OIL AND NATURAL GAS COMMISSION AND ANR. A

v.

ASSOCIATION OF NATURAL GAS CONSUMING INDUSTRIES OF GUJARAT AND 9 ORS., ETC. ETC.

MAY 4, 1990 B

[S. RANGANATHAN, N.D. OJHA AND J.S VERMA, JJ.]

Constitution of India, 1950: Articles 14, 32 and 226—OGC—A statutory corporation—Whether State agency—'Public utility' concern —Obliged to supply gas at reasonable rates—Price fixation—Interference by Court—Permissibility of. C

Oil and Natural Gas Commission Act, 1959: Section 14—ONGC—Whether 'public utility' undertaking—Whether obliged to supply gas for consumption of public.

D

Words and Phrases: 'Public utility'—'Reasonableness of rates' meaning of.

The appellant, Oil & Natural Gas Commission, is a statutory corporation constituted by and under the Oil and Natural Gas Commission Act, 1959. In most of its oil fields situated in Gujarat, gas comes E **out along with crude oil as "free gas".**

The appellant had agreed to supply this gas to the Gujarat State Electricity Board (GSEB) and the Gujarat State Fertiliser Corporation (GSFC) at a price related to fuel oil price on the basis of thermal value equivalence, without any reference to the cost of production of gas as F **such. Public discontent over the alleged high price charged was expressed and eventually the dispute was referred to the sole arbitration of Dr. V.K.R.V. Rao who gave his award. Dr. Rao made the "cost plus" method the basis of his award in preference to the basis of thermal equivalence of alternate fuel (thermal equivalence basis).**

G

In July 1967, the supply of gas to some of the industries in and around Vadodara city was started, on the basis of individual annual contracts. Aggrieved by the steady rise in the prices, the respondents—Association of Natural Gas Consuming Industries and Others—moved the Bombay High Court in March 1979 by way of a writ petition. In the petition it was, *inter alia*, prayed that the ONGC be directed (i) to H

A continue to supply the gas to the respondents despite the contracts in their favour having lapsed; (ii) to discuss and negotiate a fair, reasonable and just price for supply of gas; (iii) to stop charging discriminatory prices for the supply of gas to the respondents in comparison with the price charged to public sector undertakings; and (iv) to restrict the minimum guaranteed quantity of offtake.

B

The High Court passed an interim order directing the ONGC to continue the supply of gas to the respondents, at the existing rate of Rs.504 per unit which was later raised by the Court to Rs.1000 per unit.

The High Court held; (i) The Oil and Natural Gas Commisson is a public Utility Undertaking and has a duty to supply gas to anyone who C requires it so long as there is enough supply available; (ii) Price fixation is generally a legislative function. But the Oil and Natural Gas Commission being a State instrumentality, is bound to act reasonably in the matter of fixation of price; such price is bound to be determined by following any one of the modalities suggested in the judgment of the D High Court; (iii) There was no discrimination by the Oil and Natural Gas Commission between the public sector undertakings on the one hand and the respondents' undertakings on the other in charging differential prices; and (iv) The clause regarding minimum guaranteed offtake was valid and enforceable.

E Before this Court, the appellant primarily challenged the finding of the High Court that the ONGC was a 'public utility undertaking' which was bound to supply gas at the request of any member of the public at large. The appellant also contested the correctness of the High Court's conclusion that the price of gas must be determined on the basis of cost of production plus a reasonable return for the investment made. F The appellant submitted that (i) the prices under the contracts entered into with the respondents had been determined on the basis of a well-known principle, viz., the ruling prices for an alternate fuel, and this could not be said to be either arbitrary or unreasonable particularly when a large number of industries were willing to take the supply of gas at the prices fixed on that basis; (ii) while public sector units and State G instrumentalities ought not to be allowed to exploit the consumers, it was equally necessary to ensure that such units and instrumentalities were enabled to make reasonable profits; (iii) in the context of the integrated activity of production of crude oil and gas, it was almost impossible to work out the cost in respect of any particular area or of a particular bye-product; (iv) the cost plus basis was fixed by the Award H several years ago and that too in the context of supply to certain State

undertakings which, in turn, supplied essential commodities like electricity and fertilizers; and (v) the onus of showing that the prices charged were unreasonable or arbitrary was on the respondents and they had done nothing to discharge this onus.

On behalf of the respondents it was contended that a public utility undertaking could not arbitrarily discontinue its supply or services merely because the customer was unwilling to pay the price asked for as unconscionable and unreasonable. It was further contended that the price fixed must be reasonable and fair so as to give the undertaking a reasonable return on the capital employed and that there could not be any discrimination against industrial consumers. According to the respondents, this was the only reasonable way of price fixation and referred to the Award in support of this proposition. The respondents further urged that to allow Oil and Natural Gas Commission to sell gas at a higher price than this merely because, otherwise, but for the availability of gas, the consumers would have to spend more for their sources of energy, will really amount to introduction an irrelevant element in the process of price fixation and result in allowing the Oil and Natural Gas Commission to make unreasonable profits at the expense of unhappy consumers. It was argued that these principles were applicable with greater force in the context of the constitutional discipline over state instrumentalities under Article 38 & 39 of the Constitution.

Bolt v. *Stennett* CJ E.R.—Revised—p.1572; *Allnutt* v. *Inglis* CIV E.R.—Revised—p. 206; *Ira Y. Munn* v. *People*, 24 L.Ed. 77; *United Fuel Gas Co.* v. *Railroad Commission*, 73L. Ed. 390; *Los Angeles Gas & Electric Corporation* v. *Railroad Commission*, 77 L.Ed. 1180; *Leo Nabbia* v. *People*, 78 L.Ed. 940; *Harold E. West* v. *Chesapeake & Potomac Telephone Com.*, 79 L.Ed. 1640; *Federal Power Commission* v. *Hope Natural Gas Co.*, 88 L.Ed. 333; *Premier Automobiles* v. *Union*, [1972] 2 S.C.R. 526; *Panipat Cooperative Sugar Mills* v. *Union*, [1973] 2 S.C.R. 860; *Shree Meenakshi Mills* v. *Union*, [1974] 2 S.C.R. 398; *Saraswati Industrial Syndicate* v. *Union*, [1975] 1 S.C.R. 956; *Prag Ice and Oil Mills* v. *Union*, [1978] 3 S.C.R. 293; *Union of India* v. *Cynamide India Ltd.*, [1987] 2 S.C.C. 720, relied upon.

Allowing the appeals and upholding the prices charged by the Oil and Natural Gas Commission, this Court,

HELD: (1) The Oil and Natural Gas Commission does not satisfy the primary conditions for being a public utility undertaking as it has not so far held itself out or undertaken or been obliged by any law to

A provide gas supply to the public in general or to any particular cross-section of the public. The proviso to Section 14(1)(e) of the Act which lays down that the setting up of industries to be run with the aid of gas was not to be undertaken by the Oil and Natural Gas Commission without the Central Government's approval also gives an indication that the supply of gas to various industries on a general basis was not in B the immediate contemplation of the Act but was envisaged as a future expansion to be initiated with Central Government's approval. Perhaps a stage in the developmental activities of the Oil and Natural Gas Commission will soon come when such an obligation could be inferred but, at present, the Oil and Natural Gas Commission supplies gas only to certain selected contractees. [181E-G]

C

(2) It is however not necessary in this case to express any final opinion on the issue whether the ONGC was a public utility undertaking except to say, *prima facie*, that it could not be placed on par with a public utility undertaking. All that the respondents wanted was a declaration that they were entitled to the supply of gas at a reasonable price. D It was sufficient, for disposing of this claim, to deal with this aspect of the matter and the larger aspect of Oil and Natural Gas Commission being a public utility undertaking could be left out of account. [183E-F]

(3) The treatment of the Oil and Natural Gas Commission as a public utility undertaking for the supply of gas will raise innumerable E basic questions totally inconsistent with the present system of selective supply which the respondents want to be continued. It will transpose the area of controversy to a totally different and wider plane. The Court would then be constrained to hold that the present system of supply was inconsistent with public law and the constitutional requirements of a public utility undertaking. [183C-D]

F

(4) The main activity of the Oil and Natural Gas Commission is that of exploration and prospecting for petroleum and petroleum products. So far as gas, which is a bye product, is concerned, the Oil and Natural Gas Commission has not so far been able to voluntarily or constrained statutorily to harness and utilise its production for con-G sumption by the public. [181H; 182A]

(5) There is no doubt that Dr. Rao made the cost plus method the basis of his award in preference to the basis of thermal equivalence of alternate fuel (thermal equivalence basis). But, the cost plus basis fixed by Dr. Rao in the background of the real nature of the dispute before H him three decades ago could not be taken as conclusive in the present

situation. Dr. Rao was concerned primarily with an issue raised by the public of Gujarat as against the Oil and Natural Gas Commission. He was really adjudicating upon the price which the Oil and Natural Gas Commission should charge to public sector undertakings catering to the essential needs of the State. In that context, his objective was, understandably, to fix the price as low as possible. The consumer under consideration by him represented the public need of the State of Gujarat and, as against such public interest, the Oil and Natural Gas Commission's profit requirements paled into insignificance. [189C; G; D-E]

(6) Here, the Court is dealing with a price to be fixed under a contract between the Oil and Natural Gas Commission and one set of industries in the State who wish to make a change over from the furnance oil system to that of gas supply with a view to increase their own profitability and gain an advantage, if possible, over other industries in the State. In this context, Oil and Natural Gas Commission is entitled to a larger latitude and charge a price which the market can bear. The only restriction is that, being a State instrumentality, it should not be a whimsical or capricious price but should be one based on relevant considerations and on some recognised basis. [189H; 190A]

(7) Cost plus is not a satisfactory basis in all situations. May be the cost plus is an ideal basis where the commodity supplied is the product of a monopoly vital to human needs. In that context the price fixed should be mumimum possible as the customer or consumer must have the commodity for his survivial and cannot afford more than the minimum. Per Contra, there can be situations where the need of the consumer is not so vital and the requirements of the economic scene are such that the needs of the producer should be given greater consideration. In such situations, the "plus" element in the cost plus basis (namely, the allowable profit margin) should not be confined to "a reasonable return on the capital" but should be allowed to have a much larger content depending on the circumstances. Given a favourable area of operation, commercial profits need not be either anathema or forbidden fruit even to public sector enterprises. [191D-E; G-H]

Anakapallee Case, [1973] 2 S.C.R. 882; *Venkatachalam* v. *Deputy Transport Commissioner*, [1977] 2 S.C.R. 392, **referred to.**

(8) It would not be right to insist that the Oil and Natural Gas Commission should fix oil prices only on cost plus basis. Indeed, its policy of pricing should be based on the several factors peculiar to the industries and its current situation. and so long as such a policy is not

A irrational or whimsical, the court may not interfere. [195D]

(9) Price fixation is generally a legislative function. But Parliament generally provides for interference only at a stage where in pursuance of social and economic objectives or to discharge duties under the Directive Principles of State Policy, control has to be exer-
B cised over the distribution and consumption of the material resources of the community. [195F]

M/s. Shri Sitaram Sugar Company Ltd. & Anr. v. *Union,* J.T. 1990 (1) S.C. 452; *Jagadamba Paper Industries* v. *Haryana State Electricity Board,* [1984] 1 S.C.R. 165; *Kerala State Electricity Board etc.* v.
C *M/s. S.N. Govinda Prabhu & Bros. & Ors. etc.,* [1986] 4 S.C.C. 1968, referred to.

