IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.18868 of 2007
With
SPECIAL CIVIL APPLICATION No.19045 of 2007
With
CIVIL APPLICATION No.3774 of 2008
In
SPECIAL CIVIL APPLICATION No.19045 of 2007
With
SPECIAL CIVIL APPLICATION No.19046 of 2007
With
SPECIAL CIVIL APPLICATION No.19047 of 2007
With
SPECIAL CIVIL APPLICATION No.19048 of 2007
With
SPECIAL CIVIL APPLICATION No.19049 of 2007
With
SPECIAL CIVIL APPLICATION No.19050 of 2007
With
SPECIAL CIVIL APPLICATION No.23018 of 2007
With
SPECIAL CIVIL APPLICATION No.23019 of 2007
With
SPECIAL CIVIL APPLICATION No.23151 of 2007
With
SPECIAL CIVIL APPLICATION No.4201 of 2008
With
SPECIAL CIVIL APPLICATION No.4468 of 2008
With
MISC.CIVIL APPLICATION No.2362 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MR.JUSTICE D.N.PATEL Seen

HONOURABLE MR.JUSTICE J.C.UPADHYAYA Seen

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES

2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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GUJARAT STATE PETROLEUM CORPN. LTD. - Petitioner(s)

Versus

THE UNION OF INDIA & 7 - Respondent(s)

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Appearance :

SPECIAL CIVIL APPLICATION No.18868 of 2007

Mr. S.N. Soparkar, Senior Advocate, with Mr. Aspi M. Kapadia for the petitioner

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.1 – Union of India;

Mr. Nirupam Nanavaty, Senior Advocate, with Mr. Maulik Nanavati with Mr.N.L. Ganapathi, with Mr. Dhananjay Shahi for respondent No.2 – PETRONET LNG LTD.

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.3 – GAIL

Mr. Suresh N. Shelat, Senior Advocate, with Mr. Manish Bhatt with Ms. Dhara M. Shah for respondent No.4–IOCL

Mr. Ashish Dholakia with Mr. Pathik Acharya for respondent No.5–BPCL
Mr. Devang Nanavati with Mr. Saurin Mehta and Mr. R.H, Parikh for respondent No.6-(RATNAGIRI)

Mr. Nagendra Rai, Senior Counsel, Mr.Amit Kapur, for Mr. Nachiketa S. Joshi, Mr. Sudhakar B. Joshi, Mr. Apoorva

Misra, Mr.Ravi Prakash, Mr. Varun Agarwal for respondent No.7 – State of Maharashtra

Mr. Vikas Singh, Additional Solicitor General of India & Senior Counsel, Mr.Amit Kapur, for Mr. Nachiketa S. Joshi, Mr. Sudhakar B. Joshi, Mr. Apoorva Misra, Mr.Ravi Prakash, Mr. Varun Agarwal–for respondent No.8-MSEDCL

S Y N O P S I S.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
AND
HONOURABLE MR.JUSTICE D.N.PATEL
AND
HONOURABLE MR.JUSTICE J.C.UPADHYAYA

Date : 16/05/2008

COMMON C.A.V. JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Someone who thinks logically is a nice contrast to the real world. Normally that is what is required of a judge. While adjudicating a lis a judge is expected not to fall prey to over simplified generalisations made on basis of cited, but inapplicable, precedents. The problem of stereotyping is that it makes particular into the

general, often leading to wholly misleading conclusions.

2. This group of petitions has been heard by the Larger Bench constituted in compliance with directions issued by the Hon'ble Supreme Court vide order dated 26.02.2008 in Petition(s) for Special Leave to Appeal (Civil) No(s) 21397-21399 of 2007 which reads as under :

> *"Transfer Petition (c) Nos.513-515 of 2007 and 557-564 of 2007 are taken on Board. These special leave petitions have been filed against the interim order(s) passed by the High Court of Gujarat refusing stay to the petitioners during the pendency of the writ petitions.*
>
> *Petition(s) for Special Leave to Appeal (Civil) No(s). 21397-21399/2007.*
>
> *Learned Senior Counsel appearing for the petitioners as well as learned Solicitor General and Additional Solicitor Generals and other respective counsel are agreed for disposal of these special leave petitions in the following terms :*
>
> *1. We would request the Hon'ble Chief Justice of the Gujarat High Court to constitute a three Judge Bench by 07th March, 2008 and the*

hearing of the writ petitions shall start from the 10th March, 2008 on day do day basis and dispose them off as expeditiously as possible, without being influenced by any of the observations made in the impugned orders.

2. In case, the petitioners succeed, then the High Court would be at liberty to pass such directions as it may deem fit regarding refund of the amount in accordance with law.

3. All contentions are left open. Ordered accordingly.

Transfer Petition(c) Nos. 513-515 of 2007 have been filed seeking transfer of Special Civil Application No. 18868/2007 pending in the Gujarat High Court to the High Court of Delhi and to be heard along with WP(C) No.5098 of 2007 pending in the High Court of Delhi on the same point whereas Transfer Petition (C) Nos. 557-564 of 2007 have been filed by the Union of India seeking transfer of writ petitions pending in the Gujarat High Court as well as Delhi High Court to this Court.

In view of the aforesaid order passed by us today in the special leave petitions, transfer petitions seeking transfer of writ petitions pending before the Gujarat High Court have become infructuous and are dismissed as such. Insofar as Civil Petition(s) for Special Leave to Appeal (Civil) No(s). 21397-21399/2007

Writ Petition No. 5098 of 2007 pending before the Delhi High Court is concerned, since we have disposed of the special leave petitions by requesting the Gujarat High Court to dispose of the writ petitions pending before it, we deem it appropriate to transfer the writ petition pending before the High Court of Delhi to the Gujarat High Court and to be heard along with the writ petitions pending before the Gujarat High Court. We order accordingly. We would request the Hon'ble Chief Justice of the High Court of Delhi to direct the Registrar, High Court of Delhi to forthwith transfer the entire record relating to writ petition No. 5098 of 2007 to the Gujarat High Court so as to reach there before 07th March,2008. It is also brought to our notice that one more writ petition bearing No. 4853 of 2007 is pending before the High Court of Madhya Pradesh, Gwalior Bench on the same point. Although the parties are not before us but keeping in view the facts and circumstances of the case and in order to avoid conflicting decisions and further delay in the hearing of the writ petitions before the Gujarat High Court, the same is also transferred to the Gujarat High Court. We would request the Hon'ble Chief Justice of the High Court of Madhya Pradesh to direct the Registrar, High Court of Madhya Pradesh to forthwith transfer the entire record relating

to writ petition No. 4853 of 2007 to the Gujarat High Court so as to reach there before 7th March,2008. Since this order has been passed in the absence of the parties, if any of the parties has any objection to transfer of the case Petition(s) for Special Leave to Appeal (Civil) No(s). 21397-21399/2007 from Gwalior to Gujarat, it may move this Court for variation of this order. The special leave petitions and transfer petitions are disposed of in the above terms.

(Praveen Kr.Chawla) (Kanwal Singh)
Court Master Court Master ”

The petitions have been accordingly heard on day to day basis.

3. In light of the aforesaid directions of the Apex Court the petitions have been taken up for final hearing and disposal. **Rule**. The learned Advocates appearing for respective parties are directed to waive service of Rule in this Special Civil Application as also in all cognate matters.

4. The principal challenge in these petitions is Central Government directive issued by way of

communication dated 06/03/2007. The said directive reads as under:

" L-11012/1/06-GP-II/Vol.-II
Government of India
Ministry of Petroleum & Natural Gas

Shastri Bhavan, New Delhi
March 6, 2007.

To,
The Managing Director & CEO,
Petronet LNG Ltd.
New Delhi.

Subject : Policy decision as to pooling of RLNG prices.

Sir,

The question of prices to be charged for RLNG from different customers has been under consideration of the Government. After considering existing practices and to avoid loading high cost of additional RLNG being made available to the prospective customers, it has been decided, after examination of all aspects, in public interest, that the gas prices being charged on supply of RLNG procured under long term contracts should be on a non-discriminatory basis and uniform pooled prices should be charged from all the existing and new consumers.

2 You are advised accordingly and requested to give effect to the same immediately.

Yours faithfully,

Sd/-
(Deepak Ratanpal)
Under Secretary to the Govt. of India.

Copy to :-

1 Chairman, IOC, New Delhi.

2 C & MD, GAIL, New Delhi.
3 C & MD, BPCL, Mumbai ”

5. Gujarat State Petroleum Corporation Limited (GSPCL), petitioner of Special Civil Application No. 18868 of 2007, is a Government Company engaged in business of Oil and Gas exploration and also marketing of oil, natural gas and regasified liquefied natural gas (RLNG). GSPCL has entered into contracts on 07.02.2004 to purchase RLNG from various agencies including Gas Authority of India Limited (GAIL), Indian Oil Corporation Limited (IOCL) and Bharat Petroleum Corporation Limited (BPCL). It is an agreed position between the parties that the said contract provided for specified quantities of RLNG at a fixed rate upto 31.12.2008. The case of the petitioners is that by the so called directive dated 06.03.2007 under a purported policy decision Union of India (UOI) is seeking to disturb the concluded contracts by overriding the terms of contract between two private parties.

6. The facts which are not in dispute are that

one Ras Gas Agency based at Qatar has agreed to supply liquefied natural gas (LNG) for a period of 25 years under a sale purchase agreement entered into in July, 1999 by Ras Gas with PETRONET LNG, (PETRONET) a Company incorporated under the Companies Act, 1956. Ras Gas and PETRONET entered into a fixed price five years contract for sale of LNG by Ras Gas to PETRONET on 26.09.2003. Under the said contract PETRONET is to receive contracted quantity of LNG which is 5 Million Metric Tonnes Per Annum (MMTPA) and the price of LNG is fixed between 2 to 3 US$ per Million Metric British Thermal Unit (MMBTU).

7. Pursuant to contract with Ras Gas, PETRONET entered into back to back contracts with GAIL, IOCL and BPCL for sale of 5 MMTPA LNG after regasifing the same. In other words, PETRONET after purchasing LNG from Ras Gas converted the same into RLNG before supplying to three Government Companies i.e. GAIL, IOCL and BPCL, who can be described as distributing companies, though at places the

parties have described the three distributors as Offtakers. LNG transported (shipped) from Qatar is unloaded at Dahej Port located in South Gujarat at a terminal belonging to PETRONET where LNG is first converted into RLNG and thereafter transmitted through pipeline.

8. At this juncture, it is necessary to take note of the fact that PETRONET is not a Government Company. The said Company is a joint venture involving public and private participation promoted by GAIL, IOCL, BPCL and Oil and Natural Gas Corporation Limited (ONGC). PETRONET was set up in 1998 to import LNG, Build and operate terminals so as to receive, store and undertake regasification of imported LNG. 50% shareholding of PETRONET is in the hands of four promoter corporations while the balance 50% is held by private entities/persons,i.e.public.

9. RLNG received from PETRONET by three distributing companies is sold to some of the

petitioners and various other persons. Thus in effect there are three stages or three contracts, the common thread running through all the contracts and at all the stages is that the contracts are for supply of 5 MMTPA of LNG/RLNG upto 31.12.2008 at a fixed price i.e. foreign component of the price is frozen : [i] The first stage or the first contract is between Ras Gas and PETRONET for supply of LNG, [ii] the second stage or the second contract is between PETRONET and the three distributor companies for supply of RLNG, [iii] the third stage or the third contract is between the three distributor companies and their respective customers.

10. The second and third stages involve more than one contract – the total quantity of 5 MMTPA gas remaining constant. The reason is, PETRONET does not have additional capacity at Dahej to either receive, store or regasify quantity of gas exceeding 5 MMTPA.

11. In the aforesaid backdrop of facts the case of the petitioners is that Union of India cannot be permitted to direct one of the contracting parties to modify/rewrite the terms of contracts entered into between the parties, more particularly when contracts at stages 1 and 2 are not being disturbed/modified/rewritten in any manner whatsoever. In other words, if Ras Gas is not entitled to and is not charging anything more than the contracted prices to PETRONET, PETRONET in turn is not entitled to charge anything more than the contracted price to the distribution companies, the distribution companies cannot charge anything more from the petitioners who have direct contracts with the distributor companies. That under the guise of directive from Union of India the distributor companies cannot call upon PETRONET to recover a larger amount from the distributor companies so as to enable the distributor companies to recover such larger amount viz. more than the contracted price, from the petitioners who have contracted with the distributor companies. That the entire

exercise is malafide only to artificially reduce cost price of RLNG in hands of one Ratnagiri Gas Power Project Limited (RGPPL).

12. It is an admitted position that a fresh agreement dated 03.07.2007 between Ras Gas and PETRONET, for supply of further 1.5 MMTPA of LNG at the then prevailing price, which approximately comes to 8 to 9 US$ per MMBTU, has been entered into. It is further an accepted position that this entire quantity of LNG i.e. 1.5 MMTPA received by PETRONET is being supplied to RGPPL through the distributor companies. The petitioners therefore contend that to benefit RGPPL the impugned directive dated 06.03.2007 has been issued by Union of India, but the direct consequence of the said communication is escalation in the foreign component of the cost price of RLNG in the hands of the petitioners. That just as RGPPL is to use RLNG for production of electric power even the petitioners are engaged in production of electric power which is being supplied to various consumers

of electricity.

13. GSPCL supplies RLNG to Gujarat Paguthan Energy Corporation Limited (Petitioner of SCA No. 23151 of 2007), Essar Power Limited (Petitioner of SCA No. 19045 of 2007) etc. who produce electricity after consuming RLNG and the electricity so produced is sold to Gujarat Urja Vikas Nigam Limited (GUVNL) (Petitioner of SCA No.23018 of 2007). GUVNL is a Government Corporation involved in transmission and distribution of electric power procured from various sources, including from the aforesaid consumers of RLNG who are customers of GSPCL.

14. Similarly Gujarat State Electricity Corporation Ltd. (GSECL) (petitioner of SCA No.19048 of 2007) is also receiving RLNG from GAIL under a contract executed on 09.02.2004 and using such RLNG for producing electricity and selling to GUVNL for further transmission and distribution of electric power through four different

regional/zonal companies.

15. Gujarat Alkalies and Chemicals Limited (GACL) (Petitioner of Special Civil Application No. 19050 of 2007) has a captive gas based power plant.

16. Gujarat Narmada Valley Fertilizer Company (Petitioner of Special Civil Application No. 19049 of 2007) uses RLNG for manufacturing different chemicals for various uses including manufacture of fertilizers.

17. Gujarat Industries Power Company Limited (Petitioner of Special Civil Application No. 19047 of 2007) is involved in power generation which is sold to GUVNL for being transmitted and distributed.

18. During course of hearing the learned Advocates for the various petitioners have referred to various clauses of the respective agreements entered into by the petitioners with the

distributor companies as there is a serious dispute between the parties as to whether the contracts permit, or do not permit, revision of price of RLNG supplied by the distributor companies. However, in light of the view that the Court is inclined to adopt it is not necessary to record the respective contentions as to operation of, import of and the interpretation of various clauses of agreements.

19. There are other petitioners who enter at stage No.4 viz. who are having contracts to purchase RLNG from GSPCL at a fixed rate upto 31.12.2008. In so far as such petitioners are concerned, it is apparent that the said petitioners have no direct nexus with distributor companies and are thus not directly affected, though there may be an indirect effect of the litigation between the distributor companies on one hand and the petitioners, who are having agreements with the distributor companies. In the circumstances, for the time being it is not necessary to state anything further as regards such petitioners. Suffice it to state that case of such

petitioners is that if GSPCL and similarly situated petitioners are affected by the escalation of the cost price it is the fourth stage petitioners who would directly be affected in the event the increased price component is passed over to such petitioners.

