. We will examine the case in a chronological manner with reference to facts and draw our inferences based on the material on record, the question for consideration being whether the probe ordered is justified or not. F

The Central Electricity Authority conducted a power survey in India which indicated that the southern region including the State of Karnataka would face acute power shortage both in terms of peaking capacity as well as energy requirement. The Survey further indicated that an addition of 38,000 MW of electric power would become necessary by the VIIIth Five Year Plan. The National Thermal Power Corporation [for short 'NTPC'] in collaboration with the erstwhile USSR evinced interest in setting up a 2420 MW coal fired G H

A super thermal power plant at the site at which the KPCL had intended to set up a project. This proposed project was, therefore, entrusted to the NTPC. NTPC also obtained clearance from the Department of Ecology and Environment and Forests, Government of Karnataka. The Government of India issued a policy statement in two resolutions both dated October 22, 1991. The first resolution was numbered as 7/8/88 (Thermal). The second resolution. No. B 7/70/90(I.P.Cell), *inter alia,* stated as follows :

"5. Objectives of the High Powered Board

The objectives of the Board include promotion of investment by private units in the electricity sector in India both by indigenous, non-C resident Indian and foreign entrepreneurs within the ambit of the policy in this regard, keeping in view the optimal utilisation of the country's natural and financial resources. To promote investment by entrepreneurs in the private sector, the Board will, *inter alia*, serve as a single point forum for faster clearances of the proposals received D from them within a definite time frame and resolve outstanding issues pertaining thereto.

6. Function of the High Powered Board

(i) While the agencies concerned with issuing statutory and other E clearances, will continue to process the proposals to set up electricity projects from all organisations, as also, those from the private sector as per law and the guidelines, as applicable, and, as amended, from time to time, the Board would monitor the processing of the clearances including those statutory in nature, in respect of the proposals received from private entrepreneurs.

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(ii) With a view to expediting the clearances, the Board may issue such directives as may be necessary regarding the processing and issuing of clearances. The Board will also lay down the time frame by which the clearances by agencies concerned may be issued.

G (iii) The Board will resolve all outstanding issues in respect of clearances including cases of import of equipment in cases where foreign supplier(s)/agency (ies) is/are extending concessional credit assistance.

(iv) The Board will consider all investment proposals from non-resident H Indian and foreign investors.

(v) The Board will undertake periodic review of measures taken to encourage private sector participation in the electricity sector and decide on the steps to be taken for promotion of the scheme.

(vi) The Board will consider and decide on matters regarding the scheme for encouraging private enterprise participation in the electricity sector which may be referred to the Board by the Department of Power, including any specific proposal from a private entrepreneur coming under the scheme :

7. Constitution of the Board :

The Board shall comprise the following :

From the Government of India :

(1) Cabinet Secretary	-	Chairman
(2) Secretary (Deptt. of Power)	-	Member
(3) Secretary (Finance)	-	Member
(4) Additional Secretary (Banking)	-	Member
(5) Secretary (Planning Commission)	-	Member
(6) Secretary (Environment & Forest)	-	Member
(7) Secretary (Industrial Development)	-	Member
(8) Secretary (Technical Development)	-	Member
(9) Chairman, CEA		

From the State Governments :

(10) Chief Secretary to the concerned State Governments will be co-opted as required."

The proposal to set up the project by NTPC with the aid from USSR did not materialise for various reasons including the distintegration of USSR. The Government of India invited Cogentrix Inc. established in the USA to attend a seminar on the power sector in the month of June, 1992 when the representatives of the Cogentrix met the officials of the Karnataka Government. On July 2, 1992, Cogentrix forwarded a draft Memorandum of Understanding