(10) It cannot be said that the Oil and Natural Gas Commission has acted arbitrarily in fixing the prices on the thermal equivalence basis; the fact that it has not done it on cost plus basis does not vitiate
D the price fixation. The only question to be considered is as to whether the Oil and Natural Gas Commission has fixed a price based on relevant materials and on some known principle. [200C]

(11) The manufacture, distribution and consumption of gas has yet not attained the status of an essential commodity till recently. At
E present, the industry is in the penumbral region where the commodity is free to be distributed at the manufacturer's choice, but yet where such manufacturer being a State instrumentality, has to conform to Articles 14 and 19 of the Constitution. At this stage of development of the industry a much wider latitude is permissible in the fixation of prices than the imposition of a "no profit, no loss" basis or a "cost plus" basis
F on the producer. [200E-G]

(12) It is now well settled that a favourable treatment of public sector organisations, particularly ones dealing in essential commodities or service, would not be discriminatory. No tangible material has been brought to the Court's notice which would support the plea of unfair
G discrimination. [203E-F]

(13) The High Court rightly upheld the Oil and Natural Gas Commission's right to insist on a munimum offtake guarantee. [202G]

Amalgamated Electricity Co. Ltd. v. *Jalgaon Borough Munici-*
H *pality,* [1976] 1 S.C.R. 636.

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 8530-40 of 1983. A

Appeals by Certificate from the Judgment and Decree dated 30.7.1983 of the Gujarat High Court in Special Civil Application Nos. 883 of 1979, 913 of 1979, 1897 of 1981, 2316 of 1982, 2384 of 1982, 2445 of 1982, 2470 of 1982, 2977 of 1982, 4194 of 1982, 4520 of 1982 and 2542 of 1982. B

K. Parasaran, Attorney General, B. Sen, A.K. Ganguli, Dr. Y.S. Chitley, T.S. Krishnamurthy Iyer, N. Nettar, G.S. Narayana, P. Parameshwaran, T.V.S.N. Chari and N.N. Sharma for the Appellants.

C

Anil B. Diwan, K.J. Kazi, Dr. L.M. Singhvi, Ms. M. Arora, Mrs. B. Chib, M. Singhvi, D.A. Dave, Mrs. M. Karanjawala, R.N. Karanjawala, Mr. P.H. Parekh, Mr. C.A. Cazi and Mrs. H.S. Anand for the Respondents.

D.N. Misra for the Intervenor. D

The Judgment of the Court was delivered by

RANGANATHAN, J. These are eleven appeals preferred by the Oil and Natural Gas Commission (ONGC, for short) from a judgment and order, dated 30th July, 1983, of a Division Bench of the High Court of Gujarat at Ahmedabad in a batch of writ petitions, since reported in 1983-24(2) Gujarat Law Reporter 1437. The appeals are pursuant to a certificate of fitness granted by the High Court. E

The ONGC was initially a Department of the Government of India but, in view of its expanding activities in the search for strategic and vital materials like oil, petroleum and its products it was set up as a body corporate. It is now a statutory corporation constituted by and under the Oil and Natural Gas Commission Act, (Central Act 43 of 1959, hereinafter referred to as 'the Act'). The Act provides for the establishment of a Commission "for the development of petroleum and petroleum products produced by it and for matters connected therewith". Section 2(f) of the Act defines 'petroleum' as having the same meaning as in the Petroleum Act, 1934 (Act 30 of 1934) and as including 'natural gas'. The Commission established under the Act took over the previously existing organisation with effect from 18.9.59. F G

Some of the provisions of the Act which are relevant for our H

present purposes may be set out here. Chapter III which deals with the powers and functions of the Commission consists of Sections 14 and 15. S. 14 reads thus:

"14. *Functions of the Commission—*

(1) Subject to the provisions of this Act, the functions of the Commission shall generally be to plan, promote, organise and implement programmes for the development of petroleum resources and the production and sale of petroleum and petroleum products produced by it and to perform such functions as the Central Government may, from time to time, assign to the Commission.

(2) In particular and without prejudice to the generality of the foregoing provision, the Commission may take such steps as it thinks fit—

(a) for the carrying out of geological and geophysical surveys for exploration of petroleum;

xxx xxx xxx

(e) for the transport and disposal of natural gas and refinery gases produced by the Commission:

Provided that no industry, which will use any of these gases as a raw material, shall be set up by the Commission without the previous approval of the Central Government.

xxx xxx xxx

(h) to perform any other function which is supplemental, incidental or consequential to any of the functions aforesaid or which may be prescribed."

Section 15 empowers the Commission to exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions under the Act. Such powers include the disposal of any property, right or privilege, the original or book value of which exceeds such amount as may be prescribed, or where no such amount has been prescribed, exceeds ten lakhs of rupees and this power could be exercised after obtaining the previous approval of the Central Government

[Clause (c)]. Chapter IV of the Act deals with finance, accounts, audit and reports. Sections 16 and 17 deal with the capital of the Commission and the vesting, in the Commission, of the previous set up in this regard. Section 23 of the Act requires the Commission to furnish to the Central Government such returns and statements and such particulars in regard to any proposed or existing programme for the development of petroleum resources and the production and sale of petroleum and petroleum products produced by the Commission as the Central Government may, from time to time, require. Section 24 in Chapter V (Miscellaneous) enacts that any land required by the Commission for carrying out its function under the Act shall be deemed to be needed for a public purpose and such land can be acquired by the Commission under the provisions of the Land Acquisition Act, 1894. S. 31 confers rule making powers on the Central Government, in pursuance of which have been framed the Oil and Natural Gas Commission Rules, 1960. The only rule relevant for our present purposes is rule 25, dealing with contracts. It reads as follows:

> "25. *Contracts*:
>
> (1) The Commission may enter into contracts for the purpose of performing its functions under this Act;
>
> Provided that provision therefor exists in the budget approved by the Government.
>
> (2) Contracts made on behalf of the Commission shall not be binding on it unless they are executed by a person duly authorised by it.
>
> (3) A person authorised by the Commission to enter into any contract on its behalf shall not be personally liable for any assurance or contract made on its behalf and any liability arising out of such assurance or contract shall be discharged from the Fund."

The statute, it may be observed, neither imposes a specific duty on the O.N.G.C. to supply its products to consumers at large nor contains any provisions regarding the fixation of prices for the commodities made available by the O.N.G.C. for sale.

In the course of its drilling and exploration of oil, the ONGC discovered oil-bearing fields in Cambay and Ankleswar region in 1969

A and 1961 respectively. In most of the oil fields situated in Gujarat, gas comes out along with crude oil and is commonly known as "associated gas". In Cambay area, gas is unaccompanied by crude oil and is known as "free gas". This is easily combustible and can be used as domestic as well as industrial fuel. We are concerned here with both these commodities which are generally known as 'natural gas' and we shall refer B to them compendiously as 'gas'.

In October, 1961 ONGC first thought of the idea of using natural gas in addition to fuel oil in industries. It had detailed discussions with the Gujarat State Electricity Board (GSEB) and it was agreed between them that gas should be supplied to the GSEB at a price related to fuel oil price on the basis of thermal value equivalence. On this basis, an C agreement was entered into between them in March, 1963 whereunder the price of fuel oil was fixed at Rs.77.26 per tonne including rail frieght; and, based on this price and thermal value equivalence, the price of Cambay gas was fixed at Rs.80.14 per 1000 cubic metres (hereinafter referred to as 'the Unit') and of Ankleshwar gas at D Rs.106.66 per unit, rounded off to Rs.80 and Rs.100 per unit respectively. The ONGC began to supply gas from Cambay region of Dhruvan Power Station in 1964 and from Ankleshwar to Uttaran Power Station in 1965. The ONGC also entered into discussions with the Gujarat State Fertilizer Corporation (GSFC) and ultimately it was agreed, on the footing of the price of Rs.76 per tonne in respect of E Koyali Naphtha, that associated gas should be supplied to the GSFC at between Rs.88 and Rs.90 per unit on the principle of thermal equivalence. This was in 1966. It may be mentioned here that the three parties concerned viz. the ONGC, GSEB and GSFC, had more or less agreed to the principle of determining the price of gas on the basis of thermal equivalence with an alternative fuel or feedstock emanating F from the processing of crude oil. There was no reference to the cost of production of gas as such.

Despite the above agreements, however, the concerned parties were not all very happy. The GSFC resented the fact that discount was not given to them as bulk purchasers and that the prices charged for G the Trombay fertiliser factory and power house at Bombay were substantially lower than the prices that the ONGC charged them. Eventually, public discontent was expressed over the alleged high price that was being charged for gas by the ONGC to these organisations. It was felt that the ONGC was denying to them the advantage they should have obtained by the discovery of gas in the region of their operation. H It was also felt that this treatment resulted in discrimination against

them in comparison with advantages enjoyed by other States due to the availability of fuel resources such as coal or hydro-power within their areas. In view of these expressions of public feeling, the question of fixing a proper price for the gas was taken up by the Government of Gujarat with the Government of India. Eventually, as no agreement could be arrived at, the disputes was referred to the sole arbitration of Dr. V.K.R.V. Rao who gave his award (hereinafter referred to as 'the award') on 23.9.1967. He determined the price of natural gas at Rs.50 per unit ex-well-head, to which were added royalty, sales-tax, depreciation and the transport charges. This award was to be enforced for a period of five years i.e. upto 31.3.1971. Between April 1971 and December 1975, the well-head price was increased and fixed at Rs.66 per unit, we are all told, on the intervention of the then Gujarat Governor. These prices were revised subsequently. The supply to GSEB was revised to Rs.155 and the rate of supply to GSFC was revised to Rs.320 per unit.

At that time, there were very few industries set up in and around Vadodara and these depended, besides electricity, on other forms of energy generated through coal or furnance oil. In July 1967, the supply of gas to some of these industries in and around Vadodara city was started, initially as a temporary measure pending the effective materialisation of the Gujarat Fertilizer Corporation demand, after which the industries were to go over to fuel oil if gas could no longer be supplied. After a series of discussions, the Federation of Gujarat Mills and Industries agreed to a price of Rs.100 per unit of Ankleswar gas for this supply. The charging of ten rupees less per unit supplied to the Fertiliser Corporation was justified on the ground that such differentiation was consistent with general practice where a petroleum feed stock is used for chemical industry. Among the industries that thus received gas supply were the ten respondents (respondents 2 to 10 in these appeals) who have formed themselves, in September, 1978, into an association called "The Association of Natural Gas Consuming Industries of Gujarat", which is respondent No. 1. The supply to these industries—extended later to a few more—was based on individual contracts entered into with each one of the concerns. Initially, the ONGC entered into contracts valid for a period of five years at a time but, subsequently—it is said, due to a fear of possible shortage in the availability of enough gas—this was changed and the contracts were, generally, made annual, except in regard to certain public sector undertakings and, it is said, a few companies. The rates of supply were also slowly stepped up as can be seen from the following table:

Period	*Price of supply*
1.1.1976 to 31.03.1976	Rs.322.63
1.4.1976 to 31.12.1976	Rs.341.45
1.1.1977 to 31.03.1977	Rs.351.00
1.4.1977 to 31.12.1977	Rs.371.16
1.1.1978 to 31.03.1978	Rs.382.15
1.4.1978 to 31.03.1979	Rs.504.00

According to the ONGC, the price demanded from these industries and initially been based on alternative fuel cost i.e., the cost which these industries would have had to pay for fuel oil if no supply of gas had been available. Later, upto December 1975, the price was based on the cost of production, as determined by the award. After the expiry of the period of operation of the award, the basis for calculation of price was revised on the basis of the thermal equivalence of coal price. The rates of supply from 1.4.78 as fixed above from time to time were also made subject to an automatic annual escalation at 5%. The contracts, as already mentioned, were annual and contained no term for renewal. On the expiry of each contract, a fresh contract had to be entered into and, naturally, the new contract stipulated prices for supply that were prevalent at the time of the respective contracts. It may be mentioned that the existing contracts with the various consumers had lapsed by efflux of time on 31.3.79 in some cases, 30.1.80 in some other cases and in 1982 in respect of others.