20. On behalf of Union of India and other respondents the principal contention raised before the Court is whether Government of India is justified in making a policy decision to ensure that the price of gas charged in relation to RLNG supplied after procuring under long term contracts should be uniform, nondiscriminatory pooled price from all existing and new customers ? In support of the submission attention was invited to historical background in which Ras Gas agreed to supply LNG @ 2 to 3 US$ per MMBTU in 2003 when the agreement was entered into between Ras Gas and PETRONET. The Court was also informed about the global shortage of natural gas and difficulties in procuring the same coupled with the prices of

Oil & Petroleum Products in international markets to contend that an action which may be seen disadvantageous vis-a-vis the petitioners at present would ultimately be beneficial to the petitioners in future. That the emphasis of Union of India was to ensure proper growth of power and fertilizer sectors, which are priority sectors, and are facing production deficit at present. It was further submitted that Union of India had taken a policy decision and the High Court should be slow and unwilling to interfere with the policy decision unless and until the Court came to the conclusion that the policy was arbitrary or unreasonable or was detrimental to public interest. That the settled legal position did not permit the Court to strike down a policy decision merely because a better policy could have been framed. It was therefore urged that the petitions deserved to be rejected.

21. Alternatively, it was pleaded that Union of India was well within its right to issue a

directive to the Government Companies who were bound by their respective articles of association which permit intervention and issuance of directions. That accordingly the offtakers, each of them having similarly worded articles of association, were bound by the directions issued by the Central Government and were therefore bound to charge and recover enhanced price for RLNG supplied by offtakers. That Government of India was of the opinion that the contract between offtakers and their respective customers permitted enhancement/revision of the price of gas supplied, but if the petitioners were of the opinion that the contract did not permit such revision it was left upto the petitioners to take appropriate steps in accordance with law in light of their respective rights available under the terms of their respective contracts. That the Court would not interfere with terms of the contract and relegate the parties to avail of appropriate legal remedies, inclusive of arbitration, as may be provided by the contracts. Lastly, it was pleaded that there was

clause of *Force Majure* and the effect thereof would have to be worked out by the contracting parties.

22. The contentions raised by various counsels appearing for various petitioners and various respondents have not been individually reproduced and recorded for the simple reason that the basic controversy between the parties is as noted hereinbefore. All the parties put together, through their respective counsels, have cited more than One hundred authorities. Suffice it to state that the Court has taken note of the ratio laid down in the said authorities without finding it necessary to enumerate and list the same and thus burden the judgment.

23. The principal controversy between the parties relates to the decision, termed to be a policy decision, communicated vide letter dated 06.03.2007 by the Union of India :the case of the petitioners being that the so called policy cannot be termed to be a policy considering that the decision is in interest of only one party viz. RGPPL, while the

case of the respondents, more particularly Union of India, is that the decision is a policy decision and the Court should not intervene in policy matters.

24. Though a great deal has been said, written and expounded as regards policy, in the context of the controversy brought before the Court the plain meaning of the word 'policy' is required to be recapitulated.

> ***<u>72. Corpus Juris Secundrum</u>.***
> ***C.J.S. Principal and Surety – By Francis J. Ludes & Harold J. Gilbert (Page 208)***
>
> ***"POLICY.*** *The word "policy" is defined as meaning a settled or definite course or method adopted by a government, institution, body, or individual.*
>
> *As applied to a rule of law, "policy" refers to its probable effect, tendency, or object, considered with respect to the social or political well-being of a state".*
>
> ***Black's Law Dictionary – Eighth***

Edition – By Bryan A. Garner (Page 1196)

***"policy**. **1**. The general principles by which a government is guided in its management of public affairs. See PUBLIC POLICY. **2**. A document containing a contract of insurance;"*

Judicial Dictionary - 13th Edition – By K.J. Aiyar (Page 749)

***"Policy.** The word 'policy' according to the Black's Law Dictionary, 16th edn, means the general principle by which a government is guided in its management of public affairs and according to the Concise Oxford Dictionary 8th edn a course of principle of action adopted or proposed by a government [Adarsh Matsyodyog Sahkari Sanstha Ltd. v. M P Rajya Matsya Vikas Ngam 1995 JLJ 682 at 686]"*

A Dictionary of Modern Legal Usage - 2nd Edition – By Bryan A. Garner (Page 670)

***"policy; polity.** Policy, by far the more common of these words, means*

"a concerted course of action followed to achieve certain ends; a plan." It is more restricted in sense than polity, which means (1) "the principle upon which a government is based"; (2) "the total governmental organization as based on its goals and policies." Sense (2) is more usual – e.g.: "The ancient doctrine of the common law, founded on the principles of the feudal system, that a private wrong is merged in a felony, is not applicable to the civil polity of this country." / "As to the practicing lawyer, in our polity he is potentially law-writer, law teacher, legislator, or judge." (Roscoe Pound)

Webster's Comprehensive Dictionary – Published by Trident International (Page 976)

***"pol-i-cy** 1 Prudence or sagacity in the conduct of affairs. **2** A course of plan of action, especially of administrative action. **3** Any system of management based on self-interest as opposed to equity; finesse in general; artifice. **4** Obs. Political science; government. See Synonyms under POLITY."*

Shorter Oxford English Dictionary – Fifth Edition - Vol-II (Page 2267)

*"**policy** In branch I from Old French policie from Latin politia from Greek politeia citizenship, government, etc., from polites, from polis city, state: cf. POLICE noun. In branch interim injunction from assoc. with Latin politus polished, refined. Cf. Also POLITY.]*

***I 1** An organized and established form of government or administration; a constitution, a polity. Now rare or obsolete. LME.*
***2** Government; the conduct of public affairs; political science. LME-L18.*

***3** Political sagacity or diplomacy; prudence or skill in the conduct of public affairs. Also, political cunning. LME.*

***4 a** Prudent or expedient conduct or action; sagacity, shrewdness. Also, cunning, craftiness. LME **b** A contrivance, a crafty device, a trick. LME-M19.*

> ***5*** *A course of action or principle adopted or proposed by a government, party, individual, etc; any course of action adopted as advantageous or expedient. LME.”*

25. Thus, it can be summarised that there has to be a settled or definite course/method adopted by a Government in the course of management of public affairs. In other words, the total Governmental organisation as based on its goals and policies reflecting prudence or sagacity in the conduct of affairs, especially of administrative action. However, such conduct has to be the conduct of public affairs guided by prudence based on general principles.

26. Thus,when the word 'policy' is read and applied to the administrative action, viz. conduct of governmental affairs, one has to necessarily bring in the concept of policy being for public good, or public interest. Anything that is done contrary to 'public policy' is a harmful thing, though the concept of what is for the public good or in the public interest or what would be injurious or harmful

to the public good or public interest has varied from time to time. However, one thing is certain that the interest of all the public must be taken into account; but in practice one finds that in many cases what seems to be in contemplation is the interest of only one section of the public, and it may be a small section at that. At this juncture, the Court is required to weigh the interest of the whole community as well as the interest of a considerable section of the community. To put it differently, the Court may be required to strike a balance in express terms between community interest and sectional interest. For this purpose the Court would also be required to apply the test of fairness while evaluating as to whether the decision is in interest of a well defined section of the community and such a classification is reasonable at the anvil of established principles. The following decisions of the Apex Court delivered over a period of two and a half decades aptly lay down the aforesaid concept and the relevant extracts may be usefully reproduced :

(a) Gherulal Parakh Vs. Mahadeodas Maiya & Ors., AIR 1959 SC 781 (Page

795 – Paragraph No.23)

“..... The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one" "unruly horse", etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public .....“(emphasis supplied).

(b) Murlidhar Agarwal & Anr. Vs. State of Uttar Pradesh & Ors., AND Murlidhar Agarwal & Anr. Vs. Ram Agyan Singh, AIR 1974 SC 1924 (Page 1929–1930 Paragraph Nos.30, 31 and 32)

30*. "Public policy'' has been defined by Winfield as "a principle of judicial legislation or interpretation founded on the current needs of the community''. (See Percy H. Winfield, "Public Policy in English Common Law'', 42 Harvard Law Rev. 76). Now, this would show that the interests of the whole public must be taken into account; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public, and a small section at that. The explanation of the paradox is that the courts must certainly weigh the interests of the whole community as well as the interests of a considerable section of it, such as tenants, for instance, as a class as in this case. If the decision is in their favour, it means no more than that there is nothing in their conduct which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a more tacit*

consideration. The courts may have to strike a balance in express terms between community interests and sectional interests. So here we are concerned with the general freedom of contract which everyone possesses as against the principle that this freedom shall not be used to subject a class, to the harassment of suits without valid or reasonable grounds. Though there is considerable support in judicial dicta for the view that courts cannot create new heads of public policy, see Gherulal Parakh v. Mahadeodas Maiya, 1959 Supp (2) SCR 406 at p. 440 = (AIR 1959 SC 781), there is also no lack of judicial authority for the view that the categories of heads of the public policy are not closed and that there remains a broad field within which courts can apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community. See Dennis Lloyd, "Public Policy'', (1953), pp. 112-113.

***31**. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it*

were to remain in fixed moulds for all time.

***32**. If it is variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? The judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with judges. The difficulty of discovering what public policy is at any given moment certainly does not absolve the judges from the duty of doing so. In conducting an enquiry, as already stated, judges are not hide bound by precedent. The judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction he must cast his gaze. The judges are to base their decision on the opinions of men of world, as distinguished from opinions based on legal learning. In other words, the judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The judges must consider the*

social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. Of course, it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is not open to the judges to make a sort of referendum or hear evidence or conduct an inquiry as to the prevailing moral concept. Such an extended extra-judicial enquiry is wholly outside the tradition of courts where the tendency is to 'trust the judge to be a typical representative of his day and generation'. Our law- relies, on the implied insight of the judge on such matters. It is the judges themselves, assisted by the bar,who here represent the highest common factor of public sentiment and intelligence. See Percy H. Winfield, "Public Policy in English Common Law'', 42 Harvard Law Rev. 76; and also, Dennis Lloyd, "Public Policy'' (1953), pp. 124-25. No doubt, there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. But this is beside the point. The point is rather that this power must be lodged somewhere and under our Constitution

and laws, it has been lodged in the judges and if they have to fulfil their function as judges, it could hardly be lodged elsewhere. See Cardozo. "The Nature of Judicial Process''. pp. 135-136.

(c) Central Inland Water Transport Corporation Ltd. & Anr. Vs. `Brojo Nath Ganguly & Anr., AND Central Inland Water Transport Corporation Ltd. & Anr. Vs. Tarun Kanti Sengupta & Anr., AIR 1986 SC 1571 (Page 1612– Paragraph No.93)

***93**. The Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts*

take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from Inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Mines, Limited (1902) AC 484, 500, "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years" earlier, Burrough, J., in Richardson v. Mellish (1824) 2 Bing 229, 252 SC 130 ER 294, 303, and (1824-34) All ER Reprint 258,

266. described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which' conjure up before our eyes the picture of the young Alexander the Great Taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Association Ltd. (1971) Ch 591, 606, "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held "the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said :

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative

them."

> *It is thus clear that the principles. governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.*

27. The following decisions lay down the principles which would permit a Court to enter into the domain of judicial review in respect of disputes relating to contractual obligation, more particularly when the obligation is of a public

character.

(d) L.I.C. Of India & Anr. Vs. Consumer Education and Research Centre and Ors., AIR 1995 SCC 1811:

> *"**28**. In Kumari Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 : (AIR 1991 SC 537), this Court in paragraph 22 pointed out that the private parties are concerned only with their personal interest but the public authority are expected to act for public good and in public interest. The impact of every action is also on public interest. It imposes public law obligation and impress with that character, the contracts made by the State or its instrumentality. "It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to the adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case*

irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions." In Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries, (1993) I SCC 71 at P.76, : (1993 AIR SCW 1509 at P.1513), in para 8, this Court held that "the mere reasonable or legitimate expectation of a citizen may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process." In Sterling Computers Ltd. v. M. and N. Publications Ltd., (1993) 1 SCC 445 at Page 464 : (1993 AIR SCW 683 at P.697) Para 28, it was held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. In Union of India v. M/s. Graphic Industries Co., (1994) 5 SCC 398 : (1994 AIR SCW 4617), this Court held that even in contractual matters public authorities have to act fairly; and if they fail to do so approach under Article 226

would always be permissible because that would amount to violation of Article 14 of the Constitution. The ratio in General Assurance Society Ltd. v. Chandumull Jain, (1966) 3 SCR 500 : (AIR 1966 SC 1644), relied on by the appellants that tests laid therein to construe the terms of insurance contracts bears no relevance to determine the constitutional conscience of the appellant in fixing the terms and conditions in Table 58 and of their justness and fairness on the touchstone of public element. The arms of the High Court is not shackled with technical rules or of Procedure. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amendable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy in now narrowed down. .....”

(e) Union of India & Ors. Vs. Dinesh Engineering

Corporation and Anr., (2001) 8 SCC 491:

> *"12. ..... There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and Courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the Courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. .....*
>
> *..... Any decision be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."*

(f) *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer & Ors., (2005) 1 SCC 625:*

> *"9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy*

must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

***10**. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is*

per se arbitrary.

***17**. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into the judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See Parbhani Transport Coop. Society Ltd. v. RTA, Shree Meenakshi Mills Ltd. v. Union of India, Hari Chand Sarda v. Mizo Distt. Council, Krishan Kakkanth v. Govt. of Kerala and Union of India v. International Trading Co.)*

28. On a plain reading of the directive/communication dated 06/03/2007 one may feel that once the subject matter is stated to be a policy decision, the Government having taken a decision after examination of all aspects, in public interest, the Court should not intervene. If one goes by the form of the communication that would be the result. However, it is well established that the Court is required to consider both the form and the substance of a document and the transaction. This is more so in a case where the challenge is to the existence or otherwise of the policy. Hence, even if one permits the Union of India play in joints in the decision making process yet on application of the tests for judicial scrutiny the substance of the decision is not backed by the decision making process.

29. To examine and to appraise the actual decision making process the Court had requested Assistant Solicitor General Mr. Harin Raval to place before the Court the original file and the Court has gone

through the said file. On going through the file it becomes apparent that in fact the decision dated 06.03.2007 cannot be termed to be a policy decision. The entire file pertains to :(i) Funding the completion cost for RGPPL;(ii) Restructuring of the project; and (iii) Treatment of the LNG facility. This becomes clear from the Minutes of the Meetings held on 27.02.2007 and 02.03.2007. These two meetings have been held by the Committee formed under the Chairmanship of Secretary (Financial Sector), Ministry of Finance, Government of India, comprising various stock holders of RGPPL following the meeting of the Empowered Group of Ministers (EGOM) held on 22.02.2007. This meeting and the minutes thereof assume importance as the entire case of the respondents, including Union of India, is founded on the meeting held on 22.02.2007 by EGOM. The genesis of the various meetings held by EGOM and Committee(s) of various Secretarial level officers is found in the note dated 24.03.2006 bearing No. L.11012/1/06-GP-II, Government of India, Ministry of Petroleum and Natural Gas. The subject of the note is *“Review of pipeline connectivity to*

Dabhol Power Project and LNG terminal". It is an admitted position that RGPPL is the changed name of Dabhol Power Project wherein apart from setting up of power plant one LNG terminal is also being set up for receiving, processing and transmitting imported LNG of atleast 5MMPTA capacity. Therefore, the submission on behalf of the respondents that there is a policy decision to adopt a pooled uniform price of RLNG is factually not borne out from the record.

