HIGH COURT OF GUJARAT (*D.B.*)

GUJARAT STATE ELECTRICITY CORPORATION LTD
Versus
GAIL (INDIA) LTD

Date of Decision: 01 September 2007

Citation: 2007 LawSuit(Guj) 2203

Hon'ble Judges: Y R Meena, Akil Kureshi

Case Type: Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civil Application; Special Civi

Case No: 19048 of 2007; 18868 of 2007; 19045 of 2007; 19046 of 2007; 19047 of 2007; 19049 of 2007; 19050 of 2007; 23018 of 2007; 23019 of 2007; 23151 of 2007; 2362 of 2007

Subject: Constitution, Contract

Acts Referred:
Constitution of India Art 226, Art 154, Art 14, Art 162, Art 73
Contract Act, 1872 Sec 15, Sec 5

Advocates: K B Trivedi, Sangita Vishen, Nanavati Associates, Mihir Thakore, K M Thaker, Abhishek M Mehta, Trivedi & Gupta, Gopal Subramaniam, Harin P Raval, Rashmin Chhaya, S N Soparkar, Aspi M Kapadia, Rashmin Chhaya, Aspi Chinoy, Maulik Nanavati, N Ganapathi, Dhananjay Shahi, Trilegal, Vivek Tankha, Abhishek M Mehta, Ashish Dholakia, Manish Bhatt, Devang S Nanavati, S I Nanavati, D G Shukla, Saurin A Mehta, Nagendra Rai, Nachiketa Joshi, Ravi Prakash, Sharad B Vakil, Sudhakar B Joshi, Nachiketa Joshi

Cases Referred in (+): 30

Y. R. MEENA

[1] Ten petitions are filed challenging the policy decision dated 6.3.2007 of the Central Government, which has been communicated to the Petronet LNG Limited, New Delhi and copies to three respondents i.e. GAIL (India) Limited (?SGAIL?? for short), Indian Oil Corporation Limited (?SIOC?? for short) and Bharat Petroleum Corporation Limited (?SBPCL?? for short). In all these petitions, a prayer has been made for stay of

operation of the communication dated 6.3.2007 issued by the respondent-Union of India.

[2] Initially, six petitions were filed seeking stay against the impugned communication dated 6.3.2007. The learned Single Judge vide his order dated 31.07.2007 has granted ad-interim order in terms of Para-8(B) i.e. stay of operation of the impugned communication dated 6.3.2007. Thereafter, Transfer Petitions to transfer these petitions were submitted in the Apex Court being Transfer Petitions Nos.513, 514 and 515 of 2007. Applications were also moved before Their Lordships with a prayer that the original respondents No.2 to 5 (respondent No.2-Petronet LNG Limited, respondent No.3-GAIL (India) Ltd., respondent No.4 ?∟ Indian Oil Corporation Ltd., respondent No.5-Bharat Petroleum Corporation Ltd.), whose names were deleted, but, in fact, as they are contesting respondents and necessary parties, they should remain as party respondents in those petitions. The Apex Court has set aside the order of the learned Single Judge dated 31.07.2007 and also ordered for joining of original respondents No.2 to 5 as party respondents. Their Lordships have also vacated the stay granted by the learned Single Judge in all six Special Civil Applications staying operation of the impugned communication dated 6.3.2007 and further directed that these matters be heard before the Division Bench to be constituted by the Chief Justice of the Gujarat High Court and the Division Bench, so constituted, shall take up the applications for hearing afresh from 10.09.2007 on day to day basis.

[3] In pursuance of the directions of Their Lordships by order dated 22.08.2007, all ten matters are listed and placed before the Division Bench ?∟ First Court for hearing of the petitions / applications for stay.

[4] As in all these petitions, the common prayer is to stay operation of the communication dated 6.3.2007, therefore, we hear all these writ petitions / applications together and pass this common order pursuant to the directions of Their Lordships.

[5] Shri Kamal B. Trivedi, learned Advocate General appeared for the petitioners i.e [SCA No.19048/2007-Gujarat State Electricity Corporation Limited (?SGSECL?? for short), SCA No.19047/2007 ?∟ Gujarat Industries Power Corporation Ltd. (?SGIPCL?? for short), SCA No.23018/2007 ?∟ Gujarat Urja Vikas Nigam Ltd.(?SGUVNL?? for short)]. The case of the petitioners is that the respondent-Union of India has taken a policy decision and instructed the respondents i.e.(Respondents-Petronet LNG Limited (?SPetronet?? for short), GAIL (India) Ltd. (?SGAIL?? for short), Indian Oil Corporation Ltd. (?SIOC?? for short), Bharat Petroleum Corporation Ltd. (?SBPCL?? for short)) by its communication dated 6.3.2007 to charge gas price on sale of Regasified Liquified Natural Gas (?SRLNG?? for short) procured under the terms of contract by the

respondent ?└ Petronet by pooling the prices of all old and new customers. The case of the petitioners is that they have entered into various agreements with the respondents-GAIL, IOC, BPCL for supply of gas at a particular fixed price for period till 31.08.2008, and now by this communication dated 6.3.2007, the price of the gas being supplied by the respondents-GAIL, IOC, BPCL is changed and gas will be supplied on uniform pooled price. When the agreement was for fixed term and fixed price, the respondent?└Union of India cannot take policy decision for uniform pooled price which results in increase in the price of the gas purchased by the petitioners from the respondents-(GAIL, IOC, BPCL).