Aggrieved by the steady rise in the prices, writ petition No. 883 of 1979 was filed by the respondents in the Bombay High Court in March 1979. In this writ petition it was prayed that the ONGC should be directed (a) to continue to supply the gas to them despite the contracts in their favour having lapsed; (b) to supply the break-up and the data on the basis of which the price structure was arrived at and to fix the price after giving reasonable opportunity to the concerned industries or their associations; (c) to discuss and negotiate a fair, reasonable and just price for supply of gas; (d) to restrict the minimum guaranteed quantity of offtake to 75 per cent of the contracted quantity (this was because the ONGC had been insisting on raising the said guarantee to 90 per cent) and; (e) to stop charging discriminatory prices for the supply to the respondents in comparison with the price charged to public sector undertakings. Pending the hearing and final disposal of the petition, an interim order was sought restraining the ONGC from discontinuing the supply of gas to the petitioners on such terms as the Court may think fit and proper.

On 30.3.1979, the Court passed an interim order permitting the petitioners to continue to pay "on the same terms as at present" i.e. at Rs.504 in some cases and a slightly different figure in other cases. Subsequently, however, with the passage of time the price of gas was stepped up by the ONGC in the following manner:

Period	*Amount*
1.4.1981 to 31.12.1981	Rs. 741.00
1.1.1982 to 31.12.1982	Rs.2095.70
1.1.1983	Rs.2403.03
15.2.1983	Rs.2503.03
17.3.1985	Rs.2878.00

We are told that the sudden jump in prices w.e.f. 1.1.1982 was consequent on the decision of the ONGC to change the basis of fixation of price, once again, to furnace oil equivalence. In view of this increase in the prices demanded by it from other parties, who according to the ONGC were willing to pay the price asked for, an application was made to vacate or modify the interim order dated 30.3.1979. On 5.11.1982, the Division Bench of the High Court, after pointing out the various difficulties and questions raised by the case thought it would be fit and proper to direct the ONGC not to discontinue the supply of gas but to continue to supply it at the rate of Rs.1,000 per unit till November 30, 1983 (unless the petition was disposed of in the meanwhile), subject to adjustment being made in case this Court or the machinery evolved at the time of final disposal of the petition determined the price of gas at a different rate. In other words, if, ultimately, the price of gas should be determined at a higher rate, the writ petitioners would be obliged to make good the difference. In case a lower rate should be determined, the ONGC would be obliged to refund the excess amount collected or adjust it against future supplies, as the Court may direct at the time of disposing of the matter finally. A similar order was passed on 29.12.1982 in another batch of cases. When these appeals were filed a Bench of this Court, on 6.10.1983, continued the interim price of Rs.1,000 per unit without prejudice to the rights and contentions of the parties and directed the appeals to be expedited.

It has taken six years since then for these petitions to come up for hearing and till now the respondents have continued to pay at the rate of Rs.1,000 per unit. It has been stated before us that some of the respondents have failed to pay even at the rate of Rs.1,000 as directed

by this Court and that this Court had to direct, by its orders dated 15.4.87 and 30.10.87, that the respondents "will not charge, encumber or alienate, except with the leave of this Court, any of their immovable assets included in the respective undertakings and that they will make their immovable assets available for discharging the respective liabilities on account of the difference in the price of (all) the gas supplied to them (and) further during the pendency of the appeals as determined by the orders made by the Court while disposing of the appeals."

In order to complete the narration of relevant facts, it may be mentioned here that, though natural gas, being a "petroleum product" falls within the scope of the Essential Commodities Act and though control orders have been issued under the said Act regulating the supply and distribution of several petroleum products, it is only by an order dated 30.1.1987 that the price of gas has been fixed by the Government at Rs.1400 per unit which, together with taxes, comes to about Rs.1848 per unit. It may also be mentioned that, while on the one hand the said fixation of price has been challenged by the petitioners and certain other industries before the Gujarat High Court, the Government, on the other hand, is in the process of revising the prices, perhaps to a higher figure, in consultation with the Bureau of Industrial Costs and Prices. In the petitions which are pending before the Gujarat High Court an interim price of Rs.1,000 has been fixed following the orders in the matters now before us. The result is that, ever since January 1983 and till today, most of the petitioners have been paying for the gas supplied only at the rate of Rs.1,000 per unit and some of the industries have defaulted even in doing this.

A prayer was made by the Union of India to transfer to this Court the writ petition subsequently filed challenging the price fixation of 30.1.87 but this request was declined on 4th August, 1988. This court observed that, after these appeals are disposed of, the High Court can proceed to dispose of the said writ petitions in accordance with the judgment. The position, therefore, is that we are not concerned in these appeals with the period beyond 30.1.1987 when the jurisdiction to fix prices came to be vested in the Central Government. We are concerned in these matters only with the period from the date of expiry of the contracts in favour of each of the respondents to 30.1.1987 and with the following questions: (a) whether the O.N.G.C. is at liberty to fix its own price for the gas or should be directed to fix the price in any particular manner; (b) whether the O.N.G.C. can be directed to supply data and the break-up for the price charged and to negotiate the price with the parties concerned; (c) whether the

O.N.G.C. can be compelled to continue to supply gas to the various petitioners at the interim prices fixed by the court subject to adjustment on fixation of prices determined in accordance with the directions of the court; and (d) whether the minimum guarantee of off-take could be raised by the O.N.G.C. to 90 per cent instead of 75 per cent. A

It is unnecessary at this stage to set out the various contentions raised by the parties before the High Court as they will have to be discussed in some detail later. Here it may be sufficient to summarise the effect of the High Court's judgment in disposing of these writ petitions. The High Court held: B

(i) The O.N.G.C. is a public utility undertaking and has a duty to supply gas to anyone who requires it so long as there is enough supply available; C

(ii) Price fixation is generally a legislative function. But the O.N.G.C., being a State instrumentality, is bound to act reasonably in the matter of fixation of price; such price is bound to be determined by following any one of the modalities suggested in the judgment of the High Court; D

(iii) There was no discrimination by the O.N.G.C. between the public sector undertakings on the one hand and the respondents' undertakings on the other in charging differential prices; E

(iv) The clause regarding minimum guarantee was valid and enforceable.

However, in view of its finding that the ONGC is a public utility undertaking, the Court took the view that it should supply gas to the respondents subject to the availability of gas supply and also that such supply should be made at a price which was to be determined in one of the four different methods set out in paragraph 36 of the judgment. It was also observed by the Court that, the respondents were agreeable to price fixation by anyone of three of the said methods. The concluding portion of the judgment, reads thus: F G

"36. Now we come to the last part of this judgment. It is regarding what relief should be granted in this group of petitions. We have already said above that the action of the ONGC in charging the rate in the respective cases is H

ex-facie unreasonable and to that extent their demand for the said price is set aside. The ONGC however, shall be at liberty to get the price for that period and subsequent period fixed according to the reasonable and rational norms and for that purpose it is open to the ONGC to follow any one of the following three courses:

(i) They may request the Central Government to appoint a Commission for the purpose of deciding the prices of gas from time to time, including the time for which we have set aside their demand of price, invoking the provisions of the Commission of Inquiry Act or any other law;

(ii) They may invoke the arbitration of some eminent economist in consultation with the petitioners; or

(iii) They may themselves decide the price, after bringing to their consideration all relevant factors and for that purpose they may hear fully and effectively the petitioners and other persons likely to be affected thereby:

If the last of the above three courses is adopted by the ONGC for deciding the price structure afresh, it would be in their interest to give hearing to the persons likely to be affected so that the possibility of a new round of litigation is avoided. We reiterate that as far as the petitioners are concerned, they are amenable to any of the three modes which the ONGC may choose to adopt.

"37. We accordingly set aside the prices demanded by the ONGC from these petitioners in this group of petitions, leaving it open to the ONGC to deal with the question of price fixation in any one of the three modes suggested by us. The petitions are accordingly partly allowed. Rule is accordingly made absolute in all these petitions with costs.

38. The civil applications, in view of the final decision, do not survive and stand disposed of and till the new price fixation is had, the price charged last from these petitioners under the respective contracts with them shall continue to operate between the parties, subject to adjustments in future after prices are fixed as stated above."

Shri B. Sen, who appeared for the ONGC, made it clear at the outset that he was not disputing the propositions (a) that the ONGC is 'State' within the meaning of Article 12 of the Constitution; and (b) that it has a duty to act reasonably and fairly so as not to infringe the provisions of Articles 14 and 19 and also in consonance with the directive principles of State policy set out, *inter alia*, in Articles 38 and 39 (b) of the Constitution. His challenge is, primarily, to the finding of the High Court that the ONGC is a 'public utility undertaking' which was bound to supply gas at the request of any member of the public at large and to its direction that it should continue to supply gas to the respondents at an uncertain price till the price is fixed in accordance with the procedure outlined by it, notwithstanding that the contracts under which the respondents procured such supplies have expired long ago. He also contests the correctness of the High Court's conclusion that the price of gas must be determined on the basis of cost of production plus a reasonable return for the investments made, (herinafter referred to broadly as the "cost plus" basis). He submits that the prices under the contracts entered into with the respondents have been determined on the basis of a well-known principle viz. the ruling prices for an alternate fuel and this cannot be said to be either arbitrary or unreasonable particularly when a large number of industries are even today willing to take the supply of gas at the prices fixed on that basis. He also complains that the High Court overlooked that the respondents are not domestic but industrial consumers. If the ONGC were to be treated as a public utility bound to supply an essential commodity of this nature to any one for the asking subject to availability, it may be that the price for such supply should be fixed on a cost plus basis. But where the supply is limited to certain industries and other similarly placed industries have to produce similar goods by consuming furnance oil or other equivalent alternate fuel, it is quite reasonable for the O.N.G.C. to stipulate—indeed, it would be discriminatory, were it not to stipulate—that its prices would be based on the cost of alternate fuel which would have to be incurred by these industries otherwise and which is in fact being incurred by other industries engaged in the production of similar goods to which the O.N.G.C. is not making any supplies at all. Sri Sen urges that while public sector units and State instrumentalities should not be allowed to exploit the consumers, it is equally necessary to ensure that such units and instrumentalities are enabled to make reasonable profits and made good as commercial enterprises by charging prices which the "traffic can bear" so that they can also contribute substantially to national development. It is submitted that, as against the respondents who are receiving supplies at the rate of Rs. 1,000 per unit, there are 29 industries paying the Govern-

ment-fixed price of Rs.1840 (since 1987), 12 other parties who have earlier signed contracts at the furnace oil equivalent rate and 65 industries which are willing to sign contracts at the aforesaid Government rates. It should not also be overlooked that, even if the cost plus basis were to be contemplated, the prices would require substantial revision considering the huge expenditure incurred by the Government of India in recent years in prospecting for oil and the need for heavy capital investment for meeting which the Government has had to obtain huge loans from the World Bank and other organisations. In the context of this integrated activity, it is almost impossible to work out the costs in respect of any particular area or of the particular bye-product with which we are here concerned. The cost plus basis was fixed by the award several years ago and that too in the context of supply to certain State undertakings which, in turn, supplied essential commodities like electricity and fertilisers. Subsequent enquiry commissions (such as the Damle award) do not price commodities on the basis of cost. The ONGC, if it is to function effectively and make reasonable profit on the supply of this commodity, should be allowed the latitude atleast to fix its own principle of pricing. So long as such principle is a recognised one and is not *per se* unfair or unreasonable, the court should not interfere. Else, Sri Sen submits, a controversy regarding fixation of price will be raging eternally as the industries would raise some objection or other to the price fixation, whatever it be, and the interests of the public will suffer if the ONGC is constrained to stick to the throw-away prices fixed in outdated contracts until prices can be fixed on a basis agreeable to the consumer industries, as has indeed happened in this case during the past ten years. Sri Sen concluded by urging that the onus of showing that the price charged was unreasonable or arbitrary was on the respondents and they had done nothing to discharge this onus, except saying that the prices have been stepped up from time to time and that the increase in prices has been steep. Rather they have, in their pleadings, sought to throw the onus on the ONGC to prove that the prices charged by it are fair and reasonable. Even this, says Sri Sen, the ONGC has done.