30. In fact, the file dates prior to March, 2006 as can be seen from the extracts of the Minutes of the Meeting dated 02.09.2004 held by Cabinet Committee on Economic Affairs. The EGOM has been set up and constituted to consider and decide all issues relating to <u>restructuring of the project</u> (emphasis supplied). The Minutes of the Meeting of the EGOM specifically record that the meeting was held to review the status of Restructuring and Revival of the Dabhol Power Project and the major outstanding issues that needed review at that stage were : [a] completion of the gas pipeline, [b] signing of the

gas supply agreement and the power purchase agreement, and [c] funding for the completion of the project. It is only in paragraph No.7 that incidentally the issue regarding uniform pooled price for all existing and new customers came up. The issue of supply of RLNG to Dabhol Power Project is actually not a part of the restructuring and revival of that project, but is actually only a stop-gap arrangement. This becomes clear from what is recorded in paragraph Nos. 8 and 9 of the Minutes of the Meeting dated 22.02.2007 of the EGOM. It is categorically recorded that :

> *"8 Chairman, RGPPL apprised the EGOM about the completion of Power Block. He stated that Power Block-II that became operational in April, 2006 was presently running around 330 MW due to pre-mature failure in one of the gas turbine and will be restored to 740 MW by end March, 2007. Power Block-III is scheduled to be completed by April, 2007 as against the original schedule of July,2007. It was mentioned that this completion schedule was subject to*

availability of bridge loan of Rs.400 crore from MSEDCL by 28.2.2007.

9. It was further stated that the operation of the Power Block required availability of 1.5 mmpta of R-LNG by 31st March, 2007 and the balance 0.6 mmpta R-LNG by November, 2007. Cabinet Secretary informed that the GAIL has assured that the gas pipeline would be operational by March end barring a delay, if at all of maximum 7 to 10 days. This would supply the 1.5 mmpta of R-LNG supplied by PLL. However, since PLL faces a capacity constraint the additional quantity of fuel required will be procured and supplied by PLL as LNG at Dabhol. The LNG facility of RGPPL that would be ready by November, 2007 would be capable of regasifying this quantity. Since 10-15% of the LNG facility can be operational without the breakwater this target was achievable". (emphasis supplied).

31. Thereafter, in paragraph No.11(b) it is recorded

that full plant load operation would require 2.1 MMPTA of gas supply, out of which PETRONET will supply 1.5 MMPTA through pipeline and the remaining 0.6. MMPTA would be procured by PETRONET from other source as LNG consignments and regasified at the LNG facility of RGPPL.(emphasis supplied). In paragraph No. 11(d) it is recorded that efforts would be made to delink the LNG facility and hive it off to another party. Several parties like PETRONET and GAIL have shown interest. The Committee under the Chairmanship of Secretary (Financial Sector), is to explore various scenarios and submit recommendations to be placed before the EGOM. Once again when one reads communication dated 21.02.2007 issued by Director (GP), Government of India, Ministry of Petroleum and Natural Gas it becomes clear that the pooled price of LNG will come into effect from the date of supply of LNG to Dabhol Power Project and this would remain in force till arrangement for sourcing LNG or Natural gas on long term basis is made for Dabhol LNG terminal.(emphasis supplied).

32. Therefore, it is apparent that not only is there no policy decision as regards uniform pooling of

price but the decision is in relation to only one entity viz. RGPPL,i.e. Dabhol Power Project, and that too for a limited period as a stop-gap arrangement till the point of time the LNG terminal which is being set up at Dabhol is made operational. The submission on behalf of the petitioners that PETRONET does not have any capacity for receiving and regasification of imported LNG beyond 5+1.5 MMPTA, thus, appears to be well founded. The record itself reveals that PETRONET and/or GAIL is in the process of developing and setting up of LNG terminal at Dabhol with regasification facility being made available by RGPPL. Therefore, the contention on behalf of PETRONET and other respondents that the policy decision is a long term policy decision and is going to be made applicable in future across the board qua existing and the new customers is not borne out by the original file of Union of India. Even if there can be policy for a section of the public, the requirement of public interest not being restricted to interest of whole community, yet one cannot envisage that there could be a “public policy” for a single entity. For determination of requirement

of public good or public interest the oral submission canvassed at the time of hearing that the ultimate end users would be public at large viz. the consumers of the power that may be generated by RGPPL, does not merit acceptance for the simple reason that if the same test is applied to the case of the petitioners, most of them are already producing power, selling the same to the State owned transmission companies and thus there is already a larger section of the community whose interest is already being served.

33. The contention on behalf of the respondents that more than Rs.10,000/- crores of public monies have been invested in RGPPL and thus involves public interest also does not merit acceptance because if the investments made by all the petitioners are considered possibly the figure would far exceed the sum invested in one project. In fact during course of hearing on behalf of the petitioners one of the counsels had quoted the said figure approximately at a sum of Rs.25,000 crores and more. The amount of investment in a single project cannot be the

criteria for first recording a decision and then labelling the same to be a policy decision. Just as RGPPL has been funded by funds obtained from the public similarly the petitioners have also been funded by amounts received from the public. Hence, this factor would operate as 'no factor', or 'neutral factor'.

34. Reference to Pragati Power Corporation Ltd., on behalf of the respondents in support of the contention that the uniform pooled price is not only restricted to RGPPL but also to others is also not a correct representation of facts. In fact, communication dated 09.03.2007 from PETRONET to the Ministry of Petroleum and Natural Gas itself records that supply of RLNG to Pragati Power Corporation Ltd., can be only from September,2009. Therefore, not only does the file not reveal any consideration of case of Pragati Power Corporation Ltd., in the course of decision making process, but even if one assumes that the same was considered though not recorded, the same becomes irrelevant because all the contracts between the petitioners and their

respective suppliers (Offtakers) are operational only till 31.12.2008 and will come up for review at that point of time for the purpose of supply of RLNG and the price to be charged for such supply. Therefore, the reference to Pragati Power Corporation Ltd. is again not a factor which can justify the decision making process, as it was not even considered in such process.

35. It is also necessary to note that at the meeting of EGOM held on 12.10.2006, Ministry of Petroleum and Natural Gas (MOPNG) was asked to examine the issue of making available LNG supply to the project at a fair price and for this purpose MOPNG was urged to take up the issue strongly and to exert more during the scheduled negotiations so that the prices of LNG could be brought down. In relation to the proposal regarding averaging or pooling price MOPNG was urged to tap all possible alternate suppliers as well as potential domestic suppliers like Reliance, ONGC etc. Lastly, note dated 15.11.2006 records that RGPPL project may be sold to a company who can operate the plant on a sustainable

basis. Therefore, even if this meeting of EGOM is considered, it is apparent that the entire emphasis is on restructuring and revival of the project and pricing of the gas to be supplied to the said project is not restricted to term contracts or long term contracts as recorded in communication dated 06.03.2007 but the requirement was to explore all possible sources of supply, including domestic suppliers, for the purpose of pooling, if necessary. Therefore also, the action of the respondents in applying the pooled price only to the contracts of the petitioners with the Offtakers in relation to 5 MMPTA RLNG being supplied by PETRONET to Offtakers for onward supply to the petitioners vis-a-vis the contracts in relation to 1.5 MMPTA being supplied by PETRONET to the Offtakers and in turn to RGPPL is not a decision which is based on the deliberations reflected by notings in the file and the minutes of various meetings. In fact the decision appears to be an act of desperation only because of pressure from the Management of RGPPL on the MOPNG. The decision does not satisfy the test of being fair and just; the classification is not reasonable; there is no

nexus with the object sought to be achieved, namely public interest-'public good'.

36. As noted hereinbefore, PETRONET is admittedly not a Government Company. The Central Government therefore could not have issued any direction/directive to PETRONET, notwithstanding the endorsement of copy of communication dated 06.03.2007 to the three distribution companies i.e. GAIL, IOCL & BPCL. In fact, on realising this situation, one finds, that the three distribution companies wrote independent separate letters to PETRONET asking PETRONET to raise the contracted price for RLNG supplied by PETRONET. This action, if considered in isolation, cannot have any decisive indication, but when the same is considered in backdrop of the fact that there is no revision in contracted price by Ras Gas qua LNG supplied to PETRONET this factor assumes importance. In fact, PETRONET would have no reason or occasion to revise the price of RLNG supplied by PETRONET to the three distribution companies,

considering the contract between PETRONET and the three distribution companies. In no commercial transaction would a purchaser call upon the supplier to revise the price of the product purchased by such purchaser from the seller. The entire exercise is unnatural, contrary to natural conduct of human affairs, and contrary to a prudent commercial transaction. No person would invite his seller to revise the price to his own detriment viz. detriment of the purchaser. The entire exercise, under the cloak of averaging or pooling of prices seeks to subsidise, artificially reduce, the price in hands of RGPPL in relation to RLNG supplied and this is sought to be done by recovering higher amounts from the petitioners having direct nexus with the distributor companies so as to reimburse the distribution companies for the loss that they suffer while supplying RLNG to RGPPL

37. Thus, the decision cannot be upheld, viz. to average or pool prices of two contracts between

PETRONET and the Offtakers for supply of 5 MMPTA and between PETRONET and the Offtakers for the supply of 1.5 MMPTA to RGPPL, because there is no policy in fact. The decision is in relation to only one entity and furthermore is, as the file reveals, a stop-gap arrangement. In fact, the record also reveals that the Dahej-Uran Pipeline Project as well as Dabhol-Panvel Pipeline Projects are primarily not meant for transmission of either LNG or RLNG from Dahej to Dabhol but the pipeline is actually laid down for a reverse transmission, from Dabhol to Dahej so as to link the Dabhol LNG terminal with the already existing network from Dahej viz. HBJ pipeline. The reason being : all power producing blocks of RGPPL, even when fully operational, would require only 2.1 MMPTA of RLNG. The rest of processed LNG is to be commercially marketed by RGPPL. Therefore, when one considers the decision making process in context of the infrastructural facilities, that have been set up and are in the process of being set up, it is apparent that the communication of 06.03.2007 conveying so called pooling of price/averaging of price of RLNG cannot be described as a policy

decision, cannot be termed to be a public policy, and is actually a 'short term stop-gap arrangement' to benefit one entity.

38. The Court has also considered the subsequent events for the purpose of ascertaining whether any policy as such is in place. The file reveals that as recorded in the Minutes of the Meeting of the EGOM held on 19.03.2007 the decision of EGOM vide paragraph No.19(e) further establishes that the decision conveyed on 06.03.2007 is only a stop-gap arrangement. Paragraph No.19(e) reads : "*(e) Long term gas tie up, including from Indian sources, would be worked out by MoP&NG within the next 3 months*".

39. During course of hearing repeated reference was made to the *Force Majure* clause appearing in the contracts between the distribution companies and the petitioners, who are the contracting parties. Suffice it to state that as per Minutes of the Meeting held on 17.03.2007 PETRONET had categorically stated that in the event *Force Majure* clause affected 5 MMPTA RLNG supplies, the cost of gas to RGPPL would be higher with reference to 1.5

MMPTA supplies, but possibly RGPPL may not agree to the same. This gives an indication that in absence of any policy, in the event of there being no reduction of cost in hands of RGPPL, RGPPL itself may not accept RLNG at the contracted price i.e. 1.5 MMPTA contract between Ras Gas and PETRONET and consequently between PETRONET and the three distribution companies.

40. A further contention was raised on behalf of PETRONET and the three distribution companies that they were bound by communication dated 06.03.2007 issued by Union of India and therefore in absence of any relief directly claimed against the said respondents the petitioner, more particularly of SCA No.18868 of 2007 was wrongly referring to and emphasing the terms of the contract between the parties. The learned Senior Advocate appearing for GSPCL responded to the aforesaid submission by stating that in fact, the respondents were correct in contending that no relief was claimed against respondent Nos. 2 to 5 and the only prayer was to

quash and set aside the action of respondent No.1 directing respondent Nos. 2 to 5 by impugned communication dated 06.03.2007 to pool price of RLNG and charge uniform price from all existing and new customers; however, even though the petitioner had deleted the said respondents, respondent Nos. 2 to 5 approached the Apex Court and got themselves impleaded in the petition as necessary and proper parties. Therefore, the said respondents cannot now make a grievance that they are not necessary parties in the proceedings.

41. The aforesaid submissions have been recorded in detail only for the purpose of emphasing the fact that the issue as to whether the contract between the parties permits, or does not permit, intervention by Union of India and consequently modification of contracted terms is not an issue before the Court and hence, the Court is not required to enter into the finer nuances of the contract.

42. There is one more aspect of the matter. The contract between PETRONET and the three distribution companies, and further contracts between the three distribution companies and the purchaser of RLNG directly from three distribution companies are not contracts simplicitor for supply of fixed quantity of gas during contracted period, but are fixed term contracts at a fixed rate viz. foreign component of the cost price not being variable. This becomes abundantly clear from the fact that Ras Gas and PETRONET have a contract in place since 1999 for supply of LNG for a period of 25 years. The subsequent contract between Ras Gas and PETRONET is executed in 2003 for supply of 5 MMTPA LNG at a fixed rate. Thus in effect Ras Gas is bound under the contract to supply gas over a period of 25 years from 1999, but the rate at which the same is to be supplied will be fixed from time to time, first such fixed rate contract for 5 MMTPA being for a period of five years ending on 31.12.2008. Therefore also the respondents cannot

successfully contend that the contract has to be read only as a contract for supply of stipulated quantity, the price being subject to revision from time to time.

43. Therefore, merely because the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to act fairly, to take into account relevant considerations and discard irrelevant considerations. Even while being circumspect, to adjudicate disputes arising out of contract the Court in exercise of powers under Article 226 of the Constitution would examine the facts and circumstances of each case to find out the nature of the controversy bearing in mind that any action which involves element of public law or public character is amenable to judicial review. The present is not a case where the respondents can successfully contend that interests of the country are involved or that the business affects the economy of the country so as to canalise a

particular business in favour of a specified individual. The entire action of the State when tested in light of the aforesaid principles does not emerge as an action which is either fair or not arbitrary.

44. To summarise : the original file reveals that there is no policy decision. The decision if any, is only a short term stop-gap arrangement to benefit one entity. The decision is for the benefit of one entity and is not for the public. In other words, no element of public interest or public good is involved in the decision making process. There is no reasonable classification of a defined class of public for whose benefit the decision is taken. There is no nexus with the object sought to be achieved, viz. public interest. The decision cannot be termed to be fair and just. The decision making process has not considered relevant factors and the decision is sought to be supported by averments made in Affidavit-in-Reply (e.g. Reference to Pragati Power Corporation Limited) which are not

borne out by the record and which in terms of the tenure of the contracts, both with the affected petitioners and RGPPL would have no nexus. A decision making process cannot be justified on the basis of statements in relation to facts which have not been considered for arriving at the decision and events which are to take place in future.

45. In the view that the Court has adopted and considering the prayers made by GSPCL in Special Civil Application No. 18868 of 2007 the Court is not required to examine and adjudicate as to whether under the contract the petitioner is entitled to dispute modification/revision of the price charged by the distribution companies for RLNG supplied; and consequently, if revised price is charged, whether the petitioner is entitled to seek refund thereof. That issue is left open so as to enable the parties to take recourse to appropriate proceedings in accordance with law. Because even for the other petitioners there is a dispute between the parties as to whether the

revised price charged by the distribution companies has been passed over by the recipients or not, and if passed over whether such passing over is subject to outcome of the petitions. These are issues wherein the facts will have to be ascertained and evidence will have to be led, each contract examined individually. Such an exercise cannot be undertaken in these proceedings.

46. In the result, this petition being Special Civil Application No. 18868 of 2007 is allowed and communication dated 06.03.2007 is quashed and set aside. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 19045 of 2007 WITH CIVIL APPLICATION No. 3774 OF 2008.