A to Government of India. For the purpose of the Cabinet meeting held on July 15, 1992, a note was prepared wherein it was recorded that a number of major hydro and thermal power projects had been identified that could be implemented by foreign companies either wholly owned by them or under joint sector participation for which purpose discussions had been held with certain interested foreign companies whose names were enlisted there. It also B adverted to the visit of Chief Minister to USA, UK and Italy and it was proposed to hold further discussions with the different companies in USA and Italy to set up thermal and hydro projects. The Government of India having signed a draft Memorandum of Understanding by the Cogentrix in which two power plants of 2 x 250 MW each were proposed to be set up and C the Government by an order made on July 24, 1992 authorised the Government to sign the Memorandum of Understanding stipulating to give guarantee to generating companies within policy guidelines of policy on Power of Government of India and directed to enter into Power Sale Agreements in accordance with policy and also to publish the order in the Gazette. A high level delegation headed by the then Chief Minister visited USA, UK and Italy. D That team held discussion with 14 companies inviting their proposals and offers to construct, own and operate power plants in Karnataka. The appellants were willing to sign the MOUs for two projects of 2 x 250 MW each at Mangalore and Bangalore subject to feasibility studies. The Government of Karnataka entered into MOUs including two MOUs with M/s Cogentrix Energy E Inc. for setting up a 2 x 250 MW coal based thermal power station at Mangalore and Bangalore. A detailed report of the tour made by the Chief Minister was placed in the Cabinet meeting held on August 10, 1992 when it was also made known that two MOUs has been signed with M/s Cogentrix for thermal power projects at Mangalore and Bangalore, the details of which have been set out in the Cabinet Note. On November 19, 1992, a new F Government assumed office in the State of Karnataka headed by Shri Veerappa Moily as Chief Minister. Under the directions of the new Government, all MOUs signed by the previous Government were to be re-examined and brought before the Cabinet for its consideration again. That decision was taken on December 21, 1992. The Chief Secretary of Government of Karnataka G conducted meetings to review all MOUs which was attended by the Senior Officers of the Government such as Additional Chief Secretary, Finance Commissioner, Secretary to the Energy Minister, Energy Secretary and Chairman, Karnataka Electricity Board. Such review was held from January 23, 1993 to March 3, 1999. M/s Cogentrix thereafter requested the Government to extend the MOU dated July 30, 1992 upto February 1, 1993 and stating that due to H sitting difficulties at Bangalore it was agreed that the Bangalore project be

deferred and that a 1000MW project be developed at Mangalore. A delegation headed by the Chief Secretary of the Government of Karnataka held meeting with the officers of the Government of India, such as, the Principal Secretary to the Prime Minister, Union Power Secretary and Union Foreign Secretary on 25th and 26th February, 1993 as a follow up thereto. It was noticed in the meeting held on February 27, 1993 that-

(a) Foreign investment is not easily forthcoming.

(b) India does not enjoy a good credit rating of foreign investment in the international market.

(c) Any decision to cancel a MOU on the ground a fair opportunity has not been given to investors will send a signal of instability to foreign investors in business in India.

(d) That such a step will affect the national interest and will also affect future foreign investment in Karnataka.

The officers recommended to the Cabinet to consider allotting 1000 MW thermal power plant to M/s Cogentrix Keeping in mind the views of the Ministry of Power and senior Government officers of the Government of India about their experience in power generation. On March 3, 1993, a Cabinet meeting was held and it was decided to permit the appellant to set up 1000MW thermal power plant at Mangalore to be implemented in three phases of 334 MWs (each phase consisting of 2 units of 167 MW). This was widely published by publication in the Karnataka Gazette. Thereafter various steps were taken and in the meanwhile the Government of India, Secretariat for industrial Approvals, Ministry of Industry, conveyed its approval to the proposal to set up the power plant in Mangalore to M/s Cogentrix and by an amendment made, China Light and Power was permitted by the Government of India to acquire equity holdings in the project. On January 3, 1994, the Mangalore Power Company incorporated under Companies Act, 1956. Thereafter steps were taken to enter into power purchase agreement from March 23, 1994 onwards. They also consulted Tata Energy Research Institute of India (TERI), GOPA of Germany and SAIC of USA. The power projects agreement was signed on September 30, 1994 which incorporates the recommended configuration of 4x250 MW units. The power purchase agreement was signed between KEB and M/s Cogentrix Inc. on September 30, 1994. On July 19, 1995, the press release was made announcing entry of China Light and Power to Mangalore Power Plant. The power purchase agreement was placed before the State legislature on August 9, 1995. Detailed project report