The discussions in the judgment of the High Court and, to some extent, the discussions before us have touched several aspects of the principles to be kept in mind for price fixation of essential commodities basic to public need and, in doing so, have, in our opinion, travelled beyond the framwork and scope of the questions that arises for consideration in this case. It is necessary to remember that the writ petitioners are a few industrial houses which had entered into con-

tracts with the ONGC for supply of natural or associated gas. These were ordinary commercial contracts entered into by private treaty between the ONGC and these respondents to sell and buy certain goods produced by the ONGC at the prices stipulated in the contracts. Looked at purely from the contractual angle, the ONGC was perfectly at liberty to stop the supply on the expiry of the relevant contract and refuse to suppply further unless a fresh contract could be entered into agreeing upon a price for such supply. Assuming that the ONGC is a State instrumentality and the price demanded by it is susceptible to judicial review, the court may, where a contract has been entered into, consider the sustainability of the price agreed upon or where no contract has been entered into, injunct the ONGC from demanding a price for supply which is found unreasonable. But we doubt whether it is open to the Court to direct the ONGC to continue the supply indefinitely without a contract and without any price fixation.

It is clear that, in giving directions as above, the Court was considerably weighed by its conclusion that the ONGC is a public utility undertaking which is bound to supply gas to all who demand such supply subject only to the availability of enough gas. Dr. Chitale, for the respondents, strongly supported this viewpoint. He urged that it is well settled law that a public utility cannot arbitrarily discontinue its supply or services merely because the customer is unwilling to pay the price asked for as unconscionable and unreasonable. He submitted that this, indeed, is not a modern rule of constitutional law but an ancient rule of public law. He referred in this context to the early decisions of the King's Bench Division in *Bolt* v. *Stennett,* CI E.R.—Revised—p. 1572 followed in *Allnutt* v. *Inglis,* CIV E.R.—Revised—p. 206 as laying down the basic principle in this regard. This principle, he said, has also been applied by the American Courts in *Ira Y. Munn* v. *People,* 24 L.Ed. 77; *United Fuel Gas Co.* v. *Railroad Commission,* 73 L.Ed. 390; *Los Angeles Gas & Electric Corporation* v. *Railroad Commission,* 77 L.Ed. 1180; *Leo Nebbia* v. *People,* 78 L.Ed. 940; *Harold E. West* v. *Chesapeake & Potomac Telephone Co.,* 79 L.Ed. 1640 and *Federal Power Commission* v. *Hope Natural Gas Co.,* 88 L.Ed. 333). These decisions clearly lay down, according to him, that the price fixed must be reasonable and fair, that the price should be so fixed as to give the undertaking a reasonable return on the capital employed and that there cannot be any discrimination against industrial consumers. These principles, he argued, are applicable with greater force in the context of the Constitutional discipline over State Instrumentalities under Articles 38 and 39 of the Constitution which mandate the State to direct their policy towards securing "that the

A ownership and control of material resources of the community are so distributed as to subserve the common good."

As already stated, the ONGC does not dispute the proposition that it is a State instrumentality and that its actions are subject to review under Articles 14 and 19 of the Constitution; it only refutes the B suggestion that it has become a public utility undertaking with an obligation to supply gas to *any consumer* on reasonable conditions as to price etc. It is contended by Sri K. Parasaran and Sri B. Sen that the ONGC is not a 'public utility' under a duty to supply gas to members of the public. It is argued that in English common law, the expression has a specific connotation; it refers to an entity dealing in a commodity which is commonly used by the members of the public and under a C duty, in terms of a statute, licence or franchise obliging it to supply the commodity to the public at large. Thus, for example, in England the Public Health Act, 1936, the Electricity Act, 1947 and the Gas Act, 1948 provide examples of a duty cast on suppliers of water, electricity or gas. So also, in India, the Indian Electricity Act spells out a D duty on the part of the licensee to supply electricity to members of the public. There are also other public utility undertakings providing for water, sewage connections, transport and the like which are under a statutory obligation to supply goods and services to members of the society at large, subject to the fulfilment of reasonable conditions prescribed therefor. The supply of gas by the ONGC, it is urged, has E not attained this "status" yet.

As far as we have been able to see, there is no statutory definition of 'public utility' in the context of any Indian enactment that may be relevant for our present purpose. There is a definition of "public utility service" in s. 2(n) of the Industrial Disputes Act, 1947 which, *inter alia,* F covers "any industry which supplies power, light or water to the public" and certain notified industries. It is arguable whether supply of natural gas is included in this definition for, though 'power' connotes generally any form of energy available for doing work, it is normally related to such energy made available by mechanical or electrical means (vide, Webster Comprehensive, Vol. 2, p. 990). It is also a G moot question whether that definition can be appropriate in the context with which we are concerned.

Dr. Chitale cited profusely from American Jurisprudence (2nd Edition, Vol. 64) on the subject of public utilities. Some of these passages may be usefully quoted. At page 549, it discusses the definiH tion and nature of a public utility. The passage runs thus:

1. Definition and nature

A "public utility" is a business or service which is engaged in regularly supplying the public with some commodity or service of public consequence, such as electricity, gas, water, transportation, or telephone or telegraph service. Publicly owned utilities are those owned by public corporations such as municipal public utility districts and public utility districts. Apart from statutes which define the public utilities which are within the purview of such statutes, it would be difficult to construct a definition of a public utility which would fit every conceivable case, but there are certain considerations that are of aid in determining whether a specific organization or business is a public utility. As its name indicates, the term "public utility" implies a public use and service to the public, and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities." There must be a dedication or holding out, either express or implied, of produce or services to the public as a class. The term precludes the idea of service which is private in its nature and is not to be obtained by the public, although a public utility may perform acts in its private, as distinguished from the public, capacity, in which case it is subject to the same rules as any other private person so acting. Some courts, however, reject the notion that in order to be a public utility subject to governmental regulation the nature of the service must be such that all members of the public have an enforceable right to demand it, and declare that business to be a public utility which in fact serves such a substantial part of the public as to make its operations a matter of public concern. This view is in close accord with what has been termed the historic basis of classification of some businesses as public callings, that is, economic conditions, or the importance of the business to the public. While the terms "public service corporation" and "quasi-public corporation" are used to describe public utility corporations, and the term "public service commission" to describe the body regulating such utilities, some courts distinguish between a public sector corporation and a public utility on the basis that the latter is required to serve the

A public generally, whereas the former may be required to serve members only.

The mere fact that a corporation declares itself to be a public utility does not make it such. In determining whether or not a company is a public utility, the law looks B at what is being done, not what it asserts it is doing. Nor will the legislative declaration that a certain business shall be deemed a public utility make it such if, in fact, the business as conducted is not impressed with a public use or carried on for the public benefit, since it is beyond the power of the state by legislative edict to make that a public utility which in fact is not, and to take private property for C public use by its fiat that the property is being devoted to public use. Furthermore, a dedication of private property to public utility service will not be presumed from the fact that the product and service of the use of such property is the usual subject matter of utility service; neither does such D presumption arise from the sale by private contract of such product and service to utility corporations for purposes of resale. Such dedication is never presumed without evidence of unequivocal intention.

A business affected with a public interest is not necessarily a public utility or public service commission. The fact E that a business is affected with a public interest means that it may be regulated for the public good but does not imply that is under a duty to service the public."

Black's Law Dictionary (Fifth Edition) defines a "public utility" thus F at p. 1108:

"Public Utility: A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, G without discrimination. It is always a virtual monopoly.

A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, H water, transportation or telephone or telegraph service.

Gulf States Utilities Co. v. *State,* Tex. Civ. App., 46 S.W. 2d 1018, 1021. Any agency, instrumentality, business, industry or service which is used or conducted in such manner as to affect the community at large, that is, which is not limited or restricted to any particular class of the community. The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. A term implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service, to serve the public and treat all persons alike, without discrimination. It is synonymous with "public use", and refers to persons or corporations charged with the duty to supply the public with the use of property or facilities owned or furnished by them. *Euder* v. *First Nat. Bank in St. Louis,* C.C.A. Mo., 16 F. 2d 990, 992. To constitute a true "public utility", the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. The devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the State."

The Corpus Juris Secundum (Vol. 73, p. 990) also carries like definitions.

Once a concern is found to be a public utility, at least two consequences follow. One is a general duty to serve which is described in American Jurisprudence thus:

"16. *General duty to serve*

The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders, and it may not choose to serve only the portion of the territory covered by its franchise which is presently profitable for it to serve. Upon the dedication of a public utility to a public use and in return for the grant to it of a public franchise,

A the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination, and at reasonable rates, to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility. This obligation is one implied at common law and need not be expressed by statute or contract, or in the charter of the public utility.The fact that the franchises granted to the company do not expressly impose upon it the obligation to serve all persons in the locality does not relieve the company, nor does the fact that the person applying for gas is already supplied with gas by another company. The fact that a pipe laid by a water company along a street in the exercise of its franchise was laid under an agreement, with certain persons who paid the expenses, that they should have the exclusive use of water, and that the company should not tap the pipe without their consent unless it first repaid them for the pipe, does not relieve the company from its obligation to supply water, on reasonable terms, to all persons living on such street who may apply for it. A provision in an ordinance granting a franchise to an electric light company, that the city should not require the company to make "extensions" except upon certain conditions does not affect the right of a resident in an established service zone to invoke the aid of the courts to compel the company to connect his premises with its line. This duty to serve all applicants without discrimination cannot be evaded by a natural gas company on the ground that the gas pressure has fallen so low that existing customers cannot be adequately supplied, new applicants are entitled to share equally in such supply as can be furnished. Furthermore, the obligation of a public utility, such as a gas, water, or electric company, to supply a given district is inclusive of the duty, under reasonable limitations, to carry the mains or lines of the utility to a point on the consumer's premises where use can be made of the service. However, neither by common law nor by statute is a public utility required to serve all; the conduct prohibited on the part of a public utility is unjust discrimination, unfair rates or practices, or unreasonable rules."

The second constraint is in regard to the rates that can be charged by such an undertaking:

A public utility may, in the absence of a legislative prescription or limitation of rates, fix and exact reasonable rates for services furnished, in which respect the reasonableness of the rate is to be considered in relation to the value of the property used by the utility in the public service. Thus, in the absence of legislation, carriers are ordinarily entitled to establish such rates and to adopt such policy of ratemaking as they may deem best. They may voluntarily render service for less than they could be compelled to accept.

The right of a public utility or carrier to set its own rates is subject to the limitation that such rates must be nondiscriminatory and reasonable.

xxx xxx xxx

This obligation to furnish service at a reasonable price is implied by law and is incurred by acceptance of the franchise and privilege to serve the public. Furthermore, there is authority to the effect that a public utility must give a consumer the benefit of the most favourable rate which he is entitled to receive."