Essar Power Limited & Another ... Petitioners
Versus.
Gail (India)Limited and others ... Respondents

Appearance :
Mr.Mihir Joshi, Senior Advocate, with Mr. Kunal Nanavati, Advocate, for Nanavati Associates for the petitioner.

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta

and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

Mr. S.N. Soparkar, Senior Advocate, with Mr. Aspi M. Kapadia for respondent No.3.

Though in this petition communication dated 06/03/2007 as well as other communications referred to at Annexure-B (colly.) have been challenged it is an admitted position that the petitioner has no contract with any of the distribution companies. The petitioner is purchasing RLNG from GSPCL. The petitioner has filed a joint purshis signed by the Advocate of the petitioner and Advocate of GSPCL whereunder it is stated :

> *"The petitioner has challenged in the petition right of Respondent No.3 to charge price higher than the fixed prices, besides challenging the legality and validity of the policy direction/decision dated 6.3.2007. The parties agree without prejudice to their right to appropriate legal proceedings, if so required, that :-*
> *(i) the petitioners do not press any*

relief against Respondent No.3 (GSPCL) at this time.

(ii) on the ultimate outcome of the present petition, the parties may negotiate inter se to find an acceptable solution to the issues, which are subject matter of this petition.

(iii)in case within 30 days from the decision, in the aforesaid Special Civil Application, such solution is not reached, it will be open to the petitioner to take appropriate legal proceedings including, initiating proceedings under the terms of the contract for settlement of this dispute. This pursis shall not constitute an abandonment of the claim by the petitioner against Respondent No.3 – GSPCL. It is clarified that respondent No.3 – GSPCL will have the right to defend its position in accordance with law, but would not contend that by not pressing the reliefs against respondent no.3 in the aforesaid petition; the petitioner has abandoned or given up the claim".

In the circumstances, no further relief is required to be granted to the petitioner except consequential relief, if any, to the extent of common judgment and order whereunder the

direction/communication dated 06/03/2007 has been quashed and set aside. The petition stands disposed of accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

CIVIL APPLICATION No. 3774 OF 2008.

In light of the order made in main petition this Civil Application has been rendered infructuous and is disposed of accordingly.

SPECIAL CIVIL APPLICATION No. 19046 OF 2007.

Gujarat State Fertilizer &
Chemicals Ltd. & Anr. ...Petitioners

Versus.

GAIL (India)Limited & Anr. ...Respondents

Mr. K.S. Nanavati, Senior Advocate, with Mr. Kunal Nanavati and Mr. Raj Yadav, Advocates for Nanavati Associates for the petitioner

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

The petitioner herein Gujarat State Fertilizer & Chemicals Ltd. has entered into a contract with GAIL on 17.01.2004. It is an admitted position between the parties that the contentions as regards to communication dated 06.03.2007 are identical to those raised in Special Civil Application No. 18868 of 2007.

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 19047 OF 2007.

Gujarat Industries Power Company Ltd.
& Anr ... Petitioners
Versus.
GAIL (India) Limited & Another ... Respondents

Appearance :
Mr. Kamal B. Trivedi, Advocate General, with Ms. Sangeeta Vishan with Mr. Kunal Nanavati, Advocates for Nanavati Associates for the petitioners

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL
Mr. Gopal Subramanian, Addl. Solicitor General of India,

with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

The petitioner, Gujarat Industries Power Company Ltd. is purchasing RLNG directly from GAIL under contract dated 12.02.2004. It is an admitted position between the parties that the contentions as regards to communication dated 06.03.2007 are identical to those raised in Special Civil Application No. 18868 of 2007.

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 19048 OF 2007.

Gujarat State Electricity Corporation Ltd. & Another ... Petitioners

Versus.

GAIL (India) Limited ...Respondents

Appearance :
Mr. Kamal B. Trivedi, Advocate General, with Ms. Sangeeta Vishan with Mr. Kunal Nanavati, Advocates for Nanavati Associates for the petitioners

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL
Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

The petitioner, Gujarat State Electricity Corporation Ltd. is directly purchasing RLNG under a contract dated 09.02.2004 from GAIL. It is an admitted position between the parties that the contentions as regards to communication dated 06.03.2007 are identical to those raised in Special Civil Application No. 18868 of 2007.

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 19049 OF 2007.

Gujarat Narmada Valley
Fertilizer Co. Ltd. & Another ... Petitioners
Versus.
GAIL (India) Limited & Another ... Respondents

Appearance :
Mr.K.S.Nanavati, Senior Advocate with Mr. Kunal Nanavati and Mr.Raj Yadav, Advocates for Nanavati Associates for the petitioners.
Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL
Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

The petitioner, Gujarat State Electricity Corporation Ltd. is directly purchasing RLNG under a contract dated 09.02.2004 from GAIL. It is an admitted position between the parties that the contentions as regards to communication dated 06.03.2007 are identical to those raised in Special Civil Application No. 18868 of 2007.

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute

accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 19050 OF 2007.

Gujarat Alkalies & Chemicals Ltd. & Another ... Petitioners

Versus.

GAIL (India) Limited & Another ... Respondents

Appearance :
Mr.K.S.Nanavati, Senior Advocate with Mr. Kunal Nanavati and Mr.Raj Yadav, Advocates for Nanavati Associates for the petitioners.
Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL
Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;

The petitioner, Gujarat Alkalies & Chemicals Ltd., is purchasing RLNG directly under two contracts, both dated 02/02/2004 from GAIL. It is an admitted position between the parties that the contentions as regards challenge to communication dated 06.03.2007 are identical to those raised in Special Civil Application No. 18868 of 2007.

In the circumstances, for the reasons stated in

judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 23018 OF 2007.

Gujarat Urja Vikas Nigam Ltd. & Another ... Petitioners

Versus.

GAIL (India) Limited & Others ... Respondents

Appearance :
Mr. K.S. Nanavati, Senior Advocate, with Mr. Kunal Nanavati and Mr. Raj Yadav, Advocates for Nanavati Associates for the petitioner

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL

Mr. Maulik G. Nanavati for respondent No.2

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.3 – Union of India;

The petitioner, Gujarat Urja Vikas Nigam Ltd. is purchasing power from various other petitioners like

GSECL, GIPCL, GPECPL and Essar Power Limited. The petitioner has no nexus with other respondents.

In the circumstances, no further relief is required to be granted to the petitioner except consequential relief, if any, to the extent of common judgment and order whereunder the direction/communication dated 06/03/2007 has been quashed and set aside. The petition stands disposed of accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 23019 OF 2007.

Welspun India Ltd. & Another	...	Petitioners
Versus.		
GAIL (India) Ltd.& Ors.	...	Respondents

Appearance :
Mr. K.S. Nanavati, Senior Advocate, with Mr. Kunal Nanavati and Mr. Raj Yadav, Advocates for Nanavati Associates for the petitioner

Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.1 – GAIL
Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.2 – Union of India;
Mr. S.N. Soparkar, Senior Advocate, with Mr. Aspi M. Kapadia for respondent No.3.

Though in this petition communication dated 06/03/2007 as well as other communications referred to at Annexure-B (colly.) have been challenged it is an admitted position that the petitioner has no contract with any of the distribution companies. The petitioner is purchasing RLNG from GSPCL. The petitioner has filed a joint purshis signed by the Advocate of the petitioner and Advocate of GSPCL whereunder it is stated :

> *"The petitioner has challenged in the petition right of Respondent No.3 to charge price higher than the fixed prices, besides challenging the legality and validity of the policy direction/decision dated 6.3.2007. The parties agree without prejudice to their right to appropriate legal proceedings, if so required, that :-*
> *(i) the petitioners do not press any relief against Respondent No.3 (GSPCL) at this time.*
> *(ii) on the ultimate outcome of the present petition, the parties may negotiate inter se to find an acceptable solution to the issues, which are subject matter of this petition.*
> *(iii)in case within 30 days from the decision, in the aforesaid Special*

Civil Application, such solution is not reached, it will be open to the petitioner to take appropriate legal proceedings, including, initiating proceedings under the terms of the contract for settlement of this dispute. This pursis shall not constitute an abandonment of the claim by the petitioner against Respondent No.3 – GSPCL. It is clarified that respondent No.3 – GSPCL will have the right to defend its position in accordance with law, but would not contend that by not pressing the reliefs against respondent no.3 in the aforesaid petition; the petitioner has abandoned or given up the claim".

In the circumstances, no further relief is required to be granted to the petitioner except consequential relief, if any, to the extent of common judgment and order whereunder the direction/communication dated 06/03/2007 has been quashed and set aside. The petition stands disposed of accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 23151 OF 2007.

Gujarat Paguthan Energy Corporation Pvt.Ltd. ... Petitioner

Versus.

Union of India and Another ... Respondents

Appearance :
Mr. K.S. Nanavati, Senior Advocate, with Mr.Kunal Nanavati with Mr.Uttam Datt and Mr. S.D. Vasavda for the petitioner

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.1 – Union of India;

Mr. S.N. Soparkar, Senior Advocate, with Mr. Aspi M. Kapadia for respondent No.2.

The petitioner, Gujarat Paguthan Energy Corporation Pvt. Ltd. purchases RLNG from GSPCL. While seeking a writ of mandamus for quashing and setting aside communication dated 06.03.2007 the petitioner has also prayed for relief against GSPCL in relation to consequential communications issued by GSPCL for follow up action in consequnece of the revision sought to be affected by GAIL pursuant to communication dated 06.03.2007.

In the circumstances, no further relief is required to be granted to the petitioner except consequential relief, if any, to the extent of

common judgment and order whereunder the direction/communication dated 06/03/2007 has been quashed and set aside.

The petition stands disposed of accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 4201 OF 2008.

Malanpur Captive Power Limited .... Petitioner
Versus.
Union of India & Another .... Respondents

Appearance:
Mr. S.G.Chitnis and Mr.A.K.Chitale for the petitioner
Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.1 – Union of India;
Mr. Mihir Thakore, Senior Advocate, with Mr. Rakesh Gupta and Mr. Abhishek Mehta for Trivedi & Gupta Advocates for respondent No.2 – GAIL.

This is transferred petition pursuant to direction issued by the Apex Court. The petition was originally registered as Writ Petition No. 4853 of 2007 before the Hon'ble High Court of Madhya Pradesh, Bench at Gwalior. The petitioner, Malanpur Captive Power Limited entered into a tripartite agreement dated 27.10.2006 for purchasing RLNG from GAIL whereunder Wartsila India Ltd.

is the original buyer and the petitioner is buyer assignee. The petitioner produces power i.e. generates electricity on use of RLNG purchased under the agreement.

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

SPECIAL CIVIL APPLICATION No. 4468 OF 2008.

Essar Steel Limited .... Petitioner
Versus.
Union of India & Ors. .... Respondents

Appearance.
Mr. K.S. Nanavati, Senior Advocate, with Mr. Kunal Nanavati for Nanavati Associates for the petitioner.

Mr. Gopal Subramanian, Addl. Solicitor General of India, with Mr. Harin P. Raval, Assistant Solicitor General of India, with Mr. Rashmin M. Chhaya, Central Government Standing Counsel with Mr. Ragenth Basant, Mr. Nishant Lalakiya and Mr. Param Buch, Advocates for respondent No.1 – Union of India;

Mr. Ashish Dholakia with Mr. Manish Bhatt for respondent No.2 – IOCL
Mr. Ashish Dholakia with Mr. Pratik Acharya for respondent No.3 – BPCL

Mr. S.N. Soparkar, Senior Advocate, with Mr. Aspi M. Kapadia for respondent No.4.

Mr.N.L. Ganapathi, with Mr. Dhananjay Shahi for respondent No.5 – PETRONET LNG LTD.

This is transferred petition pursuant to direction issued by the Apex Court. The petition was originally registered as Civil Writ Petition No. 5098 of 2007 before the Hon'ble High Court of Delhi. The petitioner, Essar Steel Limited is purchasing RLNG for producing electric power which is captively consumed for manufacturing steel products such as Hot Briquetted Iron, Hot Rolled Coils etc. For purchasing RLNG the petitioner has entered into separate agreements dated 01.03.2004, 08.03.2004 and 08.03.2004 with IOCL, BPCL and GSPCL respectively. The petitioner has filed a joint purshis signed by the Advocate of the petitioner and Advocate of GSPCL whereunder it is stated that :

> *"(i) the petitioners do not press any relief against Respondent No.4 (GSPCL) at this time.*
> *(ii) on the ultimate outcome of the present petition, the parties may negotiate inter se to find an acceptable solution to the issues, which are subject matter of this petition.*

(iii) in case within 30 days from the decision, in the aforesaid Special Civil Application, such solution is not reached, it will be open to the petitioner to take appropriate legal proceedings incuding, initiating proceedings under the terms of the contract for settlement of this dispute. This pursis shall not constitute an abandonment of the claim by the petitioner against Respondent No.4 – GSPCL. It is clarified that respondent No.4-GSPCL will have the right to defend its position in accordance with law, but would not contend that by not pressing the reliefs against the respondent no.4 in the aforesaid petition; the petitioner has abandoned or given up the claim".

In the circumstances, for the reasons stated in judgment of even date rendered in Special Civil Application No. 18868 of 2007 the petition is allowed. Communication/decision dated 06.03.2007 is quashed and set aside. Rule made absolute accordingly. There shall be no order as to costs.

MISC. CIVIL APPLICATION No. 2362 OF 2007.

This application already stands disposed of vide order dated 13.09.2007 and hence it is wrongly listed along with this group of petitions.

Sd/- Seen Seen

(D.A.Mehta, J.) (D.N.Patel, J.) (J.C.Upadhyaya,J)

M.M.BHATT/BHAVESH.

PER : D.N.PATEL,J (For himself and on behalf of Mr.Justice J.C.Upadhyaya

1. We have the benefit of reading the judgement of my esteemed brother Mr.Justice D.A. Mehta, who proposes to allow these writ petitions, but, we regret our inability to agree with ratio decidendi propounded by Hon'ble Mr.Justice D.A.Mehta. In our view, these writ petitions deserve to be dismissed, as the impugned decision of fixing price of gas is a policy decision, taken by Empowered Group of Ministers of Union of India with advise of experts. By the impugned decision, Union of India has fixed price of Regasified Liquefied Natural Gas (RLNG).

1.1 In all the aforesaid petitions, the decision taken by Union of India dated 6th March,2007, has been challenged. The decision taken by Union of India dated 6th March,2007, reads as under:

> *"The question of prices to be charged for RLNG from different customers has been under consideration of the Government. After considering existing practices and to avoid loading high cost of additional RLNG being made available to the prospective customers, it has been decided, after examination of all aspects, in public interest, that the gas prices being charged*

on supply of RLNG procured under long term contracts should be on a non-discriminatory basis and uniform pooled prices should be charged from all the existing and new consumers.

2. You are advised accordingly and requested to give effect to the same immediately."

(Emphasis supplied)

[A] FACTS : Relevant and necessary facts of the present cases are as under :

2.1 It appears that from the year 1999, correspondence has started from the Minister of Petroleum & Natural Gas, Union of India, New Delhi, to the Minister of Energy, Industry, Electricity and Water, Qatar, which states that the pending issues of the Sale and Purchase Agreement between Petronet and Ras Gas should be resolved at the earliest.

2.2 India purchases natural gas essentially from Gulf countries. Transportation of gas through pipelines is an expensive proposition and, therefore, before gas is transported, it is liquefied and the resultant gas is known as Liquefied Natural Gas (hereinafter referred to as "LNG"). LNG is transferred to India through ships and after it reaches India, the said LNG is re-gasified and the resultant gas is known as Regasified Liquefied Natural Gas (hereinafter referred to as "RLNG").

