HIGH COURT OF GUJARAT

INDIAN PETROCHEMICALS CORPN
Versus
UNION OF INDIA AND ORS

Date of Decision: 19 September 2006

Citation: 2006 LawSuit(Guj) 686

Hon'ble Judges: D N Patel

Eq. Citations: 2006 3 GLH 746

Subject: Constitution

Acts Referred:
Constitution Of India Art 11, Art 16, Art 10, Art 226, Art 32, Art 21, Art 14

Advocates: K B Naik, K S Nanavati, Kamal Trivedi, Kartik Thacker, Nanavati Associates, Trivedi & Gupta

Cases Referred in (+): 4

D. N. Patel, J.

[1] This petition has been preferred under Article 226 of the Constitution of India, whereby the petitioners have challenged the action of the respondents especially of respondent Nos. 2 and 3 of incorporating clause, in contract, to pay transportation charges, as the same is contrary to Government Pricing Orders dated 30th January,1987, 31st December,1991, 18th September,1997; 30th September,1997 and 20th June,2005. It is alleged by the petitioners that they are not liable to pay transportation charges or the price for supply of gas like HBJ Consumers, who are using HBJ pipeline of respondent No. 2 since, the petitioner No. 1 company transports the gas to its plant, through its own pipeline from the ONGC Metering Station and for getting declaration that the clause for payment of transportation charges incorporated in the contract dated 9th November,2001 is unfair, unreasonable, unconscionable and opposed to the public policy, hence, violative of Article 14 of the Constitution of India as the contract was entered into with respondent No. 2 - a monopolist and there was highly unequal bargaining power.

[2] An important question has been raised for adjudication in the present petition is that:

> Whether a term of a contract, which compels petitioner (Non-HBJ Consumer) for the payment of transportation charges as applicable from time to time to HBJ Consumers, is against the Pricing Orders, unfair, unreasonable, against the public policy, unconscionable and violative of Article 14 of the Constitution of India or not? and Whether petitioner can waive its fundamental right enshrine under Article 14 of the Constitution of India ?

FACTS AND ARGUMENTS OF BOTH SIDES:

[3] The contract was entered into between the petitioner No. 1 company and respondent No. 2 on 9th November,2001 for supply of natural gas. Respondent No. 2 is enjoying a position like monopolist so far as supply of natural gas is concerned. On the basis of assurance to supply of gas, given by the Central Government, plant was set up and installed at Gandhar. It appears from the facts of the case that the petitioner No. 1 company invested a huge capital approximately of Rs. 4500/- Crores, for setting of Gandhar complex and they were eagerly awaiting for supply of gas. Gas having 9 MMSCMD, (which is also known as 'semi rich gas') for extraction of C2 & C3 fractions and after this abstraction, line gas was to be returned to respondent No. 2. This usage involves, transportation of the gas, from the meter station to the factory premises of the petitioner No. 1 company i.e. at Gandhar complex. It appears from the facts of the case that the petitioner No. 1 company has laid down its own pipeline for approximately 97 KMS, incurring approximately Rs. 354/- Crores. Thus, huge amount was invested for setting up of industries and for pipeline so that without payment of transportation charges, the gas can be obtained uninterrupted from respondent No. 2. Maintenance of the pipelines is also at the cost of the petitioner No. 1 company. Respondent No. 2 is getting gas from Oil and Natural Gas Corporation (hereinafter referred to as 'ONGC'). This gas they are supplying to the petitioners. The Metering Station is nearby the premises of the GAIL respondent No. 1 at Hazira. After measuring the gas, it is transported through the pipeline of the petitioner No. 1 company. The contention raised by the learned Counsel for the petitioners is that the gas is being transported through the pipeline laid down by the petitioners. Respondent No. 2 is supplying the gas through the petitioner's pipeline. Respondent No. 2 is also having its own pipeline network, which is not at all utilized by the petitioners and, therefore, the petitioner No. 1 company is constantly ventilating its grievances with respondent No. 2 that they are not liable to make payment of transportation charges because transportation of the gas is at the cost of the petitioners through the pipeline of the petitioners and no network of pipeline of respondent No. 2 has ever been utilised by petitioner No. 1. Several letters have been written by the petitioners to respondent

Nos. 2 and 3. Several meetings have been held by the petitioners with respondent Nos. 2 and 3 and it is contended that respondent No. 2 insisted for introduction of clause in the contract as to the payment of transportation charges. It is also contended by the learned Counsel for the petitioner that the petitioners had no option but to fall prey to the unreasonably, arbitrary, unfair term of contract and, therefore, such terms were incorporated in the contract and reduced in writing as clause Nos. 10.01 and 4.04. Respondent No. 2 is enjoying a monopoly so far as supply of the natural gas is concerned. Very few are the other persons, who are supplying gas even as on today. They can be counted on fingers and perhaps they may not be available, even on tips of fingers when the contract was entered into with respondent No. 2 i.e. on 9th November,2001. Thus, highly imbalanced bargaining power was their between the petitioners and respondent No. 2 and huge amount of approximately Rs. 4500/- Crores, public money, was at stake and pipeline for transportation of the gas was laid down by the petitioner at the cost of approximately Rs. 354/- Crores. There was no option with petitioner but to sign the contract. With this background of facts, payment of transportation charges (as applicable to other purchasers - those who are using pipeline of respondent No. 2) has been challenged by the petitioners. According to the petitioners, such a clause in the contract is highly unfair and unconscionable and against Pricing Policy and, hence, against Public Policy, arbitrary and, hence, violative of Article 14 of the Constitution of India.

[4] Learned Senior Counsel for the petitioners further submitted that so far as fixation of price is concerned, it is in the hands of the Central Government. Thus, the price of the gas is being fixed by a separate order as per respondent No. 1 from time to time. Initially, ONGC was selling the gas at a price, which was dependent upon the need of the purchaser. Thus, price of Gas was varying, with the need. To avoid fluctuation of prices of gas, Central Government published Price Order, which was made applicable to all over the country. How much quantity of gas is to be supplied and to whom, is also in the hands of the Central Government. Thus, quantity of Gas and recipient of gas, are decided by Central Government. Transportation charges have also been fixed by the Central Government, for particular class of purchasers. To avoid any price fluctuation Pricing Control Order has been published by Central Government so that the purchaser can get the gas, at equal rate. Looking to the nature of commodity, the use and the application in the industrial usage, it was though it fit by the Central Government to control price of the gas and the allotment of the gas and the quantity of gas and, therefore, the Price Control Order has been published by the Central Government from time to time. It is submitted by the learned Senior Counsel for the petitioners that Clause 10.01 read with Clause 4.04, which compels the payment of transportation charges is not only unfair and unconscionable but it is also violative of the Price Control Order issued by the Central Government. The price control order fixes the price of the

gas for the whole of the country; likewise it also fixes the transportation charges. If the gas is supplied through the pipeline of respondent No. 2, there is a fixed transportation charge at Rs. 1150/MCM whereas if the network of pipeline of respondent No. 2 is not to be utilized and if the gas is to be taken by the purchaser, at landfall point, then actual cost of the transportation is to be charged by respondent No. 2. The difference in these two types of consumers is that Consumers, which are using HBJ pipeline, which are known as HBJ Consumers, they have to pay a fixed transportation charges at Rs. 1150/MCM whereas the Consumers, which are not using HBJ pipeline are known as Non-HBJ consumer/Ex-Hazira Consumer/Landfall Consumer, shall have to pay actual cost of transportation. It is contended by the learned Senior Counsel for the petitioners that the petitioners are falling in the category of Non-HBJ Consumer/Ex-Hazira Consumer/Landfall consumer and, therefore, they are not liable to pay transportation charges at Rs. 1150/MCM (at present, it is reduced to Rs. 950/MCM). Learned Senior counsel for the petitioner has relied upon Annexure 'B' to the memo of the petition, which reveals the price fixation of natural gas by the Central Government, Ministry of Petroleum and Gas, New Delhi, dated 18th September,1997 and especially Clause 6 and 7 thereof.