We do not think that ONGC satisfies the primary conditions enunciated above for being a public utility undertaking as it has not so far held itself out or undertaken or been obliged by any law to provide gas supply to the public in general or to any particular cross-section of the public. The proviso to sec. 14(1)(e) of the Act which lays down that the setting up of industries to be run with the aid of gas was not to be undertaken by the ONGC without the Central Government's approval also gives an indication that the supply of gas to various industries on a general basis was not in the immediate contemplation of the Act but was envisaged as a further expansion to be initiated with Central Government's approval. Perhaps a stage in the developmental activities of the ONGC will soon come when such an obligation can be inferred but, at present, the O.N.G.C. supplies gas only to certain selected contractees. It does not supply gas to the public either in the sense that any individual member of the public or any identifiable cross-section of the public is entitled to demand and receive such supply due to various limitations we shall now touch upon.

The main activity of the ONGC is that of exploration and

prospecting for petroleum and petroleum products. So far as gas, which is a bye product, is concerned the ONGC has not so far been able voluntarily or constrained statutorily to harness and utilise its production for consumption by the public. Even as per the information placed on record by the respondents about 3,000 million cubic metres of gas were burnt in 1985-86 due to the inability of the ONGC to harness it for industrial or domestic use. Such large scale utilisation will involve capital outlay to a considerable extent particularly for the laying of pipe lines to convey the gas to sites of its user. The quantity of gas which is put to such use at present is an insignificant part of the gas that is being produced and so far the Government does not appear to have called upon the ONGC to draw up or submit to the Government under s. 23 of the Act any programme of sale of natural gas to the public generally or even to some categories of public consumers. There is no doubt that the expansion of the oil sector in recent years, including the recent construction of the HBJ pipeline, will eventually require the ONGC to set up and devise a rational and equitable scheme of distribution and supply of gas to various types of consumers situate over various parts of India. But, as yet, the ONGC has not embarked on any such scheme. It has been supplying gas to certain consumers on the basis of individual contracts and it is in regard to these consumers alone that the question of price has been raised before us.

We do not, however, think that it is at all necessary for us to delve further into the above concept or express any final opinion as to whether the ONGC is a public utility or not because the claim of the respondents is for a continuance of the present system followed by the ONGC of supplying gas to select customers on the basis of contracts entered into with them. They only want the price to be regulated by the court; they do not challenge, for obvious reasons, the system of distribution thus far adopted by the ONGC. If the argument that the ONGC is a public utility is accepted, then the first consequence to follow will be that gas should be made available by it to all persons who need it for use. It cannot be supplied by the ONGC to only a few public sector undertakings like the GSEB and GSFC or only to a few industries like those of the respondents or only to a few municipalities like the Vadodara Municipality for domestic supply, at its sweet will and pleasure. It would then be open to all undertakings, industries and domestic consumers in Bombay, Gujarat and perhaps elsewhere in the country to demand that steps should be taken for the supply of gas to them also. We are unable to agree with the observation of the High Court that, even if the ONGC is treated as a public utility, the respon-

dents, merely because they had entered into temporary contracts for supply of gas with the ONGC, could still insist on continued supply to themselves on "the first come, first served" basis, to the exclusion of later arrivals on the scene. If, as suggested by the respondents, the ONGC is to be treated as a public utility and the price of gas is bound to be on cost plus basis, it may be that quite a few other industries would like to avail themselves of such supply. They have perhaps kept out so far only because the supply price based on alternative fuel price is not acceptable to them. They are keeping out only because they are under the impression that the ONGC is entitled to supply gas to persons with whom it has entered into commercial contracts and on the terms of supply envisaged in those contracts. The treatment of the ONGC as a public utility undertaking for the supply of gas will raise innumerable basic questions totally inconsistent with the present system of selective supply which the respondents want to be continued. It will transpose the area of controversy to a totally different and wider plane. We cannot say that the ONGC is a public utility undertaking and yet direct that it should supply gas to the respondents and a few other industries with which it has entered into contracts. The court would then be constrained to hold that the present system of supply is inconsistent with public law and the constitutional requirements of a public utility undertaking and direct the ONGC to completely overhaul its system of public distribution on sound lines *qua* types of consumers to be catered to, areas of supply to be covered, price for supply and all other matters. That is not the relief sought by the respondents. All that they want is a declaration that they are entitled to the supply of gas at a reasonable price. It is sufficient, for disposing of this claim, to deal with this aspect of the matter and the larger aspect of ONGC being a public utility undertaking should be left out of account. We, therefore, do not express any final opinion on the issue except to say, *prima facie*, that it cannot be placed on par with a public utility undertaking.

In this context, we should like to point out once again that the ONGC does not dispute that the price to be charged by it for gas supply should have some basis and not be arbitrary or unconscionable. Their stand before the High Court (vide para 29 of the judgment) and before us has been that the prices are fixed by them from time to time on a well-recognised principle viz. on the basis of the alternative fuel cost which the consumers may have to incur had they not been in receipt of gas supply. Assuming this to be correct, is there any illegality in the procedure adopted by them?—that is the question. The respondents contend, and the High Court has held, that there is.

A According to them, a public sector undertaking must supply its goods at a price which will cover their cost and leave them a reasonable margin of profit and no more. Dr. Chitale says that this is the only reasonable way of price fixation and refers to the award in support of this proposition. He points out that this is the basis incorporated in several statutory instruments, such as the Sugarcane Price Control B order or the Drug Prices Control order or other orders passed under the Essential Commodities Act. He cites the followinng decisions of this Court in relation to the fixation of such prices: *Premier Automobiles* v. *Union,* [1972] 2 SCR 526; *Panipat Cooperative Sugar Mills* v. *Union,* [1973] 2 SCR 860; *Shree Meenakshi Mills* v. *Union,* [1974] 2 SCR 398; *Saraswati Industrial Syndicate* v. *Union,* [1975] 1 SCR 956; *Prag Ice and Oil Mills* v. *Union,* [1978] 3 S.C.R. 293 and *Union of* C *India* v. *Cynamide India Ltd.,* [1987] 2 S.C.C. 720. He urges that, to allow the ONGC to sell gas at a higher price than this merely because, otherwise, but for the availability of gas, the consumers would nave to spend more for their sources of energy, will really amount to introducing an irrelevant element i the process of price fixation and result in D allowing the ONGC to make unreasonable profits at the expense of unhappy consumers. The question for consideration is whether this argument is correct. Is the ONGC bound to adopt only the cost plus basis in fixing its prices or can it also invoke any other well-known and reasonable, if commercial, formula in fixing its prices?

E We shall first consider the findings in the award. Dr. V.K.R.V. Rao was arbitrating on a dispute between the ONGC and the Gujarat State Government as to the price at which gas was to be supplied by the ONGC. Though the dispute arose as a result of the dissatisfaction of the GSEB and the GSFC with the prices charged by the ONGC, the terms of reference to Dr. Rao were very much wider. They read:

F

> "The point at issue is the price that should be charged by the ONGC for gas that may be supplied after taking into consideration the volume and pressure of gas supplied to any particular party and the distance to which it has to be carried. You may also indicate if ONGC should offer any
>
> G differential rates in respect of gas supplied to:
>
> (a) Undertakings for the generation of power
>
> (b) Fertiliser plants
>
> H (c) State projects

(d) Private sector industries

(e) Domestic fuel"

The contentions urged by the two parties arrayed before the arbitrator and set out in sections IV and V of the award also covered a very wide ground. The award starts with a discussion of certain general considerations and while doing so, dealing with a contention comparing the price fixation in Assam and Gujarat, the award says:

> "The Gujarat contention that in fixing the price of gas in Gujarat, note should be taken of the price fixed by Oil India for the sale of Assam gas to the Assam Electricity Board at 25 paise per cubic foot cannot be dismissed as lightly as the O.N.G.C. seem to have done. Nor can it be contended by Gujarat that if a mistake has been made once in one area, that therefore it should be extended to other areas. It must be added also that the price of gas in Assam and in Gujarat is not on all fours for the reasons that I shall mention later. All the same, one cannot ignore the relevance of the Assam gas price, even though the remedical action required is perhaps more on the Assam side than on the ONGC attitude in Gujarat. I shall have something to say on the question later on in this report, though it is not strictly within the terms of reference given to the arbitrator.
>
> I am not prepared to accept the ONGC contention that because they are All India agency expected to function as a commercial undertaking in the public sector, they are entitled to take no account of the fact that the cost of power generation is high in Gujarat, that this has hampered the possible development of some industries for which Gujarat has natural resources and that public opinion in Gujarat has a natural expectation of a reduction in the cost of power production on account of the discovery of gas in their area. After all the ONGC is an enterprise in the public sector and is expected to take public interest into account and not be exclusively concerned with commercial considerations that would be more appropriate to a private enterprise. Moreover, there, as in the United States, the gas industry is in the private sector, there is also governmental regulation through the Federal Power Authority in the public interest. I believe that Gujarat has a valid point in

A urging that advantages that accrue to the coal-bearing provinces by way of low cost in fuel or power generation should also apply to Gujarat because of the discovery of gas in its area and its protected use for power generation. I propose therefore to take into account the pit-head price of Bengal coal and its thermal equivalence with Gujarat gas in B determining my award on the price of gas. I must add that this will not be the primary basis for my award, though it will certainly be treated as a relevant consideration.

At p. 16 the report deals with the contention that the price of gas should be based on the price of substitute products in the following words:

C

"As regards the ONGC contention that the price of gas should be based on the price of substitute products and that this is the practice generally followed in the oil industry, I am not prepared to accept the ONGC constention. While D the price of substitutes undoubtedly would determine the demand price for gas, the position becomes different when prices are sought to be fixed and not left to market forces; and prices have to be fixed because the ONGC is virtually a nonopoly at least as far as Gujarat is concerned; there is no market price in the normally understood sense of the term E as emerging from sales by competing sellers; the ONGC is a public sector enterprise, and considerations of public policy cannot be considered irrelevant in the fixation of prices. Above all it has always been the practice in India, when prices are fixed, to base it on the cost of production plus a reasonable profit and this has been what the Tariff F Commission has been doing all these yeas in regard to other commodities. Under the circumstances, while the price of substitutes is undoubtedly a relevant (factor?) in the fixation of the price of gas, I have no doubt that it cannot be treated as the primary factor under the Indian circumstances referred to earlier."