2.3 In the present case, Ras Gas, Qatar liquefies natural gas and transports the resultant LNG to India. In India, Petronet re-gasifies the said LNG at its plant at Dahej and converts it into RLNG. Petronet sells the resultant RLNG to the three off-takers i.e. GAIL, IOC and BPCL. GAIL, IOC and BPCL, in turn, sell the said RLNG to various customers including entities like GSPC. Entities like GSPC, in turn, sell the gas to the ultimate consumer, namely, companies like Essar Power and Essar Steel.

2.4 Likewise there are letters from Minister of Energy, Industry, Electricity and Water, Qatar to the Minister of Petroleum & Natural Gas, India in the month of July,1999.

2.5 From Annexures “R-4” to “R-16” reflect the Governmental initiative in execution of Sale and Purchase Agreement-I between Petronet and Ras Gas, Qatar to import LNG into India. Government of India created a Special Purpose Vehicle, called Petronet in the year 1998. Four Public Sector Undertakings namely GAIL (India) Limited, Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited and ONGC, have 50% shares in Petronet LNG Limited. At length, it has been stated before this Court through various tables and statistics about prevailing market price of all gases in different

countries in different years, but it appears that due to intervention of Union of India, Petronet as Special Purpose Vehicle, entered into “Sale and Purchase Agreement” with Ras Laffan Liquefied Natural Gas Co. Ltd., Qatar (Ras Gas) for supply of LNG at Dahej Terminal, State of Gujarat, whereby Ras Gas, Qatar is to supply 5 MMTPA of LNG, effective from 2004 for an initial period of five years ending 31st December,2008.

Originally, one of the conditions of the Sales and Purchase Agreement with Ras Gas, Qatar was that the price of LNG to be purchased from Ras Gas by Petronet was based on the formula with prevalent market price as one of the factors. However, due to protracted negotiations by Government of India, extensively on behalf of Petronet, subsequently, Ras Gas, Qatar agreed to supply LNG at the fixed rate for an initial period of first five years i.e. from 2004 to 2008.

2.6 This price was fixed on the basis of crude price of US $ 20 per barrel. It is submitted by learned counsel Mr.Gopal Subramaniam, that price of crude oil per barrel, now, has gone to approximately US $ 100. This Sale and Purchase Agreement is for 25 years as the price of crude oil moves up, LNG price also moves up.

2.7 It also appears that the global demand of LNG is

much higher than supply as LNG is an essential fuel for generation of power and production of fertilizer in all over the world.

2.8 To keep pace with rest of the parts of the world, Union of India was to develop a policy called New Exploration Licencing Policy (in short “NELP”) and secondly, was to import gas in a liquefied form (LNG).

2.9 It appears that thereafter, gas imported from Ras Gas, Qatar was to be converted into Regasified Liquefied Natural Gas (RLNG) and was to be sold to GAIL, IOC and BPCL. Separate contracts have been entered into between Petronet and three off-takers and they further sold RLNG to various consumers like GSPC, etc and these consumers have further sold RLNG to their further consumers. These petitions have been preferred by consumers and further consumers. In fact, there are approximately 116 consumers of off-takers, out of which, very small number of consumers and their consumers have preferred this petitions.

2.10 Petronet – Special Purpose Vehicle has further entered into Sale and Purchase Agreement with Ras Gas, Qatar for 1.5 MMPTA of RLNG. The price for this RLNG is higher than previous price of RLNG.

2.11 The Dabhol power project, which is now reconstituted and taken over by new company namely Ratnagiri Gas Power Pvt. Ltd. (in short “RGPPL”) was also in need of RLNG. This project is a Public Sector Undertaking. This RGPPL power plant has a capacity of 2150 Mega Watts (MW). In the said project, Rs.265 Crores have been invested by State of Maharastra and the total investment of Public money is more than Rs.10,000/- Crores. However, the viability of the project is dependent upon RLNG being available at afordable price. The price of RLNG in the open market is US $ 16 – 19 / MMBTU. Whereas as per Sale and Purchase Agreement, price of RLNG ex-ship, is approximately US$ 2 to 3/ MMBTU. Thus, if Government sells RLNG to Ratnagiri Project, like it is selling to other companies at US$ 2-3/ MMBTU at reduced rate, then, the said project i.e. Ratnagiri Gas and power project can survive. Otherwise, they have to purchase from open market RLNG at the price approximately US $ 16- 19 / MMBTU. It appears that Empowered Group of Ministers (EGOM), who has discussed revival of Dabhol project or which is now known as Ratnagiri Gas Power Project and held numerous meetings along with experts of the subject including Secretaries of various Departments of Union of India as well as representatives of off-takers i.e. representatives of GAIL, IOC and BPCL. This Court has called upon the original file, whereby impugned decision has been taken by Union of India dated 6th

March,2007. It appears that after verifying several pros and cons and number of factors, effecting price of RLNG, it has been decided by Union of India in exercise of power under Article 73 of the Constitution of India and also keeping in mind the existing contracts between Petronet and off-takers as well as contracts between off-takers and consumers and also keeping in mind the other future need of RLNG by Pragati II Power Project and also keeping in mind the other future power projects, which has been planned by Delhi Government Bawana plant (1600 MW) and Bamnauli plant (750 MW), which will be necessary for the Common Wealth Games, scheduled to be held in the year 2010 and after considering several other factors, like use of alternative fuel for manufacturing power i.e. Nephtha, a decision dated 6th March,2007 has been taken by Union of India with the help of experts and keeping in mind welfare of the society and public interest at large, whereby, it has been decided that gas price charged on supply of RLNG procured under long term contracts should not be a non-discriminated price and uniform pooled price should be charged from all existing and new consumers so as to avoid loading high cost of additional RLNG being made available to the prospective consumers. The aforesaid decision was conveyed by Union of India to a Special Purpose Vehicle i.e. Petronet LNG Ltd. and to the off-takers i.e. GAIL, IOC and BPCL and who have, in turn, conveyed this decision to their consumers. By virtue of

this decision dated 6th March,2007, instead of US $ 2-3/ MMBTU consumers of long term contracts will have to pay US$ 4.32/MMBTU. In open market RLNG is available and, therefore, 'consumers' and 'further consumers' of off-takers i.e. GAIL, IOC and BPCL can purchase RLNG at the rate of US$ 18-20/ MMBTU. Thus, all the consumers of RLNG have been brought under one denomination by the decision of the Government dated 6th March,2007, which has fixed the price of the gas.

[B] ARGUMENTS :

3. ARGUMENTS OF PETITIONERS :

On behalf of all the petitioners, who are purchasing RLNG gas from off-takers i.e. from GAIL, IOC and BPCL and also on behalf of some of the petitioners, who are consumers' consumer, argued :

3.1 that the impugned decision is not a policy decision at all. The said decision is discriminating and violative of Article 14 of the Constitution of India as it treats unequals as equals.

3.2 that the impugned decision is in breach of contract between off-takers and consumers i.e. between GAIL and GSECL. It is submitted by learned counsel for

the petitioners that there is no power with Union of India to increase the price of RLNG. Initially, there was a clause for change in price as clause No.9.2.5 whereas vide letter dated 22nd July,2006, this clause was removed from the contract entered into between Gujarat State Electricity Corporation Ltd. with GAIL (India) Ltd.

3.3 that it is vehemently submitted by learned counsel for the petitioners that Union of India cannot take any decision in violation of terms of contract. The contract is valid upto 31st December,2008. It is also submitted by learned counsel for the petitioners that only with a view to give benefit to Dabhol project, which is now known as Ratnagiri project, the impugned decision has been taken, which is not permissible in the law. Whereas other projects like Pragati II project has not yet commenced at all. It is also submitted that Central Government has not issued the aforesaid Order under the Essential Commodities Act and no decision can taken under Article 73 of the Constitution of India, if it affects rights of third party and if they exercise power under Article 73 of the Constitution of India, which is prejudiced to the petitioner company and if it is not supported by any legislative authority, such usage of power said to be useless.

3.4 that increase in price of RLNG is bad in facts

and bad in law and is in breach of contract. Learned counsels appearing for 'consumers' and 'further consumers' have read and re-read terms of contract, especially clause 11.1, 11.3 and 11.4 and has pointed out that if Ras Gas, Qatar increase the price, Union of India can increase the price of RLNG because contract between consumers and off-takers and contract between off-takers and Petronet, are back to back contract. It is also submitted that decision taken by Union of India is arbitrary and unreasonable and pooling of price must be pulled down.

3.5 that the cost of Dabhol project or Ratnagiri project has to do nothing with increase of price of RLPG.

3.6 that judicial review of the decision taken under Article 73 is permissible.

3.7 that the present petitioners are selling their products to the end consumers, who are public at large and, therefore, Union of India cannot take into consideration the welfare of one sector of the society and ignore the welfare of another sector of the society. Learned counsel for the petitioners further submitted that directions given by Government, at the most, can be binding, to the Government Companies i.e. GAIL, IOC and BPCL under the Articles of Association, but, is not

binding to the further consumers i.e. to the present petitioners. Learned counsel for the 'consumers' and 'further consumers' have relied upon several judgements.

4. ARGUMENTS OF RESPONDENTS :

4.1 Learned Additional Solicitor General of India Mr. Gopal Subramaniam on behalf of Union of India submitted that basically this Court has to see Whether Union of India has power to take a policy decision or not? Looking to entry no.53 of List I – Union List Schedule VII of the Constitution of India to be read with Article 73 of the Constitution of India, Union of India has all competence and power to take impugned policy decision. In fact, there is no law for price fixing for gas and, therefore, executives have to take decision under Article 73 as the subject matter is falling within Union list. Learned counsel for Union of India submitted that policy decision taken by Union of India, is neither arbitrary, nor malafide nor violative of fundamental rights nor violative of constitutional rights nor violative of statutory rights. In fact, Empowered Group of Ministers with the help of experts of various fields, has taken the aforesaid policy decision, after due delebrations. The decision taken in favour of welfare of the people. It is an ultimate result of the policy is to be seen. Dabhol power project or Ratnagiri power Project

is not to be looked at, but, the ultimate result of policy decision may be considered by this Court. The impugned decision is taken for pooling of the price for all existing and new consumers. In fact, the spot price or open market price of RLNG available in the market, is between 18-20 US $ per MMBTU whereas, as per the aforesaid decision, now, it will be 4.32 US $ per MMBTU. If this decision would not have been taken, some consumers like the petitioners, would have got RLNG at the price US $ 2 -3 (“Ex-ship”) and the other consumers would have got at US $ 8 – 9/MMBTU. Looking to the policy decision taken by Union of India, the consumers under the long term contracts, are otherwise, also getting benefit despite the aforesaid policy decision because spot price of RLNG is much higher than what is fixed by the aforesaid policy decision.

4.2 Learned counsel Mr.Subramaniam has also pointed out that there are in all approximately 116 consumers and in most of the contracts, there is a clause for change in price, if there is change in policy by the Government. Such clause is in existence e.g. in contract between Gujarat State Petroleum Corporation Limited, (petitioner of Special Civil Application No.18868 of 2007) with GAIL (India) Ltd. i.e. there is a clause for change in a price, viz. Clause No.11.4. Likewise, in agreement between GSPCL and IOC also, there is a clause for change

in price due to change in government policies. Likewise, there is a clause for change in price in the agreement between GSPL and BPCL. Likewise, in agreement between Essar Steel (petitioner of Special Civil Application No.4468 of 2008) and IOC, there is a clause of increase in the price. Likewise, in agreement between Essar Steel and BPCL, there is a clause for increase in the price. Likewise, in a contract between Malanpur Captive Power Ltd. (petitioner of Special Civil Application No.4201 of 2007) and IOCL, there is a change in law clause for increase in price.

4.3 Learned counsel for the Union of India submitted that change in policy clause, even if inadvertently not included in any of the contracts of the public sector undertaking, such clause has to be read into, as an implied condition, in the contract. In fact, Petronet, which is Special Purpose Vehicle has already started implementing the policy decision. Correspondingly, off-takers i.e. GAIL, IOC and BPCL have also started implementing the aforesaid policy decision and correspondingly, consumers and consumers' consumers (further consumers), who are petitioners, have also implemented the aforesaid policy decision and all are recovering from their further consumers increased price of RLPG with effect from July, 2007. Thus, policy decision has been implemented and there is no loss to the

present petitioners, who are recovering increased RLPG price from their further consumers.

4.4 In reply to an argument, upon one of the clauses of contract, learned counsel for Union of India has also taken this Court to the fine nicety of the terms of contract, and submitted that in Clause 11.4 of the contract between GSPCL and GAIL word “request” has been used. As per arguments of consumers and further consumers, whenever there is increase in the price, there must be a request to the petitioners for change in price and if they accept the request, then only price can be increased. Learned counsel Mr.Subramaniam submitted that in fact, word “request” used, is not giving any option for accepting or refusing, the price of RLNG, but, it gives option to the petitioners to continue with or rescind the contract. Learned counsel has narrated in detail about “Force Majeure Event Clause”. Learned counsel for the Union of India submitted that all the consumers, who are procuring RLNG under long term contracts and the prospective consumers of RLNG have been brought under one denomination so that uniform pooled price can be charged for RLNG. It is further submitted that in a policy decision, scope of judicial review is to a limited extent, as has been narrated by Hon'ble Supreme Court in various decisions and it has been pointed out that once there is a power to take policy decision and if

the said policy decision is not arbitrary, malafide, violative of fundamental rights, violative of constitutional provisions or violative of statutory rights, the Court will not interfere with the policy decision. Government should be allowed to take such type of policy decision.

4.5 Learned Additional Solicitor General of India Mr.Vikas Singh, submitted that impugned decision is a policy decision and that there are three major points in these petitions, before this Court viz. (i) Whether Union of India has power or competence to take the impugned decision; (ii) Whether the impugned decision is arbitrary, unjust or violative of any statutory, constitutional or fundamental rights of the petitioners; and (iii) what is scope of judicial review in policy decision / impugned decision. Learned counsel Mr.Singh has relied upon several decisions rendered by Hon'ble Supreme Court. It is also submitted that impugned decision is taken on non-discriminatory basis. There is no breach of fundamental or constitutional rights of the petitioners. For the breach of the contractual rights, these petitions are not tenable at law and there is also arbitration clause in the agreement and, therefore, either suit should be filed or dispute may be resolved by arbitrator under the Contract.

4.6 This Court has heard arguments canvassed by learned counsel for the off-takers as well as learned counsel appearing on behalf of the Petronet and Ratnagiri Gas and Power Project, and State of Maharashtra, who have submitted that they are adopting the arguments canvassed by Mr.Subramaniam and Vikas Sing and further submitted that for the policy decision taken by Union of India, very limited is a scope of judicial review and in fact, increase in price of RLNG has already been passed by the petitioners to their further consumers. Thus, in fact, the petitioners are not aggrieved parties and they have also relied upon the terms of the contract and have pointed out that for breach of contract, petitions are not tenable at law. Remedies are available under the contract. All these counsels on behalf of respondents have placed reliance upon few dozens of judgments. Relevant and necessary are referred hereinafter.

R E A S O N S :

Having heard learned counsel for both the sides and looking to the facts and circumstances of the cases, we see no reason to entertain these petitions, for the following facts and reasons :

[C] What is policy decision ? :

5. As per dictionary meaning of the word “policy” means

(i) A general principle by which a Government is guided in its management of public affairs (Blacks Law Dictionary 8th Edition); or

(ii) “A concerted course of action followed by achieve certain ends; a plan (A Dictionary of Modern Legal Usage 2nd Edition)

(iii)”Prudence of sagacity in conduct of affairs. A course of plan of action, especially of administrative action ...” (Webster's Comprehensive Dictionary)

(iv) “Prudence or skill in the conduct of public affairs (Shorter Oxford English Dictionary 5th Edition)

Thus, in view of the aforesaid meanings of word “policy”, policy decision means a conscious decision taken by Government for the management of public affairs. It has applicability in rem.