[6] In the present case, the Ras Laffan's Liquified Natural Gas Company Limited, Qatar (?SRas Gas?? for short) supplies gas in liquid form to Petronet after regasified liquefied natural gas. Then, after converting the liquid gas form into gas form supply it to respondents-GAIL, IOC, BPCL under Gas Sale Agreement and thereafter, these three respondents companies sell gas to Gujarat State Electricity Corporation Limited, Gujarat Industry Power Corporation Ltd and Gujarat State Petroleum Corporation Limited (?SGSPCL?? for short). GSPCL further sells it to Gujarat Paguthan Energy Corporation (?SGPEC?? for short) and ESSAR Power Limited. Gujarat State Electricity Corporation Ltd. generates electricity and part of its gas supply is sold to Gujarat Urja Vikas Nigam and they further sell it to the other power plants.

[7] The case of the petitioners is that when the agreement is for fixed price and fixed term upto 31.12.2008, they cannot take policy decision to burden the petitioners to give relief to one power project at Dabhol, Maharashtra.

[8] Shri Kamal B. Trivedi, learned Advocate General for GSECL, has submitted that when the contract is for fixed period and term which was executed and acted upon, that cannot be trenched with by the executive powers under Article 73 of the Constitution, therefore, the act of exercise of power is arbitrary. The case of the petitioners is that to get gas for fixed period at a fixed price is their legal right, and should not be disturbed by invoking the executive powers of the Central Government.

[9] He further submits that petitioners have challenged the policy and and not the terms of contract and even in contract matters, under some circumstances, writ petition is maintainable. He further submits that in 2003, nobody was prepared to take gas and at that time the petitioners had come forward to purchase the gas from the respondents-GAIL, IOC and BPCL. He further submits that the policy decision is absolutely arbitrary action on the part of the respondent-Union of India which affects the terms of contract entered into by the petitioners with the respondents i.e. Petronet, GAIL, IOC and BPCL and therefore, when their rights are affected, they have right to come before this Court under Article 226 of the Constitution. Learned Advocate General

further submits that the respondents by way of policy decision cannot take away the legal right of one party to give benefit to other party.

[10] He further submits that when the petitioners are burdened with liability of more than Rs.300 crores in the name of pooling of prices contrary to the terms of contract, the petitioners have prima facie case and if finally the petitions are not allowed and the policy decision of the Central Government is upheld, they are prepared to pay the difference amount of price between the price under the agreements and the price after pooling of prices. Therefore, the balance of convenience is also in favour of the petitioners and if this policy decision is implemented, the petitioners will suffer irreparable loss as the petitioners may or may not be in a position to increase the electricity charges after generation of electricity using this gas. Thus, he submits that it is fit case where the operation of the Central Government?"s communication dated 6.3.2007 should be stayed.

[11] Special Civil Application No.18868 of 2007 :

Shri S.N.Soparkar, Learned Senior Advocate for Gujarat State Petroleum Corporation submits that when under the contract prices are fixed for fixed period, the Central Government, even if they have executive powers under Article 73 of the Constitution, cannot change the price fixed under the contract for fixed terms. Such exercise of power is illegal and without jurisdiction. When there was a policy decision on the pooling of price why the Central Government has chosen the gas being suppled by Petronet LNG Ltd alone, there are many other sectors and gas entrepreneurs, they are not subjected to this policy decision. He further submits that the petitioners are purchasing two-third gas quantity from open market at a market rate. Why for a particular project i.e. Dabhol Project, gas should not be purchased at market price. Shri Soparkar further submits that initially, nobody was prepared to purchase this gas, and at that time, the State of Gujarat has come forward and offered to purchase this gas but with a view to see that the price shall remain fixed and unchanged till 31.12.2008, the agreements were entered and acted upon. Therefore, this policy decision is absolutely arbitrary. He further submits that so far the stay applications are concerned, the petitioners have good prima facie case and even balance of convenience is also in favour of the petitioners. If the policy decision is not stayed, the petitioners will suffer irreparable loss as there is no possibility of recovery of pooled price from the customers of the petitioners.

[12] In the last, he submits that when the policy decision is illegal, the petitioners have right to challenge the policy by way of petition under Article 226 of the Constitution of India and the writ petition is maintainable, especially, it is

discriminatory when they have pooled the prices only in respect of the gas imported through Petronet. The other agencies, which supply the gas, such as, APM and Pre NELP whereby the Government receives gas on production sharing basis, have not been touched for pooled price.