G

Again, at p. 18, the basic formula is expounded as follows:

"I have already indicated my thinking on the question of ..... prices of substitute materials on the basis of thermal equivalence in the concluding para of the previous section. H Gas pricing in relation to the prices of substitute materials

is understandable in foreign countries, where gas has been deliberately pushed into the fuel market by pipe line companies which have constructed long and expensive pipe lines and sold gas at a price lower than that of alternative fuels in order to capture and retain the market. In fact, the price of gas in the initial stage was much less than that of competing alternative fuels and not on par with their prices. With the growing recognition of the special advantages obtained by the use of gas in manufacturing operation where close control of heat and cleanliness of operation are essential and worth paying for or in commercial and residential cooking, water heating and space heating, gas prices have been steadily rising over the last few years. Thus while crude oil wholesale prices have moved downward since 1957, gas prices have recorded a steady rise throughout the post-war period. At the same time, drilling of gas wells is increasing and so is the place of gas in world energy consumption. It is therefore not correct to suggest that the oil companies were selling gas on the basis of the price and thermal equivalence of alternative fuels. Gas was sold at the price which it could fetch and not on the basis of either cost of production or parity with substitute fuels. As regard the price of gas in the field, Prof. Adleman has pointed out that it is not correct to expect any particular ceiling for this price. He adds "if the special advantage uses could generate enough effective demand, the field price of gas in the United States or elsewhere could conceivably equal or surpass the thermal eqquivalent of the crude oil; otherwise it will not". In actual fact, the principal use of gas is till not (now?) in its field of special advantages. There is validity therefore for his view that "Since gas costs roughly three times to deliver, per BTU as oil the price of gas in the producing area could not possibly equal the price of oil. Scarce resources are best used if this fuel expensive to transport, is used to the maximum, nearest its source of supply, whiles the transport—cheap oil moves greater distances". Thermal equivalence with substitute fuels and a price based thereon could therefore only be a ceiling on the price of gas rather than a parity basis for its price fixation. Moreover, in the case of Gujarat, the substitute fuel comes from long distance and bears heavy frieght charges, while the gas is found within the State. It must also be remembered that unlike in the case of foreign oil companies, cost

A data are more readily available in the case of ONGC, as it is a public sector enterprise and subject to the control of Parliament and the scrutiny of its Public Accounts Committee. All cost data have been made available to the Arbitrator by the ONGC. Under the circumstances, it is my considered judgment that formula of fixing the price of
B gas on the basis of the thermal equivalence and price of substitute fuel or feedstock should not be accepted, though the price resulting from such a formula certainly is a relevant consideration as indicating the ceiling below which the price of gas should be fixed by the Arbitrator. I would therefore reject the ONGC proposal that "the formula to be used for the price of gas should be based on the price of
C the available alternative fuels or feedstock."

The only other basic formula is the one advanced by the Gujarat Government, namely, "that the only rational approach to the pricing of gas is via the cost plus profits
D formula". And it is the cost plus profit formula that I propose to adopt as the primary base for determining my award on the price of gas in Gujarat. Having said this, I must hasten to add that this does not mean my acceptance either of the connotation that the Gujarat Government gives to this formula in terms of the content postulated for
E the cost of production and profit or the figures they have put forward for the price of gas on the basis of their interpretation of the content of cost of production and profit. What I accept is the principle of cost of production plus reasonable profit and not the interpretation that is sought to be given to this principle by the Gujarat Government".

F
The second part of the issue referred to the arbitration was disposed of summarily by the award, in a few words:

"Finally, on the question whether there should be any differentiation between the prices to be charged for power
G generation, fertilisers, and other industries, I am not in favour of any such differentiation, as it would only introduce an unnecessary complication in the pricing machinery and my award is primarily based on estimated cost of production plus reasonable profit. If, however, in order to regulate supplies in adjustment to different intensities of
H demand from the different users of gas, some premium or

> discount becomes necessary on the price suggested by me, this would not be inconsistent with my award provided the total receipts do not exceed the amount that would accrue from the application of my award on the price of gas.

Dr. Chitale naturally placed considerable reliance on this award. He contended that the reasoning of the award is impeccable and that the considerations that impelled Dr. Rao to adopt the cost plus basis are more weighty in today's context and in the background of the State's duties under Articles 38 and 39(b) of the Constitution.

There is no doubt that Dr. Rao made the cost plus method the basis of his award in preference to the basis of thermal equivalence of alternate fuel (which we shall refer to as thermal equivalence basis). But at least two important aspects have to be kept in mind in assessing the applicability of the same principle in the present context. In the first place, as explained earlier, Dr. Rao was concerned primarily with an issue raised by the public of Gujarat as against the ONGC. He was really adjudicating upon the price which the ONGC should charge to public sector undertaking catering to the essential needs of the State. In the context, his objective was, understandably, to fix the price as low as possible. The consumers under consideration by him represented the public need of the State of Gujarat and, as against such public interest, the ONGC's profit requirements paled into insignificance. He proceeded, more or less, on the footing that the ONGC was obliged to supply gas for meeting those essential purposes. Secondly, Dr. Rao also agrees that the thermal equivalence basis is a recognised method for fixation of price, that it has a relevance and that it has to be taken into account in determining the price for gas supply. We also wonder whether, in the present set up of the ONGC with a vast expansion of its exploratory activities, enough data are available to work out a price on the cost plus basis. Any such computation will have to provide adequately for future explorations, infructuous expenditure, expenditure on modern uptodate machinery and research and above all expenditure that will be necessary to reach the gas to the consumers. In these circumstances, the cost plus basis fixed by Shri Rao in the background of the real nature of the dispute before him three decades ago cannot be taken as conclusive in the present situation. Here we are dealing with a price to be fixed under a contract between the ONGC and one set of industries in the State who wish to make a change over from the furnace oil system to that of gas supply with a view to increase their own profitability and gain an advantage, if possible, over other industries in the State. In this context, we think, ONGC is entitled to a

A larger latitude and charge a price which the market can bear. The only restrictions is that, being a State instrumentality, it should not be a whimsical or capricious price but should be one based on relevant considerations and on some recognised basis.

While the cost plus basis is a recognised basis for fixation of B prices of essential commodities or for the services rendered by a public utility undertaking, it would not, in our view, be correct to treat it as the only permissible basis in all situations. On behalf of the ONGC it has been pointed out that even in the fixation of prices of essential commodities like levy sugar, the concept of cost plus is not necessarily the only method of fixing the price for the commodity. In considering the question whether the price fixation in that case was based on C proper principles and by following correct methods in accordance with section 3(3C) of the Essential Commodities Act, this Court observed in the *Anakapallee* case, [1973] 2 SCR 882 at p. 899:

> "While examining question No. 3 learned Solicitor General D has reminded us that 'cost plus' cannot always be the proper basis for price fixation. Even if there is no price control each unit will have to compete in the market and those units which are uneconomic and whose cost is unduly high will have to compete with others which are more efficient and the cost of which is much lower. It may be that E uneconomic units may suffer losses but what they cannot achieve in the open market they cannot insist on where price has to be fixed by the government. The Sugar Enquiry Commission in its 1965 report expressed the view that 'cost-plus' basis for price fixation perpetuates inefficiency in the industry and is, therefore, against the long- F term interest of the country.

The Court quoted from a study prepared in collaboration with the Institute of Chartered Accountants of India.

> "Costs alone do not determine the prices. Cost is only one G of the many complex factors which together determine prices. The only general principle that can be stated is that in the end there must be some margin in prices over total costs, if capital is to be unimpaired and production maximised by the utilisation of internal surpluses ..... while the cost plus pricing method is the most common, it H may be argued that it is not the best available method

> because it ignores demand or fails to adequately reflect competition or is based upon a concept of cost which is not solely relevant for pricing decision in all cases. What is essential is not so much of current of past costs but forecast of future cost with accuracy ..... Generally pricing should be such as to increase production and sales and secure an adequate return on capital employed." A B

Again, in a somewhat different context in relation to a State transport undertaking, this Court observed, in *Venkatachalam* v. *Deputy Transport Commissioner,* [1977] 2 SCR 392:

> "..... the special status of a Government owned transport undertaking is obvious ..... Its functional motto is *not more profits at any cost* but service to citizens first and, in a far larger measure than private companies and individuals, *although profitability is also a factor even in public utilities.* (emphasis added) C D

These passages indicate that cost plus is not a satisfactory basis in all situations. The basis may need to be made more stringent in some situations and more broad-based in others. May be the cost plus is an ideal basis where the commodity supplied is the product of a monopoly vital to human needs. In that context the price fixed should be minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. The producer should not, therefore, be allowed to get back more than a minimum profit. Indeed, in certain situations, it may even be inequitable to fix varying prices on the basis of the cost of each individual manufacturer and thus encourage inefficiency; it may be necessary to base it uniformly for a whole industry on the cost of the most efficient manufacturer as has been done in the case of drugs (vide: *Cynamide* case, [1987] 2 S.C.C. 720. It was so vital that the goods should be available to the common man that the prices were statutorily fixed so low as to drive away inefficient producers and so as to make it possible only for the most efficient manufacturers to survive. *Per contra,* there can be situations where the need of the consumer is not so vital and the requirements of the economic scene are such that the needs of the producer should be given greater consideration. In such situations, the "plus" element in the cost plus basis (namely, the allowable profit margin, should not be confined to "a reasonable return on the capital" but should be allowed to have a much larger content depending on the circumstances. E F G H

A The notion that the cost plus basis can be the only criterion for fixation of prices in the case of public enterprises stems basically from a concept that such enterprises should function either on a no profit—no loss basis or on a minimum profit basis. This is not a correct approach. In the case of vital commodities or services, while private concerns must be allowed a minimial return on capital invested, public B undertakings or utilities may even have to run at losses, if need be and even a minimal return may not be assured. In the case of less vital, but still basic, commodities, they may be required to cater to needs with a minimal profit margin for themselves. But given a favourable area of operation, "commercial profits" need not be either anathema or forbidden fruit even to public sector enterprises.

C A publication on "Public Enterprises" by the Indian Institute of Public Administration, produced before us elaborates on the above aspects. It also gives an interesting analysis of pricing policies adopted in respect of various commodities. It is unnecessary to touch upon all the details. It is sufficient, for our present purposes, to say that the D monograph points out, *a propos* such pricing policy, that several state undertakings are already earning profits and the general policy has been accepted that the maximum economic returns should be secured from all public enterprises, whether these are operated by the Central or State Governments directly or through corporation or companies and that the surplus of public enterprises will have to play an increas- E ing part in financing economic development under the various National Plans. It proceeds to say (at p. 173):

> "A growing source of governmental revenue in many countries is the profits of public undertaking. In under developed countries public enterprises fostered on public F revenues are expected to play a more positive role in financing the countries' development than similar enterprises do in developed economies. In determining the price policies of these undertakings considerations of maximising revenue will not play as important a part as profits do in private enterprises, but within the limits set by the neces- G sity to foster economic development, their price policies are designed to bring in some profits to the countries' general revenues. Public enterprises in the under-developed areas are to break ground in projects which are the core of development. If such projects are to be financed on an increasing scale, the price policies have to be so H designed that significant surpluses are left with the projects

to be employed either for their own expansion or for financing the expansion of other projects. In other words, there should be an element of profit in the prices of their products or in the cost of their services to the public." A

The Krishna Menon Committee on State undertakings (November 1959), the booklet proceeds to point out, enunciated the following pricing policy for public enterprises: B

"We have stressed in these pages the importance of incentive and healthy competition and emphasised that concerns must be able to stand on their own legs for efficient and proper conduct of business ..... The considerations that should govern prices appear to be the following. Consumer prices have to be based upon general market prices and other factors as well. The decision as to what economy in cost has to be passed on to the consumer on the one hand or should benefit the taxpayer on the other and the likelihood of non-availabilities and, therefore, of scarcities in the near future has also to be considered. The principle of 'what the traffic can bear' has also to be taken into account." C D

Dr. V.K.R.V. Rao has been quoted again as saying: E

"As regards profits, it should be pointed out that contrary to some popular notions on the subject, profits have an important place in a socialist society, the difference between the economic price and the social price would be what may be called the planned profit and this would largely correspond to the excise duties and sales tax and other indirect taxes that are imposed in a capitalist society. These planned profits being no more than a way of mobilising resources and making them available to the community for purposes both of investment and maintenance expenditure. Profits also have another important role to play in so far as they relate to the economic price itself. The economic price fixed at any particular moment of time is obviously based on the capital, technique and productivity of the given base period when this price is fixed; any improvement in productivity is bound to lead to a decrease in the cost production and in turn this would lead to the emergence of a surplus within the economic price itself and that would be a F G H

surplus whch will represent a measure of the nation's increase in productivity this surplus would not be the result of the policies laid down at national level as in the case of difference between the economic price and the social price. On the contrary, it would represent the result of the motivations and efforts of a larger number of persons engaged in productive activity. Hence the importance of arranging for proper incentive to stimulate the creation of this kind of surplus. That is the reason why in socialist societies now-a-days, individual enterprises are permitted to retain a larger share of such surpluses as they may create by an increase in productivity, this larger share to be used by them partly for increasing individual incomes of those engaged in the enterprises and partly for giving an opportunity to the enterprises in question to build up the financial resources needed to following their own independent investment policies. Public enterprise must be carried on a profit-making basis, not only in the sense that public enterprise must yield an economic price in the terms described in a previous section but must also get for the community sufficient resources for financing a part of the investment and maintenance expenditure of government. Increasingly, the share of the profits of public enterprises in financing the investment and maintenance expenditure of government must keep on increasing. It is not only the expenditure on the public sector as such that will indicate the march of the economy towards its socialist goal. Even more important is the increasing role that the public sector must play for finding the resources needed for meeting both the maintenance and investment expenditure of government. This involves a price and profit policy in regard to public enterprise which goes against accepted opinion so far in regard to public enterprise. The theory 'no profit, no loss' in public enterprise is particularly inconsistent with a socialist economy, and if pursued in a mixed economy it will hamper the evolution of the mixed economy into a socialist society. The sooner, therefore, this theory of 'no profit no loss' in public enterprise is given up and the policy accepted of having a price and profit policy for public enterprise such as will make the State increasingly reliant on its own resources (as distinguished from taxing the personal incomes of its citizens), the quicker will be the evolution of a socialist society".