[D] Power or Competency :

6. In the facts of the present case, Entry No.53 of List I – Union List of Schedule VII of the Constitution of India, reads as under:

> ***“53. Regulation and development of oilfields, and mineral resources; petroleum and petroleum products, other liquids and***

substances declared by Parliament by law to be dangerously inflammable."

Learned counsel for the petitioners submitted that Union of India has no legislative competence and, therefore, Union of India cannot fix the price of Regasified Liquefied Natural Gas, especially in view of entry No.25 of List-II of Schedule VII of State List. This contention is not accepted by this Court mainly for the reason that looking to entry no.25, which is pertaining to gas and gas-works, the State has legislative power but the said entry is not including Regasified Liquefied Natural Gas. Entry No.25 of List II - State List of Constitution of India, reads as under:

"25. Gas and gas-works"

For all the natural gases, being a petroleum products, the legislative competence is vested in Union of India. Whereas Entry No.25 of List-II of State List, includes manufactured gas. Natural gas, which is remarkably different from manufactured gas. It has been held by Hon'ble Supreme Court in the case of **Association of Natural Gas and others V/s. Union of India and others**, **reported in 2004(4) SCC 489**, especially para-43, as under:

"43. Natural gas being a petroleum

product, we are of the view that under Entry 53 List I, Union Government alone has got legislative competence. Going by the definition of gas as given in Section 2(g) of the Gujarat Act wherein "gas" has been defined as "a matter of gaseous state which predominantly consists of methane", it would certainly include natural gas also. We are of the view that under Entry 25 List II of the Seventh Schedule, the State would be competent to pass a legislation only in respect of gas and gas-works and having regard to collocation of words 'gas and gas works', this entry would mean any work or industry relating to manufactured gas which is often used for industrial, medical or other similar purposes. Entry 25 of List II, as suggested for the States, will have to be read as a whole. The expressions therein cannot be compartmentally interpreted. The word 'gas' in the entry will take colour from other word 'gasworks'. In Ballantine's Law Dictionary, 3rd edition, 1969 'gasworks' is defined as "a plant for the manufacture of artificial gas". Similarly in Webster's New 20th Century dictionary, it is defined as "an establishment in which gas for heating and lighting is manufactured". In www. freedictionary.com 'gas works' is explained as "a manufactory of gas, with all the machinery and appurtenances; a place where gas is generated." The meaning of the term 'gasworks' is well understood in the sense that the place where the gas is manufactured. So it is difficult to accept the proposition that “gas” in Entry 25 of List II includes natural Gas, which is fundamentally different from manufactured gas in gas works. Therefore, Entry 25 of List II could only cover manufactured gas and does not cover natural gas within its ambit. This will negative the argument of States that only they have exclusive powers to make laws dealing with natural gas and liquefied natural gas. Entry 25 of List II only covers manufactured gas. This is the clear intention of framers of the Constitution. This reading will no way make that entry a 'useless lumber' as feared by the states, because natural gas was never intended to be covered by that entry. It is also difficult to accept the argument of States that all “gas” could be categorized as dangerously inflammable and thus arriving at the conclusion that Natural Gas is also

> *covered in State List because this differentiation is based not on the characteristics of gas, but on the manner of its origin. Entry 25 of List II covers the gas manufactured and used in gas works. In view of this specific Entry 53, for any petroleum and petroleum products, the State legislature has no legislative competence to pass any legislation in respect of natural gas. To that extent, the provisions contained in the Gujarat Act are lacking legislative competence."*
>
> *(Emphasis supplied)*

In view of the aforesaid decision and looking to the nature of product in the facts of the present cases, i.e. Regasified Liquefied Natural Gas (RLNG) is nothing but a gaseous form of natural gas and, therefore, it is covered under entry no.53 of List I - Union List and is not covered by entry no.25 of List II - State List and, therefore, for RLNG, Union of India is having legislative competence to enact a law. Therefore, as per Article 73 of the Constitution of India, Executive Powers are extended with respect to the Regasified Liquefied Natural Gas. Thus, there is a power or competence with the Union of India for taking a policy decision for Regasified Liquefied Natural Gas.

[E] Whether the impugned decision is a policy decision?:

7. It is important to note that there is no law for fixing price of the gas. During course of hearing, this Court had requested learned counsel appearing on behalf

of Union of India to produce original file, which reveals discussion of various meetings and how the impugned decision dated 6th March,2007, has been taken. Looking to Annexures “R-4 to R-16” filed along with affidavit-in-reply filed by Union of India in Special Civil Application No.18868 of 2007, it appears that Union of India has played vital and pivotal role in procuring Liquefied Natural Gas from Ras Gas, Qatar. Initially, it appears that price of gas was to be fixed, as per the price of oil per barrel. A Special Purpose Vehicle namely Petronet was established, wherein, 50% shares are held by GAIL, IOC, BPCL and ONGC. Negotiation with Ras Gas, Qatar was not materialized for longer time because of insistence by Petronet for purchase of gas at a fixed price, whereas Ras Gas, Qatar wanted it to be at fluctuated rate and variable with variation in the price of oil per barrel. By the intervention of the Union of India and after protracted negotiations between Ministry of Petroleum & Natural Gas, India with the Ministry of Energy, Industry, Electricity and Water, Qatar, Ras Gas, Qatar finalized Sales and Purchase Agreement and decided to supply of 5.0 MMTPA gas for fixed rate for initial period of 5 years w.e.f. 2004 to 31st December,2008. This contract was entered into between Ras Gas, Qatar and Petronet on 31st July,1999. Various correspondence have been pointed out by learned counsel Mr.Gopal Subramaniam, between the aforesaid two ministries of Union of India as

well as Qatar.

8. Petronet, after getting Liquefied Natural Gas from Ras Gas, Qatar, converts liquid gas into gaseous form, which is known as Regasified Liquefied Natural Gas (gaseous form of natural gas - RLNG) and selling it to GAIL, IOC and BPCL. These three companies are public sector undertakings and they are referred by the petitioners as well as by the respondents as “off-takers”. These off-takers are further selling Regasified Liquefied Natural Gas to their 'consumers' under various contracts and these consumers are selling Regasified Liquefied Natural Gas to their 'further consumers'. In contracts between 'further consumers' and 'consumers' and in contracts between 'consumers' and 'off-takers', some contracts have change in price clause whereas in some contracts, there is absence or omission of change in price clause, and, therefore, 'consumers' and 'further consumers' have filed, these petitions on one of the grounds that because of their contracts with off-takers, Union of India cannot increase the price of gas, but, it may be noted that Union of India is not a party to these contracts. It is also coming out from the facts of these cases that Union of India has Empowered Group of Ministers (in short “EGOM”), who have taken the decision upon advice of experts in the field and Secretaries of various Departments of Union of India and concluded on

the basis of protracted discussion and on the basis of permutation and combination, of various factors as revealed from the file of original papers supplied by Union of India and ultimately decided on 6th March,2007, as under :

> *"The question of prices to be charged for RLNG from different customers has been under consideration of the Government. After considering existing practices and to avoid loading high cost of additional RLNG being made available to the prospective customers, it has been decided, after examination of all aspects, in public interest, that the gas prices being charged on supply of RLNG procured under long term contracts should be on a non-discriminatory basis and uniform pooled prices should be charged from all the existing and new consumers.*
>
> *2. You are advised accordingly and requested to give effect to the same immediately."*
>
> *(Emphasis supplied)*

Thus, it appears that a conscious decision has been taken by Empowered Group of Ministers (EGOM) to bring under one denomination, consumers of long term contracts and future consumers, on non-discriminatory basis. A lot of hue and cry has been made by the petitioners about Dabhol Project, which is now, known as Ratnagiri Power Project. It appears that Dabhol Project could not achieve the goal and, therefore, it was taken over by Ratnagiri Power Project, which is having a huge investment of approximately Rs.10,000/- Crores. Contribution has been made by the State of Maharastra, is

at approximately Rs.265 Crores. Thus, the said power project was meant for production of electricity of 2150 MW. To run this project, Regasified Liquefied Natural Gas (RLNG) is required as raw material. Petronet has further entered into a contract with Ras Gas, Qatar for getting 1.5 / MMBTU. Looking to the need of Regasified Liquefied Natural Gas in the country, at large, for power generation and for fertilizer industry, etc. Obviously, the price of second quantity of Liquefied Natural Gas is much higher than the previous purchase from Ras Gas, Qatar, and, therefore, if Ratnagiri Power project has to purchase the gas at such a increased rate, it will not a viable unit at all and they have to stop the power project and, thereby, large number of persons will be affected, and, therefore, Empowered Group of Ministers have hold various meetings with the experts as well as Secretaries of various Departments and tried to resolve these difficulties. Looking to the papers of original file, it appears that Union of India has considered all the relevant aspects of the matters. Alternative arrangements have also been discussed like use of Nephtha, for manufacturing of electricity, etc. and ultimately, it has been concluded to bring all the consumers of long term contracts and future consumers of Regasified Liquefied Natural Gas, under one denomination and price has been fixed on non-discriminatory basis, for both these type of consumers. Under the initial

arrangement, price of foreign component was US $ 2 to 3 / MMBTU, whereas, now, it is fixed at US $ 4.32/ MMBTU. If this price would not have been fixed as per the impugned policy decision, it would have been US$ 8 to 9/MMBTU for future consumers. Liquefied Natural Gas is available in the open market, which can be purchased by the petitioners, which is having a price of US$ 18 to 20/ MMBTU. In view of this fact, it was practicably impossible for its survival by Dabhol project/ Ratnagiri power project, to purchase natural gas at price US$ 8 to 9/ MMBTU and, therefore, there is no question of purchasing Liquefied Natural Gas by Ratnagiri Power Project from open market, which is still at a higher price of approximately US$ 18 to 20/ MMBTU. The whole project is for the benefit of large number of people. The said project is manufacturing electricity. The said project is a Public Sector Undertaking. Approximately Rs.10,000/- Crores is the investment of the public money and, therefore, one of the considerations kept in mind by Union of India, is this project for taking the impugned policy decision dated 6th March,2007. Likewise, from the original file and also looking to the affidavit-in-reply filed by Union of India, it appears that likewise Pragati-II project has also been contemplated, which is also meant for power generation for taking a policy decision. Likewise, Empowered Group of Ministers and Committee of Experts have also contemplated about Common

Wealth Games to be held at New Delhi, in the year 2010, for which, Government has planned to set up two gas-based power plants namely Bawana plant (1600 MW) and Bamnauli plant (750 MW). The requirement of gas for the said plaints is about 11 MMSCMD.

Keeping in mind, all these factors, future and existing power projects, as stated hereinabove, and also keeping in mind, alternative raw material namely Nephtha and also keeping in mind welfare of the public at large to be achieved through Ratnagiri power project and other projects as stated hereinabove, Union of India has brought under one denomination consumers of long term contracts and future consumers, on non-discriminatory basis, by pooling the price. Pooling of the price means increase in the price of Regasified Liquefied Natural Gas for consumers of long term contracts and reduction in a price of future consumers of RLNG. This decision is a conscious decision taken by Union of India and is a policy decision taken by Union of India. There is no flaw or mistake in decision making process by Empowered Group of Ministers. Prima facie, there is a nexus with the policy decision of pooling of price and the welfare of the public at large. Court is not a Cost Accountant for the detailed calculation as to what price, is to be fixed, for Regasified Liquefied Natural Gas. Statistical accuracy and mathematical nicety, is not to be checked by this Court.

Learned counsel for the petitioners has relied upon the judgement delivered by the Hon'ble Supreme Court in the case of **Gherulal Parakh Vs. Mahadeodas Maiya & Ors. reported in AIR 1959 SC 781** and pointed out that the impugned decision is not a public policy. Looking to the aforesaid judgement, especially para-23 thereof, it has been held that public policy is a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles of public policy have been crystallized under different heads and though it is permissible for Courts to expand and apply them to different situations, it should be invoked in clear and incontestable cases of harm to the public. In fact, this judgement is not helpful to the petitioners, mainly for the reason that there is vast a difference between set norms of public policy, based upon precedents and policy decision, which is a decision, taken by the government for the management of public affairs. Policy decision is neither a static nor a stagnant one. Policy decision depends upon prevailing situation in the country. In the facts of the present case, it also depends upon demand and supply. The impugned policy decision is a price fixing of RLNG, which is absolutely different, from a public policy concept, to be read with contract and contractual obligation.

[F] Whether policy decision is arbitrary, unjust,

mala fide, violative of fundamental rights or violative of statutory rights or dehors the constitution :

9. Now, once it is decided that there is competency and power with Union of India for taking a decision of fixing price of natural gas, which is falling within entry No.53 of List I - Union List of VII Schedule of Constitution of India and once it is held that the impugned decision is a policy decision, now, the question left out for the decision of this Court is to check : Whether this policy decision is arbitrary, unjust, violative of fundamental rights, or is dehors the constitution or violative of any statutory rights. It appears from the facts of the cases that the impugned decision is a rational decision. It has nexus with the public welfare. Dabhol Project/ Ratnagiri Power Project is a huge, vast and wide project for manufacturing of 2150 MW electricity, having total investment of Rs.10,000/- Crores by the Government. Welfare of people at large, is included or covered in the welfare of this power project. Also several other future projects have been considered or contemplated by Empowered Group of Ministers and Experts upon the subject and after due delebrations and after applying their mind fully and as permutation and combination of various facts, factors, result and consequences or pros and cons, the impugned policy decision has been taken by the Union of India.

There is full application of mind by the Government of India before taking the policy decision and, therefore, the same is not an arbitrary decision nor it is an unjust decision. On the contrary, it is rational and it is in favour of rank and file of India. There is no fundamental right or constitutional right vested in the petitioners to get Regasified Liquefied Natural Gas at the fixed price. There is no breach of any of the provisions of the Constitution of India, by the policy decision. Consumers of long term contracts are class by themselves as against the consumers of spot cargo and consumers covered under Administrated Pricing Mechanism (in short “APM”). It is contended by learned counsel for the petitioners that if the Government of India wants to bring under one denomination, all the consumers of Regasified Liquefied Natural Gas, must be brought under one denomination of price, but, they have chosen only consumers of long term contracts for giving benefit to the future consumers and, therefore, policy decision is violative of Article 14 of the Constitution of India. This contention is not accepted by this Court, mainly for the reason that consumers of long term contract, is a class by themselves and it is also a part and parcel of the policy decision, as to which type of consumers, are to be considered for pooling of the price. Once this Court comes to a conclusion that consumers of long term contracts, is a class by themselves and other consumers are falling under

Spot cargo consumers, who are purchasing gas on the basis of prevailing market price, which is US$ 18 to 20/ MMBTU and when third group of consumers are consumers covered under Administrated Pricing Mechanism (in short “APM”), it is not open for this Court to quash the policy decision only on the ground that why another class of consumers are not brought under one denomination for pooling of the price as it is also a policy decision, which class of consumers is to be considered for pooling of the price. Policy decision is a very complex decision, having far reaching consequences in India, for public as well as for industry and, therefore, in such type of policy decision, which is fixing the price of natural gas and which is used as a raw material, has at a time number of effects upon power sector, fertilizer, upon public, etc. There may be crudities and inequities in complicated experimental economic decision, but on that account alone, it cannot be struck down as invalid. It has been held by Hon'ble Supreme Court in the case of **R.K. Garg V/s. Union of India**, **reported in (1981)4 SCC 675** especially para-8, as under :

> *“8. .... The Court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry', 'that exact wisdom and nice adaption of remedy are*

> *not always possible' and that 'judgement is largely a prophecy based on meagre and uninterrupted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."*
>
> *(Emphasis supplied)*

Consumers under long term contracts are separate class, in comparison with spot cargo consumers and consumers covered under Administrated Pricing Mechanism (APM). Spot cargo consumers are purchasing RLNG from open market of approximately US $ 18- 20 / MMBTU, whereas APM consumers are purchasing from domestic manufactures. Consumers of long term contract are brought under one denomination of price, with future consumer on non-discriminatory price in the interest of public as per policy decision dated 6th March,2006. The classification of these consumers is based on "intelligent differentia" and it has nexus with object to be achieved. What is to be seen is "nexus with the object to be achieved" and not quantity of benefit. It was argued by petitioners that benefit of others, by pooling of price, is loss to consumers of petitioners or to the petitioners, and, therefore also, policy decision deserves to be quashed and set aside. This contention is not accepted by this Court, because, once the classification is found based

upon intelligent differentia and once there is nexus between intelligent differentia and object sought to be achieved, Court should refrain exercise of judicial review of policy decision, merely on the ground of loss of benefit by one class of society. Dabhol project/ Ratnagiri Project is a means to achieve public good. If benefit is given to huge and ambitious Dabhol project / Ratnagiri Project, it cannot be said that only for benefit of one company, policy decision is taken. In fact, sometimes public welfare can be achieved through one institution. In the facts of the present case, Ratnagiri Gas and Power Project is a public sector undertaking. Benefit will be directly to the sizeable number of public. Therefore, there is nexus with the object to be achieved.