A was sent to the Central Electricity Authority in compliance to Sections 29, 30 and 31 of the Electricity (Supply) Act, 1948 for obtaining techno-economic clearance. A scheme was published in terms of Section 28 read with Section 29(2) of the Electricity (Supply) Act. The power purchase agreement stood revised on January 18, 1996. Techno-economic clearance was issued by the Central Electricity Authority on July 10, 1996.
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In this case, we are constrained to observe that the High Court has lost sight of certain broad features of the case. The necessity for establishing a thermal power station which is, in detail, considered by the High Court of Karnataka in *Jana Jagruthi Samithi* v. *Union of India,* (1991) 2 Kar. L.J. 524.
C The circumstance in which the Government of Karnataka took decision to invite foreign investors, the manner in which it was done, was also subject of consideration in *Indian Council* for *Enviro-Legal Action & Anr.* v. *Union of India and Ors.,* ILR (1997) Kar 2956, and the High Court rejected objections thereto which was not interfered with in SLP by this Court and thus that order has become final. The circumstance in which the National Thermal Power
D Corporation which wanted to establish a power station with the collaboration of USSR was dropped on the dissolution of the Soviet Union is not in doubt. The proposal to give the appellants the contract to establish a power station near Mangalore was taken up for consideration when Mr. Bangarappa was the Chief Minister and all decisions were taken not only by him but by the
E Cabinet concerned after being examined at various levels by the officers of the government. Thereafter on November 19, 1992 a new government was installed in the State of Karnataka with Mr. Veerappa Moily as the chief Minister and the matter was reviewed by a committee headed by Mr. J.C. Lynn, Chief Secretary to the Government of Karnataka. In that review meeting the Additional Chief Secretary, Finance Commissioner, Secretary to the Ministry
F of Energy, Energy Secretary and Chairman, Karnataka Electricity Board had attended and those deliberations were held on January 18, 1993, January 27, 1993, February 2, 1993 and February 2, 1993. Various suggestions made by M/s. Cogentrix were presented to the Foreign Investment Promotion Board formed under the auspices of the Government of India. Various aspects of the
G matter were examined by the Government of India and it expressed the view that in the event of cancellation of Memorandum of Understanding there are likely repercussions that may arise to which we have referred to earlier. Several clearances were given by different agencies of the Government of India from stage to stage. And, in the meanwhile, the government was again changed in the State of Karnataka firstly with Mr. H.D. Deve Gowda as the
H Chief Minister, later headed by Mr. J.H. Patel and once again the project

passed through the scrutiny of the new Governments. A

The genesis of the theory put forth on behalf of the writ petitioners is the balance sheet showing incurring of expenditure in India. In the balance sheet of China Light and Power Company and in Annual Report it is indicated as follows:

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> "Investment in a power project in India : reached an agreement in July with Cogentrix Energy of US to jointly invest in a 1000 MW coal fired power station project to be built at Mangalore in the State of Karnataka."

The Price Waterhouse report states that 71.8 million H.K. Dollars out of a total C of 191 million H.K. Dollars shown as provision in the accounts for September 30, 1995 and September 30, 1996 is in respect of the Mangalore Project and they relate to (i) cost of acquisition paid to Cogentrix; (ii) reimbursement of cost incurred by Cogentrix; (iii) payment to third parties for services; and (iv) staff remuneration charged to the project. As to the allegation that money D might have been paid in a foreign country, no foundation for the claim is laid in the petition. The China Light and Power Company claims that neither the company nor any group company maintained a bank account in British Virgin island at any time and accounting have always been maintained in Hong Kong. 1359 British Virgin Island Companies, including the China Light and Power (International) Ltd. having place of business in Hong Kong are registered E with the Registrar of Companies in 1997. The allegation of bribery made against Mr. Deve Gowda is based on a letter written by Mr. George Fernandes and the basis of this letter is again not clear. Thus the foundation laid for the whole case arises out of suspicion alone on the strength of dubious and amorphous material. On such material, no case can be registered, much less, an investigation can be done. We would not have hazarded to consider that F material placed before us but in order to allay the fears expressed by the parties concerned, necessarily we had to undertake that exercise.