[5] It is also contended by the learned Senior counsel for the petitioners that fixation of the price, transportation charges, allotment of the gas, is in the hands of the respondent No. 1. i.e. Union of India. Looking to the price order at Annexure 'B' issued by the Central Government, respondent No. 2 cannot levy the transportation charges in defiance of the price order and, therefore, consistently prior to the contract and subsequent to the contract, grievance was ventilated by the petitioners before respondent No. 2 that they are not liable for the payment of the transportation charges. It is also contended by the learned Senior counsel for the petitioners that while allotment of semi-rich gas on form basis from Hazira to Gandhar units for extractions of C2 and C3. The allocation of gas is subject to following two conditions:

> (i) signing of gas supply contract with GAIL and (ii) pipeline required to transport semi-rich gas from Hazira to IPCL unit at Gandhar and to transfer lean gas to Hazira shall be laid by IPCL. This communication is dated 1st January, 1999 from the Ministry of Petroleum and Natural Gas, Union of India addressed to the petitioner No. 1 company, which is at Annexure 'C' to the memo of the petition. Thus, it is stated by the Learned Senior Counsel for the petitioners that the petitioners were compelled to sign the contract with GAIL, which incorporated Clause 10.01 and 4.04 and condition to laid pipeline by the petitioners was also incorporated. With this background of facts, the petitioners entered into contract with respondent No. 2, who is enjoying monopolistic position. The investment of the petitioner company was worth Rs. 4500/- Crores. Due to highly unequal

bargaining power and to avoid wastage of Rs. 4500/- Crores, contract was signed by the petitioner. Either Shave it' or 'leave it' was the policy of respondent No. 2. Though there is a difference between HBJ and Non-HBJ Consumers, petitioner allowed to be treated equally. In fact, unequals cannot be treated equally, as petitioners cannot waive fundamental right of equality. It is also contended by the learned senior counsel for the petitioners that looking to the minutes of Gas Linkage Committee Meeting (which recommends allocation of gas, recipient of gas and quantity of gas to Central Government) held on 16th October,1998, wherein CMD of GAIL i.e. Respondent No. 2 was present, it has been observed as under:

Agenda Item No. 16:

The request for allocation to IPCL, Gandhar for extraction of C2 & C3 fractions was discussed. In view of the earlier commitments made and in the investment already made by IPCL, it was agreed to allocate 0.85 MMSCMD of semi rich gas from Hazira to IPCL, Gandhar for extraction of C2 & C3 fractions. GAIL stated that the said gas should be supplied by GAIL and not by ONGC. It was decided that the question of who should supply this gas to IPCL, Gandhar would be settled separately.

Thus, it is stated by the learned Counsel for the petitioners that it is the respondent No. 2 GAIL, who must have insisted to supply the gas to the petitioners and, therefore, ONGC was not allowed to supply the gas to the petitioners. Thus, today respondent No. 2 cannot say that there are several other suppliers from whom the petitioners can purchase the natural gas. It is also contended by the learned Senior counsel for the petitioners that there is no question of loss of transportation of respondent No. 2. Learned Senior counsel for the petitioners submitted that correspondence had taken place between the petitioners and respondent No. 2 and it is pointed out that respondent No. 2 cannot charge transportation charges on the basis that had natural gas been not supplied to the petitioners by GAIL, it would have supplied to others, who would have paid the transportation charges. Therefore, petitioners must pay this loss as 'transportation charges' In fact, as per the price order Ex-Hazira Consumer/Non-HBJ Consumer/Land Fall Consumer, are not liable to pay transportation charges at Rs. 1150/MCM. Price order makes a clear distinction between two classes of consumers. One, who are using HBJ pipelines, which is network of pipeline of respondent No. 2 and the rest, who are not using the pipeline network of respondent No. 2. Separate are the transportation charges for these two types of classes of consumers. Rs. 1150/MCM for the first kind of class whereas actual cost of transportation for rest of the consumers. This classification of Consumers cannot be brushed aside by the respondent No. 2 compelling the petitioners (who is Non-HBJ Consumer) to pay the charges of transportation (at the rate as applicable to HBJ Consumer). Respondent No. 2

cannot take transportation charges and increase the total consideration, which is otherwise not leviable as per price order. The only difference between two type of consumers is payment of Rs. 1150/MCM and actual transportation. This distinguishing line has been wiped out by introducing Clause 10.01 read with 4.04 of the contract. The thing which cannot be done directly can never be done indirectly. The petitioner No. 2 is enjoying a monopolistic position. Therefore, though there was lot of protest even prior to introduction of Clause 10.01 read with 4.04 in the contract, the petitioners were compelled to sign the contract. Even subsequent to contract, this clause has been objected and, therefore, the said clauses deserve to be declared as unconscionable clause and violative of Article 14 of the Constitution of India. Prior to issuance of Price Control Order, random was the charges and, therefore, as uniform price policy has been made in Price Control Order by the Central Government. The respondent No. 2 is an instrumentality of respondent No. 1 and it cannot over-charge the purchaser.

[6] It is also further contended by the learned Senior counsel for the petitioners that in the similarly situated case of Essar Steel Limited, who had also their own pipeline, transportation charges were impose upon this company, the writ petition was filed bearing Special Civil Application No. 3348 of 2001, which has been decided on 11th October,2005 in favour of Essar Steel Limited to the effect that respondent No. 2 cannot charge transportation charges for the gas supplied through the pipeline of the Essar Steel Limited. This judgment is reported in (2003)1 GLH 609. The facts of this case may not be similar with the facts of the present case but so far as usage of pipeline is concerned, they are the same. Learned Counsel for the petitioners has also relied upon following judgments:

(i) (1974)1 SCC 317

(ii) 1978 GLR 863

(iii) (1983)3 SCC 379

(iv) (1986)3 SCC 156

(v) (1990)3 SCC 752

(vi) 1990(Supp) SCC 397

(vii) (1991)1 SCC 212

(viii) 1993 Supp(4) SCC 46

(ix) (1995)5 SCC 482

(x) 1997(2) GLR 1386

(xi) (2000)1 SCC 600

(xii) (2001)10 SCC 513

(xiii) (2002)3 SCC 496

(xiv) (2002)5 SCC 111

(xv) (2003)1 SCC 591

(xvi) (2003)2 SCC 107

(xvii) (2004)3 SCC 553

(xviii) (2004)8 SCC 321

(xix) (2004)9 SCC 786

(xx) (2006)2 SCC 269

From the aforesaid judgments, it is submitted that there cannot be a waiver of the fundamental rights. The Clause 10.01 read with 4.04. in the contract, is violative of Article 14 of the Constitution of India. The said clauses are unfair, arbitrary, unconscionable and against the public policy. Contract was entered into with the monopolist, when huge investment of Rs. 4500/- Crores was at stake. There is no delay in filing the petition looking to the constant pursuing the matter with respondents which is evident from exchange of letters. Even after the contract several representations were made and several meetings held with respondent Nos. 1 and 2 and even after judgment of Essar Steel Limited, there was a meeting. It is further contended on the basis of the aforesaid judgment that when the term of contract is unfair, unreasonable, unconscionable and when bargaining between petitioners and respondent No. 2 is highly unequal and when respondent No. 2 is enjoying monopolistic position and also when grievances have been ventilated for these transportation charges from the beginning of the contract, the petition is maintainable, under Article 226 of the Constitution of India. The conditions imposed in Clause 10.01 read with 4.04 of the contract are against the public policy. Central Government thought it fit to apply the Price Control Order so as to regulate the price all over the country. Respondent No. 2 company cannot levy anything more than this Pricing Order. Thus, it is against the public policy. The respondent No. 2 had compelled the petitioners to have condition Nos. 10.01 with 4.04 because of highly unequal bargaining power. Respondent No. 2 being a government

instrumentality, they cannot follow 'have it' or 'leave it' policy. It is also contended by the learned Senior counsel for the petitioners that respondent No. 2 had, on earlier occasion, tried to violate the Price Control Policy of the Government by imposing marketing margin charges, which was curbed by the Central Government in the initial stage itself. This type of levy of marketing margin charges was not allowed by the Central Government as it was found dehors the price fixing policy. Thus, in under the guise of transportation charges or marketing margin, charges or with any label whatsoever any additional charges made leviable, is dehors the public policy and Price Fixing order and, hence, the incorporation and insistence of incorporation of Clause 10.01 read with 4.04 in the contract is arbitrary, discriminative, contrary to the public policy, unconscionable, unfair and violative of Article 14 of the Constitution of India and, therefore, transportation charges, which the petitioners have already paid to the tune of Rs. 111/- Crores to respondent Nos. 2 and 3, may be given set off by respondent Nos. 2 and 3 or may be ordered to be refunded.

[7] It is contended by the learned Senior Advocate Mr. Kamal Trivedi on behalf of respondent Nos. 2 and 3 that the petition is not tenable at law mainly for the reason that there is an arbitration clause in the contract agreement. There is Clause 13 in the contract. Secondly, that the petitioner has entered into a contract with wide open eyes despite the Price Control Order, 1997 was in existence. The contract was entered into on 9th November,2001. The Price Control Order is of the year 1997. Despite this fact, the petitioners have agreed to make the payment of additional charges like transportation charges over and above the price fixed under the price control order. After taking benefit under the contract, the clause of contract cannot be challenged by the petitioners. 'Qua approbate non reprobate'. Thus, after taking benefit, such challenge of the term of the contract may not be entertained by this Court. It is also contended by the learned Counsel for the respondent Nos. 2 and 3 that respondent No. 2 is charging the transportation charges not because that the gas is being transported but because of loss of transportation charges. It is contended in the Affidavit-in Reply filed by respondent Nos. 2 and 3 that the transportation charges are levied because of the reason that if the gas would have been supplied to the consumer along the HBJ pipeline, GAIL would have earned transportation charges. GAIL is not charging for any extra price but is charging the 'loss of transportation charges'. Learned Counsel for the respondents further submitted that respondent No. 2 has all power and authority to charge transportation charges, over and above the price. It is also contended by the learned Senior Advocate for respondent Nos. 2 and 3 that in a contract where the parties have chosen their rights and liability, the Court will not entertain a writ petition under Article 226 of the Constitution of India. Respondent No. 2 has installed huge pipeline known as HBJ pipeline, which is having a length of more than 2000 kms. For

maintenance of this pipeline, transportation charges have been levied. Otherwise, cost of Gas received from the petitioner is transferred to ONGC. Respondent No. 2 is retaining the transportation charges only. Therefore, as a loss of transportation charges, respondent No. 2 is levying amount equal to transportation charges from the petitioners, irrespective of the fact whether the gas is actually transported through HBJ pipeline or not. Learned Counsel for the respondent Nos. 2 and 3 further submitted that the question of unequal bargaining power whatsoever does not arises. Respondent No. 2 and the petitioners, both at the relevant time i.e. on the date of contract (i.e. 9th November,2001) were Central Government Undertakings and, therefore, there is no question of unequal bargaining power. Learned Senior counsel for respondent No. 2 has also relied upon several judgments, which are enumerated as under:

(i) (1996)6 SCC 22

(ii) (2004)3 SCC 553

(iii) (1977)3 SCC 457

(iv) AIR 1980 SC 738

(v) (1981)1 SCC 537

(vi) (2004)8 SCC 321

(vii) (2004)12 SCC 327

(viii) (2001)10 SCC 513

(ix) (2004)9 SCC 786

(x) AIR 1990 SC 1851

It is contended, on the basis of the aforesaid judgments, that Clause 10.01 read with 4.04 of the contract cannot be labelled as unconscionable, unfair and arbitrary. Learned Senior counsel for respondent Nos. 2 and 3 has also pointed out that the petitioners can get natural gas from other sellers also. The petitioners can choose their seller. There is no question of monopoly of respondent No. 2 and, therefore, the term of contract cannot be challenged under Article 226 of the Constitution of India. It is also contended by the learned Senior counsel for respondent Nos. 2 and 3 that the case of Essar Steel Limited and that of the present petitioners are not comparable. There is a difference between the contract clause with Essar Steel Limited and with the petitioners. Learned Senior counsel for the respondent Nos. 2 and 3 has taken this Court to various term of contract of Essar Steel Limited as well

as to the impugned contract and to the various correspondence between the petitioners and the respondents. Learned Counsel for the respondent Nos. 2 and 3 submitted that the Price Control Order published by the Central Government is not because of any statute or law and, therefore, there is nothing like Price Control Order much less having binding effect to respondent No. 2. On the contrary, there is nothing in Price Control Order that respondent No. 2 cannot charge transportation charges (which is actual loss of transportation charges) and, therefore, the term of contract i.e. Clause 10.01 read with 4.04 of the contract cannot be said to be against the public policy and hence the petition may not be entertained by this Court.