It has been held by the Hon'ble Supreme Court in the case of **State of A.P. And others V/s. Nallamilli Rami Reddi and others reported in (2001)7 SCC 708,** especially **para 8**, reads as under :

> *"8. What Article 14 of the Constitution prohibits is "class legislation" and not "classification of purpose of legislation". If the legislature reasonably classifies persons for legislative purposes so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is twofold : (i) that the*

> *classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (ii) that differentia must have a rational connection to the object sought to be achieved. Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstance arising out of peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation."*
>
> *(Emphasis supplied)*

Thus, there is no violation of Article 14 or right of equality of petitioner. Decision taken by Union of India is neither arbitrary nor is unjust.

In fact, there is no breach of any constitutional right of the petitioners. As held by Hon'ble Supreme Court in the case of **Rai Sahib Ram Jawaya Kapur and others V/s. The State of Punjab reported in AIR 1955 SC 549,** especially in para 20 thereof, these petitioners do not have a fundamental right or constitutional right to get RLNG with fixed price nor there is corresponding duty vested in Union of India, not to take policy decision and continue the price of RLNG for the contractual period, wherein (in contract), Union of India is not even a party.

Likewise, there is no breach of any statutory

right of the petitioners because there is no law for fixing price of the gas. From the facts of the case and looking to the original file, there is no mala fide on the part of the Union of India. Thus, the impugned decision dated 6th March,2007, is not arbitrary, unjust, mala fide, or violative of fundamental rights, nor it is violative of constitutional rights or statutory rights of the petitioners. At the most, even if the cases of the petitioners are taken at their highest pitch, maximum it is a violative of contractual rights. This point has been considered in further discussion hereinafter, wherein, it is concluded that even there is no breach of contractual rights.

[G] SCOPE OF JUDICIAL REVIEW :

10. Now, once this Court has held that there is competency and power with the Union of India and that the impugned decision is a policy decision and also, that the said policy decision is neither arbitrary, nor unjust, nor violative of fundamental rights or constitutional rights nor it is violative of statutory rights of the petitioners, what is the scope of judicial review of the policy decision?

10.1 It has been held by Hon'ble Supreme Court and by, now, it is concluded by Hon'ble Supreme Court and on

developed jurisprudence of power of judicial review in policy decision, that correctness of reasons, which prompted the Government in decision making – taking, one course of action instead of another is not a matter of concern in the judicial review and the Court is not an appropriate forum for such investigation. Court is not in search of better policy. Wisdom and advisability in economic policies are ordinary not amenable to judicial review. Court is not a mathematician or cost accountant nor a statistical expert for refixing of price of gas. In economic matters, which are highly sensitive and complex, where many problems are singular and contingent, "fair-play in joints" should be given to the Government. Economic decision may be based upon experimentation and one cannot anticipate all possible abuses. Economic policy decision may have some fabrics of crudities and inequalities and, therefore, it cannot be struck down as invalid. Court cannot replace its wisdom, especially in economic matters because it has no expertise knowledge.

10.2 It has been held by Hon'ble Supreme Court in the case of **Dhampur Sugar (Kashipur) Ltd. V/s. State of Uttaranchal and others reported in (2007)8 SCC 418**, especially in paras 63, 65 and 67, read as under:

> ***"63.*** *In our judgement, it is well settled that public authorities must have liberty and freedom in framing policies. No*

doubt, the discretion is not absolute, unqualified, unfettered or uncanalised and judiciary has control over all executive actions. At the same time, however, it is well established that courts are ill-equipped to deal with these matters. In complex social, economic and commercial matters, decisions have to be taken by governmental authorities keeping in view several factors, and it is not possible for courts to consider competing claims and conflicting interests and to conclude which way the balance tilts. There are no objective, justiciable or manageable standards to judge the issues nor such questions can be decided on a priori considerations.

65. *In the leading case of Bennett Coleman & Co. v. Union of India constitutional validity of the import policy for the newsprint adopted by the Government was challenged in this Court. The Court refused to adjudicate the policy matters unless it was shown to be arbitrary, capricious or mala fide. Speaking for the Court, Mathew, J. observed: (SCC p.834, para 125)*

> *"125. .... The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietor to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of governmental policy." (Emphasis supplied)*

67. *Reserving the judgement, this Court observed that the High Court has thoroughly misunderstood the nature of the jurisdiction that was exercised by it.*

> *"9. ... so long as there is no violation of any fundamental rights and if the principles of natural justice are not offended, it was not for the High Court to lay down the policy that should be adopted by the educational authorities in the matter of granting permission for starting schools. The question of policy is essentially for the State and such policy will depend upon an overall*

> *assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If the overall assessment is arrived at after a proper classification on a reasonable basis, it is not for the courts to interfere with the policy leading up to such assessment."*
>
> *(Emphasis supplied)*

10.3 It has been held by Hon'ble Supreme Court in the case of **Directorate of Film Festivals and others V/s. Gaurav Ashwin Jain and others reported in (2007)4 SCC 737**, especially in para 16, reads as under:

> *"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities. Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."*
>
> *(Emphasis supplied)*

10.4 It has been held by Hon'ble Supreme Court in the case of **State of Orissa and others V/s. Gopinath Dash and others reported in (2005)13 SCC 495**, especially in paras

5, 6 & 7, read as under:

> *"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J & K and Shri Sitaram Sugar Co.Ltd. v. Union of India). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.*
>
> *6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern of judicial review and the Court is not the appropriate forum for such investigation.*
>
> *7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court **will not and should not** substitute its own judgment for the judgement of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."*
>
> *(Emphasis supplied)*

10.5 It has been held by Hon'ble Supreme Court in the

case of **Sidheshwar Sahakari Sakhar Karkhana Ltd. V/s. Union of India and others reported in (2005)3 SCC 369**, especially in para 23, reads as under:

> *"23. We are also of view that grant of rebate, exemption or concession is in the nature of policy of the Government. Normally in such policy matters, a court of law will not interfere unless the policy is shown to be contrary to law, inconsistent with the provisions of the Constitution or otherwise arbitrary or unreasonable. Since the policy decision as reflected in para 3 of Notification No.132/82 cannot be said to be arbitrary, unreasonable or inconsistent with statutory provisions, a person claiming the protection under the said notification has to comply with the conditions laid down in the notification. As the appellant has been granted benefit of rebate in excise duty as per para 3 of the notification, the action cannot be held unlawful and the appellant Society has no reason to make grievance against the action of the Revenue."*
>
> *(Emphasis supplied)*

10.6 It has been held by Hon'ble Supreme Court in the case of **Balco Employees' Union (Regd.) V/s. Union of India and others reported in (2002)2 SCC 333,** especially in para 47, 92 and 93, read as under:

> *"47. Process of disinvestment is a policy decision involving complex economic factors. The courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government*

has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, in asmuch as its policy decision may have an impact on the workers' right, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law. Even a government servant, having the protection of not only Articles 14 and 16 of the Constitution but also of Article 311, has no absolute right to remain in service. For example, apart from cases of disciplinary action, the services of government servants can be terminated if posts are abolished. If such employee cannot make a grievance based on Part III of the Constitution or Article 311 then it cannot stand to reason that like the petitioners, non-government employees working in a company which by reason of judicial pronouncement may be regarded as a State for the purpose of Part III of the Constitution, can claim a superior or a better right than a government servant and impugn its change of status. In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision.

92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.

> *93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-3-2001."*
>
> *(Emphasis supplied)*

10.7 It has been held by Hon'ble Supreme Court in the case of **Union of India and another V/s. G. Ganayutham reported in (1997)7 SCC 463**, in para-30 that greater will be the judicial restraint in the matters concerning governmental policies, national security or taxation, finance and economy of the country or similar such matters of grave public policy. This restraint on the part of the judiciary is described in administrative law as giving a greater margin of appreciation to the administrator in certain areas.

10.8 Likewise, it has been held by Hon'ble Supreme Court in the case of **Tata Cellular V/s. Union of India reported in (1994)6 SCC 651** in para 94 while deducing the principles of judicial review that

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

Thus, **"Fair-play in joints" have to be permitted by Court to the Government**. The Court cannot replace its decision, once the decision making process is found to be legal and no irregularities or irrationalities are found by the Court. Very narrow is a scope of the judicial review, once the decision making process is found to be legal and flawless.

In view of the aforesaid decisions and jurisprudence developed in the country consistently from several decades, we see no reason to quash and set aside the impugned policy decision dated 6th March,2007, in exercise of extra ordinary jurisdiction vested in this Court under Article 226 and 227 of the Constitution of India.

[H] NATURE OF CONTRACT :

11. Learned counsel for the petitioners have heavily relied upon contract between 'off-takers' and 'consumers' and between 'consumers no.1' and 'consumers no.2'. The

petitioners are 'consumers no.1' and 'consumers No.2'. 'Consumers no.1 means those consumers, who are having contracts with off-takers i.e. GAIL, IOC and BPCL, whereas, 'consumer no.2' means those consumers, who are further consumers' consumers and who have no contract with 'off-takers'. Thus, consumers no.2 have no privity of contract with off-takers. On the basis of contracts, petitioner have submitted that Union of India cannot increase the price of Regasified Liquefied Natural Gas by taking the impugned decision dated 6th March,2007. This Court is not inclined to accept this contention mainly for the following reasons :

Firstly for the reason that Union of India is not a party to these contracts;

Secondly for the reason that impugned decision is a policy decision;

Thirdly for the reason that there is no law for price fixing for gas; therefore, always price fixation will be by executives, in exercise of Article 73 to be read with Entry No.53 of List I - Union List of Schedule VII of Constitution of India;

Fourthly for the reason that the petitioners are consumers under the long term contracts, they are class by themselves, comparative to other consumers;

Fifthly for the reason that in several contracts with GAIL, IOC and BPCL, there is a price changing clause, on the basis of change in government policy;

Sixthly for the reason that even if such clause for change in price is not in a contract, such clause will be read into the contract, because, whenever there is change in Government policy, a price change clause will be read in the contract because there cannot be a contract against the government policy, which is evolved for the welfare of the society.

Seventhly for the reason that there is a Force Majeure Clause in every contract, which contemplates any non-discriminatory acts of Government or compliance with such acts as a Force Majeure event;

Eighthly for the reason that Union of India, by Empowered Group of Ministers with advise of experts and Secretaries of various departments of Union of India, has taken the decision of pooling of price of Regasified Liquefied Natural Gas, on non-discriminatory basis and thereby has put under one denomination, consumers of long term contracts and future consumers. Parties to the contract cannot bind Union of India (third party) by terms of contract. Contract was contemplated while taking policy decision. Policy of Union of India is not bound by contractual terms of two private parties, on the contrary, contractual terms will be subject to policy decision by Union of India;

Ninethly for the reason that Union of India has not given any promises for not to pool the price of Regasified Liquefied Natural Gas. Thus, there is no promissory

estoppal against the Union of India.

Tenthly for the reason that Union of India has planery power to change the price of gas and has planery power to fix and refix the price of gas for the welfare of the people of India.

Eleventhly for the reason that the policy decision dated 6th March,2007 is given prospective effect, and not from date of contract, but, from July,2007, onwards.

With these eleven reasons, this Court is not inclined to accept the contention of the petitioners that there is no change in price clause, in contract, therefore, Union of India (which is not a party to the contract) cannot increase the price of Regasified Liquefied Natural Gas.

12. Learned counsel for the petitioners submitted that one segment of people is benefited whereas another segment of people in Gujarat State has not been benefited by the impugned policy, and, therefore, the same may be quashed. This contention is not accepted by this Court for the reason that it is for the Union of India to decide how benefit of policy decision, should be distributed in this, vast and wide, country. Court cannot issue writ for change of 'area affected by policy decision'. Every policy has its own impact area in the country.

13. Clause No.11.1 to 11.4 of the contract between Gujarat State Petroleum Corporation Limited and GAIL (India) Ltd. (petitioner of Special Civil Application No.18868 of 2007), read as under:

> *"11.1* ***The Per MMBTU Price for Gas***
> *(a) The Contract Price which the Buyer shall pay for quantities of Gas to be sold and purchased pursuant to this Agreement shall be as agreed separately.*
> *(b) The above Contract Price includes basic custom duty and exclusive of all other Taxes and Duties. Buyer shall pay/ reimburse Taxes and Duties as applicable in addition to Contract Price from time to time.*
> *(c) The Buyer shall be liable for Taxes & Duties with respect to the sale importation of the Gas. Any Taxes and Duties under this article which may have been paid by the Seller shall be reimbursed by the Buyer. For avoidance of doubt, the Buyer shall indemnify the Seller against any Taxes and Duties which Buyer as a result of any law, rule or policy, is or becomes obliged to pay directly or indirectly on sale importation of Gas sold as per the terms of this Agreement.*
>
> *11.2 The present basic custom duty is Rs ...../ MMBTU (equivalent USD ..../MMBTU) included in the Foreign Currency Component (currently @ 5% on importation of LNG). Basic custom duty shall be charged as applicable from time to time.*
>
> *11.3 The above Contract Price are valid upto 31st December,2008 and shall be reviewed only and to the extent to which Ras Gas (Supplier of LNG) agrees for a different price.*
>
> *11.4 Change in Law*
> *If at any time due to a change in law or a change in the policy of any government, including due to the re-flagging of any LNG Tanker required by a change in law or a change in policy, or due to any modification to a LNG Tanker*

> *arising from a change in the regulations or policies of either of the ports at Ras Laffan, Qatar, or Dahej, Gujarat, India, Seller incurs an increase or decrease in its costs or expenses, or an increase or decrease in its net after tax return in any year, Seller may request a revision of the Contract Price to reflect any such increase or decrease."*
>
> *(Emphasis supplied)*

In view of the aforesaid clause, a word "request" has been used in clause No.11.4, which has been argument upon and it is submitted that for change in price because of change in policy of the Governments, there cannot be striate-way increase in the price, but, they have to request the petitioners for accepting the increase of price of Regasified Liquefied Natural Gas and as there is no such request, the increase in price ought to be quashed. This contention of the petitioners is not accepted by this Court mainly for the reason that looking to the nature of contract and looking to clause No.11.4, the word "request" is not for giving option to the petitioners either to accept or to refuse the increase in the price, but, the word "request" used in clause No.11.4 in the contract gives option to the petitioners to continue with the contract or to rescind the contract. Dictionary meaning of word "request" :

> *"Any **"request"** of the Government to a subordinate authority is tantamount to a positive direction or order and it will be difficult for the subordinate authority to disregard the same. (CATA Sales Co-Operative Society v. A.P. Government, AIR 1977 SC 2313*

at 2318).”