In another article on "The Public sector in India", quoted in "Issues in Public Enterprise" by Sri K.R. Gupta, Dr. Rao is quoted as saying (at p. 84):

> "..... the pricing policy should be such as to promote the growth of national income and the rate of this growth ..... public enterprises must make profits and the larger the share of public enterprises in all enterprises, the greater is their need for making profits. Profits constitute the surplus available for savings and investment on the one hand and contribution to national social welfare programme on the other; and if public enterprises do not make profits the national surplus available for stepping up the rate of investment and the increase of social welfare will suffer a corresponding reduction; .... Hence the need for giving up the irrational belief that public enterprise should, by definition, be run on a no-profit basis."

In the light of the foregoing discussion, we are of opinion that it would not be right to insist that the ONGC should fix oil prices only on cost plus basis. Indeed, its policy of pricing should be based on the several factors peculiar to the industry and its current situation and so long as such a policy is not irrational or whimsical, the court may not interfere.

The question of fixation of a fair and reasonable price for goods placed on the market has come up for consideration of Parliament and Courts in different contexts. Price fixation, it is common ground, is generally a legislative function. But Parliament generally provides for interference only at a stage where in pursuance of social and economic objectives or to discharge duties under the Directive Principles of State Policy, control has to be exercised over the distribution and consumption of the material resources of the community. Thus while Parliament has enacted the Essential Commodities Act, it has left it to the discretion of the Executive to take concrete steps for fixing the prices of essential commodities as and when necessity arises, by promulgating Control Orders in exrcise of the powers vested in the Act. Various types of foodgrains, sugarcane and drugs have come under the purview of such control orders and the modalities of fixation of fair prices thereunder have also come up for consideration of the Courts. There has also been such fixation of price under the Industries (Development & Regulation) Act, 1951, vide: *Premier Automobiles* v. *Union*, [1972] 2 SCR 726. In all these cases, the primary concern of

A Government and Parliament has been that the articles in question should be available to the members of the consumer public at the minimum prices possible and, in that context, these legislations no doubt adopt the "cost plus reasonable return on investment" test in the fixation of prices. That, even in respect of such commodities, the "cost plus" method is not the only reasonable method has been recog-
B nised in judicial decisions. The cases on this topic have been reviewed and the limitations on judicial review of price fixations fully discussed recently by a Constitution Bench of this Court in *M/s Shri Sitaram Sugar Company Ltd. & Another* v. *Union,* JT 1990 1 SC 462. It is, however, not necessary here to enter into a discussion of this and the earlier cases because those cases were primarily concerned with the
C question whether the price fixation had been made in consonance with the requirements of the relevant legislation fixing prices of essential commodities in the interests of the general public and also because ONGC does not deny that, as a State instrumentality, its price fixation should be based on relevant material and should be fair and reasonable. None of these decisions hold that the cost plus method is the only
D relevant method for fixation of prices. On the contrary, there are indications in some judgments to indicate that not a minimum but a reasonable profit margin is permissible. Even in relation to a public utility undertaking like the State Electricity Boards where the duty not to make undue profits by abusing its monopoly position is clear (vide: *Jagadamba Paper Industries* v. *Haryana State Electricity Board,*
E [1984] 1 SCR 165, this Court said, in *Kerala State Electricity Board etc.* v. *M/s. S.N. Govinda Prabhu & Bros. and Ors. etc,* [1986] 4 S.C.C. 1988:

> "Now, a State Electricity Board created under the provisions of the Electricity Supply Act is an instrumentality of
F the State subject to the same constitutional and public law limitations as are applicable to the government including the principle of law which inhibits arbitrary action by the government (See *Rohtas Industries* v. *Bihar State Electricity Board,* [1984] 3 SCR 59). It is a public utility monopoly undertaking which may not be driven by pure profit
G motive—not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit; even as a private corporate body may be inspired to earn huge profits with a view to paying large dividends to its shareholders. But it does not follow that
H the Board may not and need not earn profits for the

purpose of performing its duties and discharging its obligations under the statute. It stands to common sense that the Board must manage its affairs on sound economic principles. Having ventured into the field of commerce, no public service undertaking can afford to say it will ignore business principles which are an essential to public service undertakings as to commercial ventures. (See Lord Scarman in *Bromely* v. *Greater London Council,* [1982] 1 All ER 129). If the Board borrows sums either from the government or from other sources or by the issue of debentures and bonds, surely the Board must of necessity make provision year after year for the payment of interest on the loans taken by it and for the repayment of the capital amounts of the loans. If the Board is unable to pay interest in any year for want of sufficient revenue receipts, the Board must make provision for payment of such arrear of interest in succeeding years. The Board is not expected to run on a bare year-to-year survival basis. It must have its feet firmly planted on the earth. It must be able to pay the interest on the loans taken by it; it must be able to discharge its debts; it must be able to give efficient and economic service; it must be able to continue the due performance of its services by providing for depreciation etc.; it must provide for the expansion of its services, for no one can pretend the country is already well supplied with electricity. Sufficient surplus has to be generated for this purpose. That we take it is what the Board would necessarily do if it was an ordinary commercial undertaking properly and prudently managed on sound commercial lines. Is the position any different because the Board is a public utility undertakings or because of the provisions of the Electricity Supply Act? We do not think that either the character of Electricity Board as a Public Utility Undertaking or the provisions of the Electricity Supply Act preclude the Board from managing its affairs on sound commercial lines though not with a profit-thirst.

XXX XXX XXX

7. A plain reading of Section 59 (as amended in 1978) plainly indicates that it is the mandate of Parliament that the Board should adjust its tariffs so that after meeting the various expenses properly required to be met a surplus is

left. The original negative approach of functioning so as not to suffer a loss is replaced by the positive approach of requiring a surplus to be created.

XXX XXX XXX

Under the above provision, the Board is under a statutory obligation to carry on its operations and adjust its tariffs in such a way to ensure that the total revenues earned in any year of account shall, after meeting all expenses chargeable to revenue leave such surplus as the State Government may, from time to time, specify. The tariff fixation has, therefore, to be so made as to raise sufficient revenue which will not merely avoid any net loss being incurred during the financial year but will ensure a profit being earned, the rate of minimum profit to be earned being such as may be specified by the State Government.

XXX XXX XXX

8. Shri Potti, learned counsel for the consumers placed great reliance on the observations of this Court in *Kerala State Electricity Board* v. *Indian Aluminium Co.*, [1976] 1 SCR 552; *Bihar State Electricity Board* v. *Workmen*, [1976] 2 SCR 42 and *P. Nalla Thampy Thera* v. *Union of India* to contend that the Electricity Board was barred from conducting its operations on commercial lines so as to earn a profit.

XXX XXX XXX

We do not think that any of these observations is in conflict with what we have said. Pure profit motive, unjustifiable according to us even in the case of a private trading concern, can never be the sole guiding factor in the case of a public enterprise. If profit is made not for profit's sake but for the purpose of fulfilling, better and more extensively, the obligation of the services expected of it, it cannot be said that the public enterprise acted beyond its authority. The observations in the first case which were referred to us merely emphasised the fact that the Electricity Board is not an ordinary trading corporation and that as a public utility

undertaking its emphasis should be on service and not profit. In the second case, for example, the Court said that it is not expected to make any profit and proceeded to explain why it is not expected to make a profit by saying that it is expected to extend the supply of electricity to unserved areas without reference to considerations of loss. It is of interest that in the second case, dealing with the question whether interest cannot be taken into account in working out profits, the Court observed, (SCC p. 235, para 5):

'The facile assumption by the Tribunal that the interest should not be taken into account in working out the profits is not borne out by the provisions of the statute'.

In the third case, the court appeared to take the view that the railway rate and fares should cover operational expenses, interest on investment, depreciation and payment of public obligations. It was stated more than once that the total operational cost would include the interest on the capital outlay out of the national exchequer. While the court expressed the view that there was no justification to run a public utility monopoly service undertaking merely as a commercial venture with a view to make profits, the court did not rule out but refrained from expressing any opinion on the question whether a public utility monopoly service undertaking should ever be geared to earn profits to support the general revenue of the State.

We are of the view that the failure of the government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed what a prudent public service undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private enterpreneur. The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Bard has shed its public utility character. When that happens the court may strike down the revision of tariffs as plainly

A arbitrary. But not until then. Not merely because a surplus has been generated, a surplus which can by no means be said to be extravagant. The court will then refrain from touching the tariffs. After all, as has been said by this Court often enough "price fixation" is neither the forte nor the function of the court."

B

We are not called upon here, in the view we take, to decide whether the cost plus basis or the thermal equivalence basis is more appropriate. All that we wish to say is that, having regard to the basis on which the claims of the respondents have proceeded thus far, our task is a very limited one. We cannot say, for reasons set out below, that the ONGC has acted arbitrarily in fixing the prices on the thermal C equivalence basis; the fact that it has not done it on cost plus basis does not vitiate the price fixation. The only question we have to address ourselves to is as to whether the O.N.G.C. has fixed a price based on relevant materials and on some known principle. At the outset, one must notice that the price is not directly and specifically related to or D based on any unreasonable margin of profit. There is nothing to indicate that the ONGC was prompted, in fixing its prices, on the one and only consideration of deriving maximum profits for itself. On the other hand, it appears to have been guided by the needs of the situation and the nature of the distribution system that is in operation. As we said earlier, the manufacture, distribution and consumption of gas has yet E not attained the status of an essential commodity till recently. It is still at a stage where the goods are being distributed under private contracts. Whether this is any longer justified and whether there should not be a greater amount of control over the modes of, as well as price for such, distribution is a larger question with which we are not now concerned. At present, we are in the penumbral region where the F commodity is free to be distributed at the manufacturer's choice, but yet where such manufacturer being a State instrumentality, has to conform to Articles 14 and 19 of the Constitution.