Reasons:

[8] Having heard the learned Counsels for both the sides and looking to the facts and circumstances of the case, Respondent No. 2 company GAIL is established by Union of India i.e. by respondent No. 1 for the purpose of transportation, supply, distribution and marketing of Natural Gas. The respondent No. 2 is a company in which 51% of the share holding is of respondent No. 1. Even looking to the Articles of Association of respondent No. 2, there are several clauses like Clause 93 and 127, etc., which reveal that there is a direct control of respondent No. 1 upon respondent No. 2. Thus, respondent No. 2 is an agent and instrumentality of respondent No. 1-State, which was entrusted the function of supply and distribution of gas by transferring the same from ONGC, which is another Government of India Undertaking. Even it is not a contention of respondent No. 2 that they are not a company governed by the Central Government. Once respondent No. 2 is an instrumentality of respondent No. 1 Union of India and if there is unfair, unreasonable and unconscionable term in a contract, the writ petition is tenable at law under Section 226 of the Constitution of India. Looking to the continues dispute raised by the petitioners that the respondent No. 2 cannot charge the transportation charges as the gas is transported by petitioner itself through its own pipeline, it appears that the term of contract i.e. 4.04 read with 10.01 was incorporated, despite, these grievances were ventilated by the petitioners time and again. Some of such letters are dated 1st February,2000;

26th July,2002;

20th November,2003;

8th April,2003;

20th August,2004;

2nd September,2004;

20th September,2004;

5th March,2005;

16th November,2005.

By all these communications, petitioner states that it has its pipeline for transportation of gas and actually, gas is transported at the cost and risk of petitioner therefore, respondent No. 2 cannot charge transportation charges, for transportation of gas.

Respondent No. 2 is an instrumentality of respondent No. 1. It is the duty vested in the respondents, that any term, which is unfair and unreasonable should not be incorporated, taking an advantage of unequal bargaining power. So far as unequal bargaining power is concerned, it is contended by the petitioners that respondent No. 2 was having approximately 95% business of the natural gas. GAIL is the largest gas transmission and marketing company, in India. The petitioner No. 1 company had invested approximately Rs. 4500/- Crores for establishment of its project on the basis of the availability of the gas from the respondents. Availability of gas was assured. Petitioner rely upon letter written by Ministry of Finance along with minutes of Public Investment Board to consider proposal of petitioner. The petitioners have also placed reliance upon letter dated 20th August,1998 (Annexure 'B'), 12th July,2002, 1st January,1999, 14th January,1999 (Annexure 'C') issued by respondent No. 1- Union of India that the petitioners shall have to contract with GAIL i.e. respondent No. 2 and pipeline for transportation of semi-rich gas from Hazira to Gandhar shall be laid down by IPCL. In letter dated 14th January,1999, word 'Ex-Hazira' is used. Gas will be supplied by GAIL to IPCL. 'Ex-Hazira' that means gas will be supplied by GAIL at Hazira and thereafter transportation from Hazira to factory premises of petitioner, will be at the cost and risk of petitioner. Initially, price of the gas was dependent upon need of purchaser or on the want of the purchaser. Therefore, unequal was the price structure. Thereafter, pricing policy was fixed by the Central Government and Price Control Order has been issued to regulate the price of the natural gas. The pricing structure is in the hands of the Central Government. Likewise, how much quantity of gas is supplied and to whom is also with the Central Government. Thus, Government of India decides-

(a) recipient of Gas;

(b) which of the Government Company shall supply;

(c) what quantity shall be supplied;

(d) the price of gas, by issuing Pricing Orders; and

(e) other charges including transportation charges to be recovered by the supplier.

Looking to the Price Control Order dated 18th September,1997 especially vide clause VI and VII, the transportation charges have also been fixed by Union of India. The said clauses of Price Control Order dated 18th September,1997, reads as under:

vi. Over the period October 1,1997 to March 31,2000, the transportation charge payable to GAIL along the HBJ pipeline would be Rs. 1150/MCM. The transportation charge will increase by 1% for every 10% increase in the consumer price index. This increase will be paid to GAIL out of the Gas Pool Account. The transportation charge will be linked to the calorific value of 8500 K.Cal/cu.mtr. till such time as it would be denominated in terms of calories. The transportation charge will be reviewed after years.

vii. In addition to the price as fixed above, the transportation charges and royalty, taxes, duties and other statutory levies on the production, transportation and sale of natural gas will be payable by the consumers.

HBJ pipeline is a pipeline for transportation of Natural Gas owned and maintained by respondent No. 2. These two classes of purchasers have been created by respondent No. 1. One is, who are supplied the gas through the pipeline of respondent No. 2, popularly known as HBJ pipeline Consumer. They will have to pay the cost of transportation charges of the natural gas at Rs. 1150/MMSCMD, which is reviewable after some passage of time. So far as second class is concerned, those who are not taking natural gas through HBJ pipelines i.e. those who are Non-HBJ consumers (who are also known as Ex-Hazira or Landfall Consumers). The second type of consumers, known as Non-HBJ consumer/Ex-Hazira Consumer/Land Fall Point Consumer, are not taking gas along the HBJ pipeline as they are having their own pipeline. Therefore, actual cost of transportation shall be levied by respondent No. 1 and shall be payable by the concerned purchaser like the petitioners. It is an admitted fact that the petitioner No. 1 company is not covered by the former class viz. HBJ Consumer but the petitioner is belonging to another category viz. Non-HBJ Consumer/Ex-Hazira Consumer/Landfall Consumer. Looking to the correspondence between the petitioners and the respondent No. 2 and between the petitioners and respondent No. 1, consistently, in one breath, without losing any continuity of thought, it is contended by the petitioners that the petitioner No. 1 has its own pipeline network and as they are getting gas through their own pipeline and as they are not using the pipeline network of respondent No. 2, they are not liable to

make the payment of transportation charges. List of such letters has been referred hereinabove. There cannot be a payment of transportation charges for not transporting anything. Huge amount of approximately Rs. 4500 Crores was invested by the petitioners. If the gas would not be available, project was definitely going to fail. There was no option with the petitioners but to obey the monopolistic position of respondent No. 2. This is how the contract term 10.01 read with 4.04 incorporated in the contract, which reads as under:

10.01 Present price of 1000 (One Thousand) Standard Cubic meters of GAS w.e.f. 1.10.1997 is applicable as per Government Pricing Order No. L-12015/3/94-GP dated 18.9.1997 (Annexure-IV) after which the SELLER shall have right to fix the price of GAS which may be as per directive, instruction, order, etc. of the Government of India which is likely to be market related in accordance with current policy of liberalization of the Government of India and the BUYER shall pay to the SELLER such price of GAS. In addition to the above, the BUYER shall also pay to the SELLER transportation charges, as applicable from time to time along the HBJ pipeline system, for the quantity of GAS utilized/shrinkage. Provided further, the price of GAS so fixed is exclusive of Royalty, Taxes, Duties, Service/Transportation charges and all other statutory levies as applicable at present or to be levied in future by the Central or State Government or Municipality or any other local body or bodies payable on purchase of GAS from ONGCL/other Producer(s) by the SELLER or on sale from SELLER to the BUYER or on return of the balance quantity of GAS after processing by the BUYER to the SELLER and these shall be borne by the BUYER over and above the aforesaid price.