*“**Request**” by Government is equivalent to direction by Government. (Chintapalli Agency Taluk Arrack Sales Coop. Society Ltd. v. Secretary (Food and Agriculture), Govt. of A.P. AIR 1977 SC 2313)”*

(stroud's Judicial Dictionary of words and phrases - 6th Edition page 4081)

14. It has been held by Hon'ble Supreme Court in the case of **Chintapalli Agency Taluk Arrack Sales Co-Op. Society Ltd. V/s. Secretary (Food and Agriculture), Government of Andhra Pradesh and others reported in AIR 1977 SC 2313 in para 24**, that any “request” of the Government to a subordinate authority is tantamount to a positive direction or order and it will be difficult for the subordinate authority to disregard the same.

It has been pointed out by learned counsel Mr.Gopal Subramaniam that like the aforesaid clause no.11.4, (which permits the change in price due to change in government policy), there are similar clauses in other contracts of off-takers, who have 116 contracts with their consumers and in most of those contracts, the aforesaid type of clause is in existence, whereas, in few contracts, such type of “change in law clause” is not in existence, but, it ought to be kept in mind that this type of contract is not binding to the Government of India, especially for framing out a policy, whereby, the price of the gas is to be fixed. In fact, Union of India

is not a party to those contracts, therefore, Union of India is not bound by those contracts. A contract between two persons for uniform price for decades together never disable Union of India from fixing the price of the gas. In fact, some petitioners are **consumers' consumer** and they have no direct nexus even with off-takers like Essar Power Ltd. V/s. GAIL (India) Ltd. (petitioner of Special Civil Application No.19045 of 2007) as well as like Gujarat Paguthan Energy Corporation Pvt. Ltd. U/s. Union of India and others (petitioner of Special Civil Application No.23151 of 2007) as well as Gujarat Urja Vikas Nigam Limited V/s. GAIL (India) Ltd. and others (petitioner of Special Civil Application No.23018 of 2007) as well as Welspun India Limited V/s. GAIL (India) Limited and others (petitioner of Special Civil Application No.23019 of 2007. All the aforesaid petitioners are consumers' consumer. They don't have, even privity of contract with off-takers. “Change in law” clause is in existence in following matters:

(i) Special Civil Application No.18868 of 2007 (Gujarat State Petroleum Corporation Limited V/s. Union of India and others)

(ii) Special Civil Application No.4468 of 2008 (Essar Steel Ltd. V/s. Union of India and others)

(iii)Special Civil Application No.4201 of 2008 (Malanpur Captive Power Ltd. V/s. Union of India and others;

Whereas, in Special Civil Application No.19048 of 2007 – Gujarat State Electricity Corporation Limited V/s. GAIL (India) Limited and others, initially there was a clause for change in price viz. Clause No.9.2.5 of the agreement, whereas, subsequently, by a letter, it is contended by the petitioners that the aforesaid clause No.9.2.5 was replaced by another clause, which does not permit increase in price of gas. Thus, in most of the contracts between off-takers and consumers, there is a clause for change in price due to change in law/policy of the government. It appears that there is a legislative competency with the Union of India, as per Entry No.53 – List I - Union List for enacting law upon natural gas, there is all power vested in Union of India to take policy decision under Article 73 of the Constitution of India, including fixing of the price of natural gas. None of the parties of a contract can disable Union of India or can abridge power of Union of India, to fix or refix the price of natural gas. Union of India is not a party to the contract. The case has been argued at much higher pitch by learned counsel Mr.Gopal Subramaniam that even if Union of India is a party to the contract, Union of India has all power, jurisdiction and authority to change the price of natural gas, but, in the facts of the present cases, Union of India is not a party to the contracts. Otherwise also, looking to Article 127 of the Articles of Association of GAIL (India) Ltd.; Article

144(b) of Articles of Association of IOC and also looking to Article 94(2) of the Articles of Association of BPCL, directive or instruction issued by the President with regard to the conduct of business and affairs of the company is binding. Articles 127, 144(b) and 94(2) of Articles of Association of GAIL, IOC and BPCL, read as under:

> **Article 127 of Articles of Association of GAIL (India) Ltd., as under:**
>
> *"127. Notwithstanding anything contained in these Articles the President may, so long as he holds 51% or more of the paid up Equity Share Capital of the Company from, time to time issue such directives or instructions as may be considered necessary in regard to conduct of business and affairs of the Company and in like manner may vary and annul any such directive or instruction. The Directors shall give immediate effect to the directives of instruction so issued. In particular, the President will have the power :-*
>
> *1) To give directives to the Company as to exercise and performance of its functions in matters involving national security or substantial public interest.*
> *2) To call for such returns, accounts and other information with respect to the property and activities of the Company as may be required from time to time.*
> *3) To determine in consultation with the Board annual, short and long term financial and economic objectives of the Company.*
>
> *Provided that all directives issued by the President, shall be in writing addressed to the Chairman. The Board shall, except where the President considers that the interest of the national security requires otherwise, incorporate the contents of directive issued by the President in the Annual report of the Company and also*

indicate its impact on the financial position of the Company."

Article 144(b) of Articles of Association of IOC, as under:

"144(b) Notwithstanding anything contained in any of these articles the President may, from time to time, issue such directive or instructions as may be considered necessary in regard to the finances, conduct of business and affairs of the Company. The Company shall give immediate effect to the directives or instructions so issued.

Provided that the Board shall, except where the President considers that the interest of the national security requires otherwise, incorporate the contents of directive issued by the President in the Annual Report of the Company and also indicate its impact on the financial position of the Company."

Article 94(2) of Articles of Association of BPCL, as under:

"94(2) Notwithstanding anything contained in any of these articles the President may from time to time, issue such directives or instructions as may be considered necessary in regard to the finances, conduct of business and affairs of the Company. The Company shall give immediate effect to the directives or instructions so issued.

The Board shall, except where the President considers that the interest of the national security requires otherwise, incorporate the contents of directive issued by the President in the Annual Report of the Company and also indicate its impact on the financial position of the Company."
(Emphasis supplied)

Thus, all these aforesaid public sector undertakings were bound to follow their Articles of

Association. In any event, even assuming that “the change in price due to change in law/policy” clause were inadvertently not included in any of the contracts of the Public Sector Undertakings, such a clause has to be read as an implied condition into the contracts. This is because the Public Sector Undertakings are bound by policy/directives of the Government of India. If it is not so read, the contracts would be ultra virus the Articles of Association of the Public Sector Undertakings. The uniform pattern of change in law/ policy clause shows that the purchasers from the off-takers were conscious of the power of Government of India to effect a policy change and it is an obligation on such customers to accept such policy and its implementations. This also reflects from Force Majeure Clause in the contracts between the off-takers and their customers. All the contracts provide for Force Majeure events which include acts / non-discriminatory acts of the Government which directly affects either parties performance of the obligations under the contracts. Thus, in contracts where there is 'change in price clause' there is no breach of contractual rights of petitioner by refixation of price of RLNG gas due to change in Government Policy. Likewise, even in contracts where 'change in price due to change in law/policy clause' is not there, as held above, such clause will be read into the contract therefore in these cases also there is no breach of contractual rights of

the petitioners. Force Majeure clause is incorporated in all the contracts, looking to the facts of the case.

[I] FORCE MAJEURE EVENT CLAUSE :

15. In every contract, there is a Force Majeure Event Clause. Clause 18.1 and 18.2 of a contract between Gujarat State Petroleum Corporation Limited V/s. GAIL (India) Ltd., read as under:

> ***"18.1 Non- Performance or Delay Excused***
> *Any non-performance or delay in performance by any party of any of its obligations under this Agreement shall, be excused if, and to the extent that, such non-performance or delay in performance is caused by Force Majeure Events as defined in this Article.*
>
> ***18.2 Force Majeure Events***
>
> *(a) For the purpose of this Agreement, the term Force Majeure Events shall include any causes or events, whether similar to or different from those enumerated herein, lying beyond the reasonable control of and unanticipated or unforeseeable by and not brought at the instance of the Party claiming to be affected by such event or which, if anticipated or foreseeable, could not be avoided or provided for acting as a RPO and which has caused the non-performance or delay in performance and shall, without limitation, include the failure under Force Majeure by PLL to supply Gas to Seller and shall not include commercial reasons for non performance and unavailability of funds effects of which such Party could not have prevented by acting as a Reasonable and Prudent Operator and which has materially and adversely affected the performance under this Agreement by either Party in part or in whole.*

> *(b) Without limitation to the foregoing, the term Force Majeure event shall include fire, flood, atmospheric disturbance, lightning, storm, typhoon, tornado, earthquake, landslide, soil erosion, subsidence, washout or epidemic or other acts of God, war (whether declared as undeclared), riot, civil war, blockade, insurrection, acts of public enemies or civil disturbance, lawful strike, lockout, or other industrial disturbance affecting the Seller and the Buyer including the respective Facilities and facilities of the Purchaser and Buyer's Gas Transporter Facilities and any non-discriminatory acts of Government, or compliance with such acts, rules regulations which directly affect Party's ability to perform its obligations hereunder."*
>
> *(Emphasis supplied)*

Thus, from the aforesaid clause, it is clear that if any non-discriminatory act of government or compliance with such act of government, which directly affects parties ability to perform its obligation, will constitute a Force Majeure Event. The impugned policy decision taken by Government of India for pooling of price of the Regasified Liquefied Natural Gas, if found unbearable by the petitioners, Force Majeure Clause is already in existence. Remedies are available under this clause also. Even it can lead to non-performance by any party to the contract. The whole contract may come to an end, but, as stated hereinabove, open market price of Regasified Liquefied Natural Gas is between US $ 18 to 20/ MMBTU. This pooling price is still beneficial to the petitioners, because pooling price is US$ 4.32/ MMBTU.

Thus, instead of US$ 2 to 3/ MMBTU, the petitioners will have to pay now, after pooling of price approximately US$ 4.32/ MMBTU. Still difference between, spot cargo price i.e. open market price and pooled price is remarkable and sizeable and, therefore, termination of the contract under this Force Majeure Clause is, prima facie, not beneficial to the petitioners. Under these contracts, petitioners are getting approximately 40% of Regasified Liquefied Natural Gas of their need because need is more than supply. Approximately 60% of their need of Regasified Liquefied Natural Gas is satisfied by purchasing Regasified Liquefied Natural Gas from open market. Thus, grant of Regasified Liquefied Natural Gas is like a sugar given under the ration card and if the price of sugar given under the price of ration card is increased, then also, always it is beneficial to the ration-card holder because open market price is still much more. Here also, open market price is more than four times than the pooled price of Regasified Liquefied Natural Gas and, therefore, learned counsel appearing for Union of India as well as for off-takers continuously read and re-read the Force Majeure Clause and has pointed out that choice is with the petitioners to continue with the contract or to rescind the contract. Suffice it will be for the purpose of decision of this Court to point out that there is existence of Force Majeure Clause in every contract and also the fact that natural gas is available

in the open market, which can be purchased by the petitioners. It is not the case, that the Government of India is encashing its monopoly, by increase of price, because even otherwise also, approximately 60% of the requirement of the petitioners of Regasified Liquefied Natural Gas, is satisfied by purchase of Regasified Liquefied Natural Gas from the open market and, therefore also, the impugned policy decision requires not to be quashed by this Court. There is no compulsory dragging by Union of India to the petitioners to continue with the contract.

[J] REFUND :

16. Learned counsel Mr.Gopal Subramaniam submitted that the aforesaid policy decision taken by Union of India dated 6th March,2007 has been brought into force and effect from July,2007. Union of India has conveyed its decision to the Petronet as well as to the off-takers, as stated hereinabove. Petronet is Special Purpose Vehicle, created with 50% shares of GAIL, IOC, BPCL and ONGC and as stated hereinabove, as per Article 127 of Articles of Association of GAIL and other two off-takers viz. IOC and BPCL have implemented, the policy decision and they are passing their burden of increased price of Regasified Liquefied Natural Gas to their 'consumers' and these “consumers” are further passing their burden to their

"further consumers". Thus, the petitioners, who are "consumers" as well as "further consumers" are not really aggrieved parties. Looking to invoices, they have suffered no loss. They have passed the burden of increased price of Regasified Liquefied Natural Gas to further down stream consumers. In fact, the petitioners have suppressed these facts that they have started charging increased price of Regasified Liquefied Natural Gas from their further consumers. In view of these facts, if refund is allowed to the petitioners, it will tantamount to "unjust enrichment". Once the burden is passed to the down stream consumers by the petitioners, they are not entitled for refund. Otherwise also, it will be a matter of fact to be proved on the basis of evidence on record, who has passed on burden and who has not passed burden, because one of the petitioner of Special Civil Application No.19047 of 2007 [Gujarat Industries Power Corporation Limited V/s. GAIL (India) Ltd.] has stated in affidavit-in rejoinder that they have not passed their burden upon their consumers. For this petitioner, it is a matter of evidence to prove in Suit or in arbitration, whether in fact, they have not passed burden of increase in price of Regasified Liquefied Natural Gas to their further consumers. If the burden is passed upon further consumers, they are not entitled for refund. It has been held by Hon'ble Supreme Court in the case of **Mafatlal Industries Limited and others V/s. Union**

of India and others reported in (1997)5 SCC 536, especially para 105, reads as under:

> *"105. It would be evident from the above discussion that the claims for refund under the said two enactments constitute an independent regimen. Every decision favourable to an assessee / manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, whether before or after the 1991 Amendment – as interpreted by us herein – make every refund claim subject to proof of not passing on the burden of duty on others. Even if a suit is filed, the very same condition operates. Similarly, the High Court while examining its jurisdiction under Article 226 – and this Court while acting under Article 32 – would insist upon the said condition being satisfied before ordering refund. Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceeding and whichever be the forum. Section 11-B/ Section 27 are constitutionally valid, as explained by us hereinbefore. They have to be applied and followed implicitly wherever they are applicable."*
>
> *(Emphasis supplied)*

In view of the aforesaid decision, the petitioners are not entitled to refund under writ jurisdiction.

Several other authorities have been cited before this Court by both sides. To avoid bulkiness of the present judgment,whatever are relevant for the decision

of this Court are referred.

17. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncement, the impugned decision taken by Union of India dated 6th March,2007, is a policy decision for pooling price of Regasified Liquefied Natural Gas. Union of India is competent to take this policy decision and the same is neither arbitrary, nor it is unjust, nor violative of fundamental rights, nor violative of constitutional rights nor the same is violative of statutory rights of the petitioners and the petitioners have failed to establish that they have borne the burden of increase in price of Regasified Liquefied 8Natural Gas without passing the same to their further consumers, hence, are not entitle to refund. For getting refund, the aforesaid aspect ought to be established by the petitioners, on the basis of evidence on record, either in the suit or in the arbitration. There is no substance in these petitions, and, therefore, all these petitions are hereby dismissed.

18. In view of the order passed in these writ petitions, all the Civil Applications/ Misc.Civil Applications preferred therein, are also disposed of.

Sd/-
(D.N.PATEL,J)

I agree with the decision rendered by brother **Justice D.N.PATEL.**

Sd/-
(J.C.UPADHYAYA,J)

*dipti

In light of the majority opinion the petitions are rejected with no order as to costs.

Sd/- Sd/- Sd/-
(D.A.Mehta, J.) (D.N.Patel, J.) (J.C.Upadhyaya,J.)