One of the questions raised by the writ petitioner in the High Court is regarding financial and technical capability of the sponsor of the project. The G Government of India while granting permission has considered this aspect at different stages as is clear from letters dated May 11, 1993, September 1, 1993, April 15, 1994, March 23, 1995, June 3, 1996 and January 3, 1997. The last of which indicated the permission of the Government of India to China Light to acquire equity holding in the project and stipulating Cogentrix as an equity holder. The original approval was to set up, own and operate pulverized coal H

A fired power station of capacity of approximately 1000 MW to be implemented in three power blocks of approximately 330 MWs each at Mangalore which was modified by letter dated January 3, 1997. None of the approvals granted by the Government of India and the amendments made to the approvals from time to time was in challenge before us. Thus the entry, the financial capability of Cogentrix and CLP; withdrawal of General Electricity and replacement of B CLP; the induction of foreign investment for the project through Mangalore Power Company; right to use imported coal; the capital cost of the project and the clearance for the implementation for 1000 MW project at Mangalore are all matters governed by specific approvals given by the Government of India. In these proceedings, therefore, such clearance cannot be attacked C collaterally which have been the subject matters of examination and approval at the highest level by the Ministry of Industry (Foreign Investment Promotion Board) and the Ministry of Power of the Government of India.

The financial structure of the project and project costs including tariff and the price of electricity have been subject to modifications and are D conditional upon the approval by the Central Government, Ministry of Power as well as by the Central Electricity Authority. The final draft of the power project after review by the Ministry of Finance, Government of India was forwarded to the Government of Karnataka on September 29, 1997 for delivery and execution by the Karnataka Electricity Board. Other matters relating to E power project including heat rate, capital cost, revenue expenses, fuel procurement and financial capability of the sponsor were considered at the time of examining the proposals of the scheme under Section 29 of the Electricity Supply Act and Detailed Project Report which had been submitted to the Central Electricity Authority for approval and for techno-economic clearance and detailed project report gives breakdown of the various project F costs including sponsors development expenses. Detailed project reports prepared by the Cogentrix is in conformity with the guidelines of the Central Electricity Authority. General Breakdown of the project costs and balance sheet were subject matters of consideration. The official guidelines require the development expenses to be shown separately and such expenses, therefore, G could, by no stretch of imagination, be considered as bribes or greased money.

The detailed project report was advertised and 838 representations had been received and the same were forwarded to the State Government for onward transmission to the Central Electricity Authority. The Central Electricity H Authority has examined these objections and comments offered by the CLP

or the Cogentrix before giving its approval. Thus the techno-economic clearances given to the project cannot be examined by courts to arrive at whether they are technically feasible or not or whether in granting the same strange things have happened giving rise to suspicion that something has been done by way of undue favour. A

The reference of the High Court to the liberalisation policy, reforms approved by amendment of Electricity Supply Act to enable induction of private sector to participate in power generation, to provide for level playing field for domestic and foreign companies in terms of the Government of India is a matter of policy and, therefore, the idea of foreign collaboration by itself cannot be a suspicious circumstance. The Memorandum of Understanding arose as a result of Power Seminar held on June 16, 1992 enabling the introduction of different parties. Karnataka Cabinet met on July 15, 1995 and proposed signing of various Memorandum of Understandings with various companies and the Chief Minister visited different places. The Memorandum of Understanding with Cogentrix provides for period of exclusivity, transference of existing permits and information, ability to induct partners and confidentiality. The next Memorandum of Understanding provided for promoters to undertake feasibility study, develop power sales structure and tariff design, all at considerable cost. The selection of Cogentrix was after examining the financial and executing capability as per the Central Electricity Authority guidelines. The techno-economic clearance was granted by the Central Electricity Authority after eight months of review. Foreign Investment Promotion Board granted permission for foreign investment of May 11, 1993 which also assessed the technical and financial capability of the promoters. The financial statements of the Cogentrix indicates that it is a US $944 million dollar company and not a fly by night company as alleged. The shifting of site from Bangalore to Mangalore has been considered earlier in the decision of the High Court of Karnataka, adverted to earlier. There was a change in the set up 1000 MW at Mangalore instead of 2 x 250 MW at Bangalore and 2 x 250 at Mangalore. Utilisation of transmission lines by the Cogentrix cannot be suspicious circumstance because it proposed 400 KV transmission line interconnecting Mangalore, Bangalore and Mysore has not been conceived exclusively for the Cogentrix but is for other projects totalling 2500 MW planned for the region. The increase in the electricity rates is subject to the Electricity Supply Act and clearance being given by different Departments of the Union and State Ministries. Therefore, that again cannot be a circumstance which could give rise to any suspicion. We have adverted in detail to the balance sheet showing incurring of expenses in India. Thus none of the thirteen B C D E F G H