4.04 The BUYER, in addition to price of GAS mentioned in Article 10, shall pay to the SELLER Rs. 4,16,700/- (Rupees Four Lakh Sixteen Thousand and Seven Hundred) towards fortnightly service charges on account of deployment of manpower by the SELLER for terminal operation and routine maintenance along with applicable taxes/levies thereon, connected with delivery of GAS at the Point of Onward Delivery and receipt of Gas returned by the BUYER at the Point of Return Delivery. The above service charges is exclusive of any material requirements like tools, tackles etc and also the spares/items/equipments to maintain the terminal in operable condition. Any interruptions in supply of gas to any consumers on account of such material requirement shall be at the risk and cost of the BUYER. The above Service charges shall be increased by 3 (Three) percent per annum on yearly rest basis with effect from 1st April following the scheduled date of commencement of gas supply mentioned under Article 2.01 hereinabove. In addition to the above, the BUYER shall also pay to the SELLER transportation charges, as applicable from time to time along the HBJ pipeline system, for the quantity of GAS utilised/chrinkage as

per formula provided under Article 5.02 or for the difference in quantity of gas measured at the Point of Onward Delivery at Metering Station No. 1 (after adjusting the quantity of Gas Bye Passed as mentioned under Article 4.03 hereinabove) and Point of Return Delivery at Metering Station No. -II, whichever is higher. The BUYER shall pay above charges to the SELLER in addition to invoice for supply of gas to be raised as per Article 11 hereinafter along with all applicable taxes/levies thereon. Provided that in case above charges are not paid by the BUYER within 3 (Three) working days of presentation of the invoice, the SELLER will present the invoice for the same to the Bank against Letter of Credit and draw the amount. The BUYER will make arrangements with the Bank in a manner that in such an eventuality the full L/C amount gets automatically reinstated.

With several authorities, number of meetings have been held by the petitioners with representatives of respondent No. 1 as well as with representatives of respondent No. 2. Consistently, this grievance has been ventilated by the petitioners as it appears from the correspondence and the minutes of the meetings, which are annexed with the memo of the petition. Series of such letters have been mentioned before this Court from as early as 1st February,2000 (Annexure 'I' to the Affidavit-in Rejoinder) till 16th November, 2005 (Annexure 'K' to the memo of the petition).

Looking to the aforesaid correspondence and without referring line by line and word by word, the grievance as referred in the correspondence and during the meeting with respondents, by the petitioners, one fact is explicitly and unequivocally, coming forth on the surface, that the petitioners had no option, but, to accept the term of contract, viz.- over and above, the Price Control Order dated 18th September,1997, the transportation charges shall be paid by petitioner as applicable to consumers, who are using HBJ pipeline system. The petitioners are never using HBJ pipeline system. Pricing structure is in the hands of the Central Government. This is very much stated in the pricing order dated 18th September,1997, which reads as under:

ii. The price would be determined and notified by GAIL with the approval of the Ministry for every quarter depending upon the average price of the basket of Fuel Oils based on the figures contained from platt's Oilgram for the previous quarters. The general price would vary between the floor price of Rs. 2150/MCM and the ceiling price of Rs. 2850/MCM and the concessional price for the North-Eastern States would have a floor price of Rs. 1200/MCM and the ceiling price of Rs. 1700/MCM. A discount of Rs. 300/MCM would also be available for consumers in the North-East on a case to case basis and the concessional price and the discount of Rs. 300/MCM would be available on a case to case basis to the new units in the

North-Eastern States set up during 1997-2002 for a period of five years. Clarifications/guidelines regarding the manner of fixation of the gas price would be issued separately by this Ministry.

Thus, from the above para, it is clear that though the price of the natural gas and transportation charges are fixed by respondent No. 1, respondent No. 2 compelled the petitioner to agree to pay the transportation charges, which are applicable to consumers, who are using HBJ pipeline, taking the advantage of monopoly of respondent No.

2. Such type of compulsion and addition of the clause in the contract is against the price fixing policy of the Union of India, whereby the prices are so evenly fixed that in all over the country, there may not be any arbitrary levy of price or any other amount under the guise of price by the gas supplying company, looking to the pressing need of the purchaser. Otherwise there was no necessity by Union of India to fix the price of Gas. Therefore, such clause is against the pricing policy and, therefore, is against the public policy. Whatever difference is created by the Central Government between two unequal classes, has been extinguished or brushed aside by addition of such type of clause in the contract. A thing which cannot be done directly, can never be done indirectly. A huge amount of investment of approximately Rs. 4500 crores was at a stake of the petitioner No. 1 company. When transportation of the gas is at the cost and risk of the petitioners, when the petitioner No. 1 company is not using pipeline network of respondent No. 2 coupled with the fact that there is a Price Control Order published by the Central Government, when consistently grievances have been ventilated by the petitioners prior to the contract and post contract period that the petitioners are not liable for the payment of transportation charges, such type of term referred in Clause 10.01 read with 4.04, despite the aforesaid facts, is clearly unfair, unconscionable and against the public policy. It is the duty of all the State Governments, instrumentality of the State/Central Government and the Central Government, whenever they are enjoying a monopolistic position and when any contract is entered into by them, they must take all care so that their monopolistic position and higher bargaining power may not be encashed by them. Otherwise, the other side of contract, who is either citizen, sole proprietary concern, partnership firm or company, has no option but to agree especially, (when supply is of important raw-material), to save their investment. In fact, looking to the facts of the present case, it appears that there is a highly unequal bargaining power with the respondent No. 2. Most of the business of the natural gas is in the hands of respondent No. 2. Comparatively, huge amount has been invested by the petitioners, if they are without supply of the natural gas, whole investment would have been ruined. The

petitioners have established their one pipeline network, which has also been insisted by Union of India vide their letter dated 20th August,1998; 1st January,1999; 14th January,1999 and 12th July,2002 (Annexure 'B' and 'C' to the memo of the petition). In such a situation, to compel any person like petitioner to agree to pay transportation charges as applicable from time to time like a consumer, who are using HBJ pipeline of respondent No. 2 is violative of not only the Price Policy, but, is also violative of public policy and is unfair, unconscionable, unreasonable, arbitrary, and, therefore, violative of Article 14 of the Constitution of India.

[9] Learned Senior Counsel for respondent No. 2 submitted that there are other companies, who are also selling natural gas and the petitioners therefore, can purchase the gas from other sellers. This contention is not accepted by this Court for the simple reason that when the contract was entered into, respondent No. 2 was enjoying the monopolistic position, which is a Central Government Undertaking and also a Pricing Order was published by Central Government. Therefore, respondent No. 2 ought not to taken benefit of its high bargaining power and monopolistic position. 'Have it' or 'Leave it' policy by Government instrumentality is nothing, but, reflection of highly unequal bargaining power and of monopolistic approach.

[10] Learned Counsel for the respondent No. 2 further submitted that this petition is not tenable at law because there is an arbitration clause. This contention is also not accepted by this Court for the reason that there is no dispute under the Contract but there is a dispute as to the incorporation of unfair and unconscionable clause in the contract, which has a direct resultant effect of discrimination and, therefore, is violative of Article 14 of the Constitution of India. Here, unequals are treated equally. There are two classes of consumers. Those who are using pipeline network of respondent No. 2 for transportation of gas have to pay Rs. 1150/- per MMSCMD and those who are not using any pipeline network of respondent No. 2, who are popularly known as Non-HBJ Consumer/Ex-Hazira Consumer/Landfall Consumer, they are not liable to pay at Rs. 1150/- per MMSCMD, but, they are liable to pay actual transportation cost. This type of two classes of consumers have been created by the Price Control Order. Therefore, two classes are different and ought to have been treated differently. Exactly opposite is the treatment, which is given as per contract Clause 10.01 read with 4.04. Though the petitioners are not using any pipeline network of respondent No. 2, they have to pay the transportation charges. Looking to the facts of the present case, the petitioner No. 1 company has laid down its own pipeline having length of approximately 97 kms. at the cost of Rs. 354/- Crores. Thus, the petitioner is a Non-HBJ Consumer/Ex-Hazira Consumer/is also treated at par with another class of consumer, who are known as HBJ Consumers. Thus, equal treatment has been given to those who are unequals.