At this stage of development of the industry, we think a much wider latitude is permissible in the fixation of prices than the imposi- G tion of a "no profit, no loss" basis or a "cost plus" basis on the producer. In fixing the prices, it is ligitimate for the O.N.G.C. to take into account the fact that its supplies are restricted only to a few industries that have entered into contracts with it. Like industries, producing the same or similar commodities, are carrying on business with other sources of energy such as coal or furnace oil and the supply H of gas is intended to supplement that source of energy. The supply of

gas to a few chosen industries at a much lower rate than what the companies may have to pay for an alternative fuel may indeed lead to cries of discrimination as the O.N.G.C. is scarcely in a position to supply gas to all industries and replace furnace oil as a source of energy altogether. Also, it must be kept in mind that exploration of oil is capital-intensive and money-consuming and the ONGC would be well justified in supplying gas to voluntary contractors at a price which several parties are willing to accept and which will enable the ONGC to build up a surplus to meet its manifold requirements. The surpluses, it should be remembered, are not to fatten the coffers of a private individual but only to strengthen the backbone of the public enterprise. To fix its prices on the basis of alternative fuel cannot, therefore, be described, in the present situation, as irrational or arbitrary. Our attention has been drawn to a passage from Joan Mitchell on "Price Determination and Price Policy" where, dealing with the basis of fixation of gas price by negotiation between the British Gas Commission and companies producing North Sea gas, it is pointed out hat the price is set by the nearest alternative fuel, usually fuel oil. This was also the basis, it will be remembered, on which initially the GSEB and GSFC had agreed to receive supplies from the ONGC. Thus this is a basis of fixation of price that is recognised in this field. Fixation of price on this basis is, therefore, a logical and appropriate one in the circumstances.

We should once again like to emphasise that different considerations may perhaps have to prevail if the treatment of ONGC as a public utility is taken to its logical conclusion but that is not the basis on which the present writ petitions can be decided. Even at present the ONGC is supplying to public sector undertakings at a much lower price. That has not been challenged by those organisations and the differentiation has also been upheld, in principle, by the High Court, rightly in our opinion. Fortunately, with the discovery of more and more oil wells in various parts of the country the economy of the country is booming and gas supply may also become more plentifully available in course of time. The time will perhaps soon come for the evolution of proper schemes of distribution and price control. We are now concerned, however, with the price fixation regarding supply to a few parties who considered it all right to enter into contractual agreements for supply of gas to them on the basis of the price fixed by the ONGC. So far as the scheme of supply is concerned; the respondents also stand by the existing contract scheme as they want the supply to continue. It is certainly not their prayer that the existing supply of gas, such as it is, should be considered a public utility and rationed to meet the needs of all industries and consumers in Bombay or Vadodara or

A elsewhere. Nor is there any complaint today from any industry not receiving gas supply that they are being discriminated against and that the supply to selective industries should stop. There is, therefore, no justification to strike down the scheme of supply on the basis of contracts. The only objection that survives, therefore, is that the price for the supply should be reasonable and fair. It should be based on princi-
B ple, not caprice. We have pointed out that, though the ONGC has stepped up the prices considerably, it has claimed to have done so on a principle and the correctness of this has not been challenged. The claim of the respondents only is that prices should not be fixed on that basis but should, instead, be fixed on the basis of "cost plus". For reasons indicated earlier, we do not think that the respondents are justified in challenging this basis of fixation. The basis on which the
C ONGC has fixed the prices is a known basis and, as pointed out by us, also a basis permissible at this stage of the industry where a certain amount of freedom is permitted to the organisation in supplying the gas produced by it. The situation really is one where the choice is between making the limted supply of gas available to a few chosen
D individuals at rock-bottom prices so that they can make huge profits and making the price higher but competitive so that it subserves the common good and does not benefit only a chosen few. The ONGC has rightly chosen the second alternative. We would, therefore, hold that the respondents can insist on a supply only if they agree to pay the prices fixed by the ONGC. They are also not entitled to demand
E supply as of right, without contracts. But, as they have in fact had the benefit of the supplies under interim orders of the Court, this question does not survive and all that we can declare is that the prices demanded by the ONGC are not unreasonable or capricious and are binding on the respondents.

F Having dealt with the pricipal issue, we may now refer to certain subsidiary matters touched upon in the course of arguments:

(i) A point was made about the ONGC's right to insist on a minimum offtake guarantee to the extent of 90%. This has been upheld by the High Court and there is no appeal (the cross-
G appeals having been dismissed as time barred) by the respondents. There can, however, be no doubt that the High Court was right in its conclusion on this issue. If any authority regarding the rationale of such a claus is needed, it is to be found in the decision of this Court in *Amalgamated Electricity Co. Ltd.* v. *Jalgaon Borough Municipality,* [1976] 1 SCR 636.

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(ii) A statement was filed before us to show that if the prices had been determined on the basis of the thermal equivalence of coal, they would have been much smaller. This statement has been filed before us for the first time and its correctness would need verification. It is, however, unnecessary to go into this question. The acceptability of this argument may depend, *inter alia* on how far the coal basis is relevant for the industries located in Vadodara where the principal alternate fuel is fuel oil. It is possible that this is one alternative that may be available and it was open to the petitioners to have had discuss and mediations with the ONGC for alteration of the prices on that footing. The ONGC has fixed prices on the basis of the thermal equivalence of furnance oil which, by an large, was the source of energy tapped by the local industries. There being no irrationality in adopting this basis, it is not open to us to say that the basis of thermal equivalence of coal should be adopted rather than that of furnance oil, particularly in the absence of fuller material and discussion.

(iii) A point was made that the ONGC is charging different prices to different industries. The answer of the ONGC is that, save in the case of certain public sector enterprises, their prices are fixed on the basis of the prices prevalent on the thermal equivalence of fuel oil basis as on the date the relevant contract is entered into. This has not been shown to be wrong. The only discrimination urged at the stage of the High Court was in regard to the disparities in prices between supply to public sector undertakings and private industries. Though the award, towards the end, suggested that there should be no such differentiation, it is now well settled that a favourable treatment of public sector organisations, particularly ones dealing in essential commodities or services, would not be discriminatory. Also, this differentiation, as already pointed out, has been upheld by the High Court, we think rightly. No tangible material has been brought to our notice which would support the plea of unfair discrimination.

(iv) A point has been made that the ONGC had entered into a contract for a ten year period with the Amul dairy for supply of gas at Rs.741 per unit which demonstrates the unreasonableness of the prices charged to the respondents. We do not agree. We have already pointed out that the ONGC is supplying gas, to certain public sector undertakings at much lower rates and that this differentiation has been upheld. Though the Amul Dairy is a cooperative society it deals with a basic need of society and

stands on no different footing from Electricity Boards or Fertiliser Corporations or Municipal Corporations. The instance of the Amul Dairy cannot, therefore, be treated as an index of the unreasonableness of the price charged from the respondents, particularly when the basis of fixation has been explained and is an intelligible and rational one.

(v) Reference has been made to the price of gas in Assam and U.S.A. So far as the former is concerned, the High Court has, rightly in our view, discarded the comparison. So far as the latter is concerned, the point made by the ONGC was that Dr. Rao had fixed the price of gas in India in 1967 at 15% below the then U.S. price and that on the same basis the price of Rs.2000 per unit today could not be said to be unreasonable as prices in U.S.A. have also shot up about thirty fold in the meantime. We find no effective reply to this argument. The High Court has just brushed it aside by reiterating that the well-head prices alone would be the reasonable basis for fixation of price.

(vi) The High Court in its judgment has observed:

> "If the ONGC were acting fairly and reasonably, there was nothing to prevent them from placing all their cards on the table of the court. They did not put the price structure that possibly be worked out on the lines similar or akin to those suggested by Dr. V.K.R.V. Rao in his award. Nor did they put forward any other reasonable criteria for price fixation. All throughout they harped on the thermal equivalence and furnace oil equivalance and the prices in U.S.A. and the prices of crude, but did not allow the Court to have the bare glimpse of what could possibly be the well-head price of gas, by making allowances for amortisation and all other conceivable factors, having their sway in the ultimate price fixation. This also is indicative of the unreasonableness on their part and we would say that Mr. Singhvi was justified in complaining that the return filed by the ONGC in this group of petitions was far from being satisfactory and, therefore, was liable to be brandished as no real return at all."

We think this criticism is not justified. The stand of the ONGC was that it had fixed the prices on the thermal equivalence basis and this has not been controverted or found against. It was the

respondents' case that the cost plus price would work out much cheaper and the onus was on them to prove it. We fail to see how the blame for not allowing the court to have a glimpse of what could possibly be the well-head price of gas can be put at the doors of the ONGC. However, this aspect is irrelevant as the case throughout has proceeded on the assumption that the cost plus basis would yield lower figures and the question debated was whether the ONGC could discard this and adopt the thermal equivalence basis.

(vii) Turning now to para 36 of the judgment of the High Court, we may observe that these directions do not survive in view of the conclusion we have reached that the prices demanded by ONGC are based on proper and relevant criteria. However, we may observe that directions (i) and (ii) in this paragraph virtually throw open the entire issue for fresh discussion. It may have been helpful if such a direction had been given before the hearing of the writ petitions but the exercises would not be futile. Havng reached the conclusion that the cost plus was the only proper basis of fixation of price, the High Court should perhaps have directed the ONGC to charge prices on that basis and given a reasonable time to work out the said price and implement the direction. Instead, the High Court appears to have, by its directions in para 36, left the matter at large for it asks the ONGC to get the price fixed "according to the reasonable and rational norms". We do not also see any justification for providing that the price fixation should be done in consultation with, or after giving an opportunity to the respondents. It is for the ONGC to fix the prices and there can be no requirement of a prior consultation with the present respondents or with prospective customers. In such cases of price fixation, as in the case of price fixations by Government (see *Cynamide* case, [1987] 2 SCC 720), the only remedy of aggrieved consumers can perhaps be to have some sort of post-decisional reconsideration by the ONGC after hearing the view points of those affected. But this question does not arise now in the view we have taken to the ONGC's obligations in this regard. We should also like to add that, now that the prices have been fixed by the Government since 30.1.1987 and gas has already been supplied to the respondents till then on the basis of interim prices, the implementation of the directions contained in this paragraph would be a prolonged and unmeaningful exercise and it would have been much better to fix some ad hoc price, for this period, after hearing both parties. In fact, Sri B.

A Sen who appeared for the ONGC very fairly stated before us that, so far as this period was concerned, the ONGC was prepared to leave it to this Court to fix the price of supply at any figure that the Court might consider reasonable. We also suggested to the respondents, keeping the price fixed by the order dated 30.3.1987 in mind, a figure which we thought was reasonB able but the respondents were not agreeable to the course suggested. They put forward certain alternative proposals which were not acceptable to the ONGC. In these circumstances, we have been constrained to hear the appeals on merits.

(viii) On behalf of the ONGC, it has been pointed out that a sum C of Rs. 14.35 crores is outstanding for the period from December 1982 to August 1989 from eighteen concerns, even on the basis of the interim prices at which the ONGC has been supplying them gas under the orders of this Court, primarily due to shortfalls in the guaranteed off-take and that four concerns, who have stopped taking supply of gas, are in arrears to the tune of about Rs. 12 D lakhs. We need hardly say that the ONGC will be at liberty to take immediate steps to recover the charges due from the respondents in the light of this judgment.

(ix) We wish to add that we are not called upon to, and do not, express any opinion regarding the notification dated 30.1.87 of E the Government issued subsequently fixing the price at Rs. 1,400 plus. We do not know the circumstances or the statutory authority or the basis on which the said price fixation was made and that is totally outside the purview of these appeals.

This concludes a discussion of all the points urged before us. For F the reasons detailed above, we allow these appeals and uphold the prices charged by the ONGC for supply of gas to the various respondents. We, however, make no order regarding costs.

R.S.S. Appeals allowed.