A circumstances noticed by the High Court can be characterised as giving rise to any suspicion, much less a basis for investigation by a criminal investigating agency.

It is difficult to visualise that when an agreement had been entered into with a foreign company it has been done under suspicious circumstances, B particularly when it had stood the test of scrutiny under three different Governments headed by at least three different Chief Ministers and when the examination of the project and its approval was considered by different statutory and other agencies of the Government of India. Could it still be said that there had been kickbacks to any one of them or all of them in the matter C of entering into a Memorandum of Understanding or in continuation of the same? The law, in fact, is otherwise. The acts of persons will not be subject of criminal investigation unless a crime is reported to have been committed or reasonable suspicion thereto arises. On mere conjecture or surmise as a flight of fancy that some crime might have been committed, somewhere, by somebody but the crime is not known, the persons involved in it or the place D of crime unknown, cannot be termed to be reasonable basis at all for starting a criminal investigation. However, condemnable be the nature or extent of corruption in the country, not all acts could be said to fall in that category. The attempt made by the High Court in this case appears to us to be in the nature of blind shot fired in the dark without even knowing whether there is E a prey at all. That may create sound and fury but not result in hunting down the prey. The High Court has looked at different circumstances in the case with a jaundiced eye, particularly when we look at the comments made by it in relation to the amount of paper used and standing of the learned counsel appearing in the case. Naturally when stakes are high one would not like to take a risk in allowing a matter to go by default. The persons concerned will F take all precautions by putting forth every point in their favour and to be represented by the best of counsel they can engage. Even that circumstance is taken to be against the parties concerned. We think, the High Court has gone too far. We would not have made this comment at all had the High Court given due weight to the rival submissions made by the parties. The High G Court has not at all analysed the contentions put forth by either party. Hardly any reasons are for the coming in the order. What is stated by the writ petitioners and the respondents are summarised. When the High Court steers itself clear of expressing any opinion one way or the other even as to whether a *prima facie* case exists or not and whether there is reasonable suspicion of any crime having been committed, it is difficult to accept the view taken H by the High Court.

Reference has been made to certain cases including *Vineet Narain* v. *Union of India,* [1996] 2 SCC 199, wherein this Court had monitored the police investigations by passing series of orders. But that was a case where the investigating agency, although had gathered evidence pursuant to a probe started long back, was not proceeding with investigation since the matter involved persons in very high positions in Government and in public life. The lethargy of CBI was inexplicable and hence this Court monitored the investigation. The principle of this decision is not at all applicable to the facts of the present case. Nor are we impressed with the argument that this Court should not in exercise of powers conferred under Article 136 of the Constitution interfere with the order under appeal inasmuch as an order as to wrongful investigation will certainly put a person to jeopardy when there is no justification to do so.

In the result, we think that the order made by the High Court has got to be set aside, but this order will not preclude the parties concerned on finding appropriate material to place the same before any authorised agency to register the case and investigate the matter and, in the event there is any inaction on their part, may seek relief in an appropriate court.

Subject to what is stated by us, we set aside the order made by the High Court and allow these appeals.

In the view we have of the matter, we do not think that the appeal filed by the other side can be allowed. Special leave Petition (C) No. 12834 of 1998 preferred by Shri Arun Kumar Agarwal shall stand dismissed. In the circumstances of the case, we direct the parties to bear their own costs.

K.K.T. Appeals allowed and Petition dismissed.