Therefore, there is a violation of Article 14 of the Constitution of India. Looking to the facts of the present case, the term of contract is unfair, unconscionable and against the public policy. In this situation, I am not accepting the argument of respondent No. 2 that there is an arbitration clause and therefore, the petition is not tenable under Article 226 of the Constitution of India. On the contrary, when instrumentality of Government is using, its monopoly and highly unequal bargaining power for incorporation of term which is against the public policy, the writ is tenable at law under Article 226 of the Constitution of India. Petitioner cannot waive the fundamental rights, much less the right given under Article 14 of the Constitution of India. Under Article 14 what is defined is not directly a right of the petitioners but what is defined in Article 14 is duty/obligation of the respondents and that too, with a mandate given in a negative terminology. Whenever negative sentence is used, which imposes a duty as per Rules of interpretation, the breach thereof shall be viewed seriously. Article 14 of the Constitution of India, reads as under:

> 14. Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> Thus, by signing a contract with a condition as incorporated in Clause 10.01 with 4.04 in the contract trantamounts to waiving of right of equality granted under Article 14 of the Constitution of India, which is not permissible as per the judgment delivered by Hon'ble Supreme Court in the case of Basheshar Nath v. Commissioner of Income-Tax, Delhi and Rajasthan and Anr. .
>
> In view of this interpretation of Article 14 of the Constitution of India, the term of contract at Clause 10.01 read with 4.04 is unfair, unconscionable and it gives equal treatment to unequals and is against the price policy, and is thus, arbitrary and is discriminatory and violative of Article 14 of the Constitution of India. Such type of waiver of the rights under Article 14 of the Constitution of India is not permissible and, therefore, a term of the contract whereby petitioner has waived his right to be treated unequally [by agreeing to pay transportation charges, though it is belonging to another class viz. Non-HBJ Consumer (who is not liable to pay transportation charges)], deserves to be quashed and set aside.

[11] It is contended by the learned Senior counsel for respondent No. 2 that what is charged by the respondent No. 2 is not the transportation charges but it is a loss of transportation charges. This argument appears to be attractive but if looked closely, then it has no substance in the eye of law. As stated hereinabove pricing policy and the allocation of gas is in the hands of the Central Government. Respondent No. 2 cannot charge arbitrary pricing, looking to the pressing need and want of the purchaser especially when respondent No. 2 is an instrumentality of respondent No. 1 Union of

India and is enjoying a position like a monopolist in selling natural gas. If the price fixation is allowed arbitrarily like, for ordinary article, there is no need of pricing order. Looking to the Article of Association of respondent No. 2, it appears that the respondent No. 1 has got all power to give direction and as necessary with regard to finances, to conduct business affairs of the company. Clause 127 of the Articles of Association of respondent No. 2 reads as under:

> 127. Notwithstanding anything contained in any of these Articles, the President may, from time to time, issue such directives or instructions as may be considered necessary in regard to the finances, conduct of business and affairs of the Company or of Directors thereof and in like manner may vary and annual any such directive or instructions. The Directors shall give immediate effect to the directives or instructions to issue. In particular, the President will have the powers:
>
> (i) To give directions to the Company as in the exercise and performance of its functions in matters involving national security or substantial public interest;
>
> (ii) to call for such returns, accounts and other information with respect to the property and activities of the Company as may be required from time to time;
>
> (iii) to approve the Company's five year plan, annual plans of development and capital budget;
>
> (iv) to approve the Company's revenue budget in case there is an element of deficit which is proposed to be met by obtaining funds from the Central Government; and
>
> (v) to approve agreements involving foreign collaboration proposed to be entered into by the Company.

There are several other clauses along with aforesaid Clause 127, which clearly empowers the respondent No. 1 to regulate the affairs of respondent No. 2. The issuance of Price Control Order is one type of such direction. Looking to para-2 of the Price Control Order dated 18th September,1997, it is clear that respondent No. 2 has to follow the pricing order, which fixes total consideration, including price as well as transportation charges, etc. If any amount is charged beyond this pricing order, it tantamounts to allowing, which is prohibited by this pricing order. Therefore, the contention raised by the learned Counsel for respondent No. 2 that though they are not entitled for transportation charges as per pricing order, they are entitled to levy loss of transportation charges, is self-contradictory argument and, therefore, is not accepted by this Court. It is contended in the affidavit-in reply in various paragraphs, as under:

The transportation charges are levied because of the reason that if the gas would have been supplied to the consumers along the HBJ pipeline, GAIL would have charged the same cost of transportation. Thus, GAIL is not charging for any extra profit but is preventing loss of revenue.

I humbly submit that as stated above, the transportation charges are being leveled as a result of loss of revenue to GAIL and hence, the petitioners ought not to have tried to canvass that as the pipeline is laid by the petitioner company for transportation of gas to its establishment it is not liable to pay transportation charges. Such contention is misconceived and devoid of merits. I further submit that the transportation charges are levied as a result of under-utilization of HBJ pipeline to the extent of supply of gas to the petitioner company.

I humbly submit that in the meeting dated 20.9.2004, it was submitted on behalf of GAIL that the cost of transportation charges is being charged as a result of loss of revenue.

The petitioners are aware of the fact-situation as it was made clear even during the meeting dated 20.9.2004 that the transportation charges in line with the HBJ transportation charges are being levied due to loss of revenue as a result of under-utilization of HBJ pipeline.

I humbly submit that the petitioners were appraised of the fact-situation that the transportation charges are levied due to corresponding reduction in the supply to the HBJ pipeline ultimately resulting into loss of revenue to AIL.

From the aforesaid sentences, which are used in the affidavit-in Reply by respondent No. 2 it is clear that they are charing, not transportation charges, but, loss of transportation charges. In fact, this tantamounts to violation of the pricing policy. Once the consideration, which are not allowed by the pricing policy, it cannot be levied by another nomenclature. It is also contended by the learned Senior counsel for the petitioners that respondent No. 2 had, on earlier occasion, tried to violate the Price Control Policy of the Government by imposing marketing margin charges, which was curbed by the Central Government in the initial stage itself. This type of levy of marketing margin charges was not allowed by the Central Government as it was found dehors the price fixing policy. Thus, under the guise of transportation charges or marketing margin, charges or with any label whatsoever any additional charges made leviable, is dehors the public policy and Price Fixing order and, hence, the incorporation and insistence of incorporation of Clause 10.01 read with 4.04 in the contract is arbitrary, discriminative, contrary to the public policy, unconscionable, unfair and violative of Article 14 of the Constitution of India.

The petitioner company is using its own pipeline for transportation of gas and the petitioner company is maintaining its own pipeline and, therefore, it cannot be said that respondent No. 2 is transporting gas. As per reply-affidavit, respondent No. 2 is charging 'loss of revenue' because of non-transportation of gas, which respondent No. 2 could have transported through HBJ pipeline to its other Consumers, who are using HBJ pipeline. Thus, respondent No. 2 is charging, in fact, 'non-transportation charges', which is not permissible under the Pricing Order. Therefore, respondent No. 2 cannot charge the transportation charges even under the nomenclature of 'loss of revenue' due to loss of transportation charges. This novice concept of levying 'loss of transportation charges' which is in fact, 'non-transportation charges' is absolutely arbitrary and dehors the pricing policy and tantamounts to giving equal treatment to unequals, hence, violative of Article 14 of the Constitution of India.

[12] It is also contended by the learned senior counsel for respondent No. 2 that the case which has been decided by this Court between Essar Steel Company Limited cannot be compared with the case of the petitioner against the respondent Nos. 2 and 3. There is much difference in the contract clause between Essar Steel Limited and the respondents and M/s. IPCL and the respondents. Both the counsels have read and re-read the judgments delivered by this Court between Essar Steel Limited v. Union of India, 2006 1 GLH 609. Both the sides have argued about similarity and dissimilarity of contract with impugned contract, involved in, this petition, but, one thing is certain that in the case of Essar Steel Limited also the natural gas was supplied by respondent No. 2 through the pipeline, which was belonging to the Essar Steel Limited. Essar Steel Limited was not using HBJ pipeline of respondent No. 2 at the relevant time. Despite this fact, respondent No. 2 insisted for the payment of transportation charges, which was under challenge by Essar Steel Limited and the petition was allowed in favour of Essar Steel Limited and it is held that respondent No. 2 was not entitled to transportation charges. Sizeable amount was paid by Essar Steel Limited. Thereafter, Letters Patent Appeal had been preferred by the respondents of the said petition before the Division Bench of this Court and it has been directed in Civil Application, by the Division Bench that 50% of the amount recovered by respondent No. 2 by way of transportation charges, ought to be refunded to Essar Steel Limited. Here also, the petitioner is not using HBJ pipeline, but, it has its own pipeline, through which receiving gas at Land Fall Point. Pipeline is owned and maintained by the petitioner. Here also, respondent No. 2 is charging transportation charges (due to loss of transportation charges) and as stated by learned senior counsel for the petitioner, petitioner has paid, approximately Rs. 111 Crores towards 'transportation charges'.

[13] It has been held by Hon'ble Supreme Court in the case of Ramchandra Shankar Deodhar and Ors. v. The State of Maharashtra and Ors. , especially in para 10, reads as under:

> 10... There was a delay of more than ten or twelve years in filing the petition since the accrual of the cause of complaint, and this delay, contended the respondents, was sufficient to disentitle the petitioners to any relief in a petition under Article 32 of the Constitution. We do not think this contention should prevail with us. In the first place, it must be remembered that the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition.... Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the quivive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.
>
> Here also, is a violation of Article 14 of Constitution of India by impugned clauses. Looking to the several letters written by the petitioners dated 1st February,2000;
>
> 26th July,2002;
>
> 20th November,2003;
>
> 8th April,2003;
>
> 20th August,2004;
>
> 2nd September,2004;
>
> 20th September,2004;
>
> 5th March,2005;
>
> 16th November,2005. and looking to the fact that there are several meeting with high ranking officers of respondents. Therefore contention of delay in filing petition is not accepted by this Court.

[14] It has been held by Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr. , especially in para 79,80 and 83, reads as under:

79. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in Chitty on Contracts, Twenty-fifth Edition, Volume I, in paragraph 4, and are as follows:

These ideas have to a large extent lost their appeal today. 'Freedom of contract,' it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.' Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called 'contracts d'adhesion' by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. and the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation, and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. and the Courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of Sinequality of bargaining power.

What the French call "contracts d'adhesion", the American call "adhesion contracts" or "contracts of adhesion". An "adhesion contract" is defined in Black's Law Dictionary, Fifth Edition, at page 38 as follows:

Adhesion contract'.- Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive

feature of adhesion contract is that weaker party has no realistic choice as to its terms. Not every such contract is unconscionable.

80. The position under the American Law is stated in "Reinstatement of the Law-Second" as adopted and promulgated by the American Law Institute, Volume II which deals with the law of contracts, in Section 208 at page 107, as follows:

208. Unconscionable Contract or Term If a contract or term thereof is unconscionable at the time the contract is made a Court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

In the Comments given under that section it is stated at page 107:

Like the obligation of good faith and fair dealing (205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Policing against unconscionable contracts or terms has sometimes been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract'. Uniform Commercial Code 2-302 Comment 1.... A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

There is a statute in the United States called the Universal Commercial Code which is applicable to contracts relating to sales of goods. Though this statute is inapplicable to contracts not involving sales of goods, it has proved very influential in, what are called in the United States, "non-sales" cases. It has many times been used either by analogy or because it was felt to embody a general accepted social attitude of fairness going beyond its statutory application to sales of goods. In the Reporter's Note to the said Section 208, it is stated at page 112:

It is to be emphasized that a contract of adhesion is not unconscionable per se, and that all unconscionable contracts, are not contracts of adhesion. Nonetheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability.

The position has been thus summed up by John R. Peden in "The Law of Unjust Contracts" published by Butterworths in 1982, at pages 28-29:

...Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law laesio enormis, which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery Court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle of pacta sunt servanda held dominance, the consensual theory still recognized exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.

It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both courts and Parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on Article 2.302 of the UCC have already gone some distance into this new arena....

The expression "laesio enormis" used in the above passage refers to "laesio ultra dimidium vel enormis" which in Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim "Pacta sunt servanda" referred to in the above passage means "contracts are to be kept".

83. Yet another theory which has made its emergence in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denning M.R., appears

to have been the propounder, and perhaps the originator - at least in England, of this theory. In Gillespie Brothers and Co. Ltd. v. Roy Bowles Transport Ltd., 1973 QB 400. Where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415-416):

The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to unconscionable? When it gets to this point, I would say, as I said many years ago:

there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused' : John Lee and Son (Grantham) Ltd. v. Railway Executive,1949 2 AllER 581.

It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.

In the above case the Court of Appeal negatived the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in Lloyds Bank Ltd. v. Bundy, 1974 3 AllER 757 that Lord Denning first clearly enunciated his theory of "inequality of bargaining power". He began his discussion on this part of the case by stating (at page 763):

There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.

He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words (at page 765):

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a

contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

Thus, whenever a terms of contract is unfair, unconscionable and unconstitutional and against public policy and contract is entered into due to unequal bargaining power, the Court can quash that part of term of contract and can declare it unenforceable.

[15] It has been held by Hon'ble Supreme Court in the case of LIC of India and Anr. v. Consumer Education and Research Centre and Ors. , especially in para 23 and 27, reads as under:

23. Every action of the public authority or the person acting in public interest or its act gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. The administrative Law by Wade, 5th Ed. at p. 513 in Chapter 16, Part IV dealing with remedies and liabilities, stated thus:

Until a short time ago anomalies used to be caused by the fact that the remedies employed in Administrative Law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction and declaration and there is a special family of public law remedies particularly certiorari, prohibition and mandamus, collectively known as prerogative remedies. Within each family,

the various remedies can be sought separately or together or in the alternative. But each family had its own distinct procedure.

At page 514 it was elaborated that "this difficulty was removed in 1977 by the provision of a comprehensive, 'application for judicial review', under which remedies in both facilities became interchangeable." At page 573 with the heading 'Application for Judicial Review' in Chapter 17, it is stated thus:

All the remedies mentioned are then made interchangeable by being made available 'as an alternative or in addition' to any of them. In addition, the Court may award damages, if they are claimed at the outset and if they could have been awarded in an ordinary action.

The distinction between private law and public law remedy is now settled by this Court in LIC v. Escorts Ltd. , by a Constitution Bench thus:

If the action of the State is related to contractual obligation or obligations arising out of the tort, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain form examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. This is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

Looking to the facts of the case, Natural Gas sold by respondent No. 2 as an instrumentality of Union of India. Price and transportation charges, quantity of gas, recipient of gas, allocation of gas, etc. are fixed/decided by Union of India.

Therefore, if any term of contract incorporated by respondent No. 2, which is de hors the pricing order issued by respondent No. 1 is unfair and unconscionable. There is a duty vested in Governmental instrumentality i.e. GAIL to act fairly, as a part of fair procedure envisaged under Article 14 of the Constitution of India. Unequals cannot be allowed to be treated equally, even under term of contract.

[16] It has been held by Hon'ble Supreme Court in the case of Basheshar Nath v. Commissioner of Income-Tax,Delhi and Rajasthan and Anr. , especially in para 14 and 32, reads as under:

14. Such being the true intent and effect of Article 14 the question arises, can a breach of the obligation imposed on the State be waived by any person ? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so ? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no, objection to my doing it." I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

32. This, in my opinion, is the true position and it cannot therefore be urged that it is open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights in the manner attempted to be done.

Thus, petitioners cannot waive their fundamental right. Here, petitioners have been compelled to add the clause for payment of transportation charges, thereby they have agreed to be treated equally, at par with HBJ Consumer, though in fact, they

are non-HBJ Consumer. This waiver of right enshrine in Article 14 is not permissible, as in fact it is not the right of the petitioners but it is duty imposed upon respondents to treat petitioners equally.

From the aforesaid judgments, it is clear that despite the arbitration clause, whenever the term of contract has been entered into, is unfair, unconscionable, arbitrary and between parties having highly unequal bargaining powers, where one of them is enjoying monopolistic position in sale of goods, the petition is tenable at law. It is also evident that arbitration clause gives alternative remedy when dispute under the contract is brought before the Court, but writ is tenable at law, despite arbitration clause, when term of contract is under challenge being unconscionable, unfair, arbitrary and violative of Article 14 of the Constitution of India. Alternative remedy is no bar for entertaining petition, looking to the facts of the present case. Looking to the facts and circumstances of the case, the respondent No. 2 cannot encash its position like monopolist in field of sale of Natural Gas. All the affairs of business are governed by respondent No. 1 including fixing of price and selecting persons to whom Gas is to be supplied, therefore, it is the duty of respondents to see that equal treatment ought not to be given to the unequals. Without any transportation of gas, the respondent No. 2 cannot charge transportation charges and that too, when it is not permissible under Pricing Order. Respondent No. 2 is not permitted to charge from the petitioner (Non-HBJ Consumer/Ex-Hazira Consumer/Land Fall Point Consumer), the very same transportation charges, which otherwise they are charging from HBJ Consumers. Transportation charge is the same as what is applicable to HBJ Consumer under the heading of or under the label of 'loss of transportation charges'. In fact from Non-HBJ Consumers, respondent can charge actual transportation charge. Thus, levy of transportation charge is not permitted under pricing order, is levied under 'loss of transportation charge' as per stand taken in an affidavit-in reply by respondent No. 1. This stand taken by respondent No. 2 is an assertion of highly unequal bargaining power.

[17] The judgments referred by learned Senior Counsel appearing for respondent No. 2 are not applicable in the facts of the present case mainly for the reason that all these judgments are challenging the liability or benefit under the contract, but in not a single judgment, term of contract is challenged as being unfair, unconscionable, against the public policy and violative of Article 14 of the Constitution of India. In the facts of the present case, consistently grievances have been ventilated by the petitioner before the respondents by several letters in writing and even during the course of meetings with respondents that the petitioner is Non-HBJ Consumer and the petitioner is transporting gas through its own pipeline, the petitioner is not using the pipeline network of respondent No. 2. Therefore, transportation charges cannot be levied by the

respondent No. 2. Highly unequal was the bargaining power. The petitioner invested huge amount of approximately Rs. 4500/- Crores and approximately Rs. 354/- Crores for lying down pipe lines which is 97 KMS in length. They cannot afford to lose the supply of natural gas and, therefore, they were compelled to sign the agreement.

> Freedom of contract is of little value when one party has no alternative, but, accepting a set of terms proposed by the other or doing without the goods or services offered, his option would be either to accept the unreasonable or unfair terms or forgo the service for ever. With a view to have the services of the goods, the party enters into the contract with unreasonable or unfair terms contained therein and would be left with no option but to sign the contract. An unfair and irrational clause in a contract is unjust and amenable to judicial review.
>
> In view of the aforesaid facts, the petition is tenable at law, despite the arbitration clause alternative remedy. Looking to the consistent grievances right from signing of the contract till today, there is no delay in approaching this Court. The petitioner has written various letters right from 1st February,2000 to 16th November,2005. Thus, there is no delay on the part of the petitioner in approaching this Court and, therefore, the judgments cited by learned Counsel for respondent No. 2 are not applicable looking to the facts of the present case.

[18] Looking to the aforesaid facts and circumstances of the case and judicial pronouncements, which are referred to hereinabove, the clause of term of contract, which compels petitioners to pay transportation charges, is unfair, unconscionable, arbitrary and against the public policy and is hereby quashed and set aside. It is also held and declared that respondent No. 2 is not entitled to levy the transportation charges from the petitioner, much less, under the heading and label of 'loss of transportation charges'. Petition is allowed. Rule made absolute to the aforesaid extent with no order as to costs.

[19] Civil Application No. 8738 of 2006 is disposed of, in view of the aforesaid order passed in Special Civil Application.

[20] After pronouncement of this judgment, it is prayed by the learned advocate for the respondent No. 2 that the operation and implementation of this judgment may be stayed for a period of two weeks with a view to approach the higher forum. This request is opposed by the learned advocate for the petitioner and has submitted that transportation charges which cannot be levied otherwise, can never be levied, even under the label and heading of 'loss of transportation charges'.

[21] In view of the aforesaid submissions and looking to the facts and circumstances and for the reasons assigned hereinabove, I see no reason to accede to the request

made by the learned advocate for respondent No. 2. Hence, the stay as prayed for is refused.