[13] Special Civil Application No.19045 :

Shri Anil Diwan, learned Senior Counsel appeared for Essar Power Limited and submits that the executive powers of the Union of India under Article 73 of the Constitution, can be exercised in respect of the legislative entries either in List-I or List-III provided that in doing so, the concerned Government does not trench upon the rights of any person. In this case, by this policy decision under Article 73, the Union of India has interfered with the price of gas determined under the contract for fixed term, which they cannot do it without authority of law. He further submits that when there is rule of law in this country, the Union of India cannot take away any fundamental or legal right by way of executive powers invoking provisions of the Article 73 of the Constitution by issuing the impugned communication dated 6.3.2007 that virtually disturbs legal right to get gas at the fixed price under the contract with the GAIL, therefore, that affects the legal right of the petitioner ?ESSAR Power Limited. Therefore, the policy decision communicated by the letter dated 6.3.2007 is arbitrary and the petitioner has fit case for stay of operation of said communication dated 6.3.2007. He places reliance on the decision in the case of Naraindas Indurkhya v. The State of Madhya Pradesh and others, reported in 1974 SC 1232. The relevant Para-10 is at page.1240.

[14] Opposing the aforesaid arguments of the learned Senior Counsels for the petitioners, Learned Additional Solicitor General Shri Gopal Subramaniam submits that to take policy decision under Article 73 of the Constitution, prima facie, the Union of India has power to exercise its executive rights under Article 73 in respect of the Entry 53, List I of the VIIth Schedule of the Constitution of India and in exercise of those powers, the policy decision has been taken and unless the decision is absolutely wrong, then only the Court should interfere. He further submitted that in policy decision of economic matters or contract matters, the Court under Article 226 of the Constitution of India should not interfere. Learned Additional Solicitor General further submits that when there is need in the interest of the country and any act affects the economy of the country, the Government can invoke the provisions of Article 73 of the Constitution and take policy decision which is reasonable and in the interest of the country. He submits that considering the background under which this agreement was arrived at between the Petronet and Ras Gas, Qatar because of the efforts of the Union of India, and in the interest of the country, this policy decision which now has been taken by the Union of India is also in the interest of the country.

[15] Learned Additional Solicitor General has also submitted a Note in which various efforts taken by the Union of India are shown for entering into the contract between Ras Gas and Petronet for supply of RLNG at fixed rate for fixed period. He further submits that even in the agreements entered into between GAIL, IOC and BPCL on one side and the petitioners on the other, there are clear clauses in the agreements that the change in the price is subject to change in law or in policy decision.

[16] He further submits that the petitioners, especially, Gujarat State Petroleum Corporation Ltd, Gujarat State Electricity Corporation Ltd, in fact, are not affected by the said policy decision as they pass on their burden to next customers who consume the gas for the purpose of production of fertilizer and generation of electricity. He also brought to our notice that in case of agreements between GAIL and GSECL, Article 9.2.1 was omitted and that has been reinstated by letter dated 22.07.2006 restoring the provisions in the agreement regarding change in price and/or revision in the price on the basis of the change in law or change in policy. He further submits that price, which has been referred in the Annexure to the letter dated 22.07.2006, includes price as well as transmission charges as per the definition of the price given in the agreement.

[17] To avoid discrimination and for survival of new entrants in the field of generation or manufacture and production of fertilizer, policy decision for pooling of prices has been taken so that everybody will get gas imported through Petronet at the same price. He further submits that if the gas is purchased from open market by Dabhol Power Plant, that plant will have to be closed. Learned Additional Solicitor General further submits that it is not correct to say that only two companies are picked up for pooling of prices. He submits that more than 100 parties are there who entered in similar contracts and he also submitted a list of those parties who have entered into similar contracts with GAIL, IOC or BPCL and in their cases also, this uniform pooled price policy has application. But except the petitioners, nobody has challenged the policy decision. Essar Power Ltd., which is one of the petitioners, has also filed a writ petition in Delhi High Court, but no stay was granted in its favour by the Delhi High Court.

[18] He further submits that when the economic policy decision is in the interest of the country and when the case of the petitioners depends on the contractual agreements, writ petition is not maintainable. Therefore, according to him, neither writ petition is maintainable, nor the petitioners have a case for stay as there is no prima facie case in favour of the petitioners, nor there is balance of convenience in their favour, nor the petitioners will suffer any irreparable loss if the policy decision is implemented.

[19] Shri Aspi Chinoy, learned Senior Advocate appeared for the respondent?Petronet LNG Ltd. submits that under the agreements between GAIL and Gujarat State Petroleum Corporation Ltd and Gujarat State Electricity Corporation Ltd, there are clauses in those agreements for revision of gas price and that depends upon the change of law and change in policy. He submits that the rise in the gas price does not affect the petitioners, more particularly, GSPCL and GSECL. Under the agreements, they can pass over the burden to their customers. Here, the petitioners have challenged policy decision that affects the price of gas fixed under the contract and when challenge is based on the contract, it is a contractual matter. In cases of economic policy decision and contractual matters, writ petition is not maintainable. He places reliance on some decisions including the decision in the case of Balco Employees Union v. Union of India reported in (2002) 2 SCC 333.

[20] Shri Vivek Tankha, learned Senior Counsel for the respondent ?GAIL submits that GAIL is the Government company and bound by the decision of the Union of India and has no authority to challenge the policy decision of the Union of India. Therefore, whatever policy decision of Union of India, GAIL is bound to comply with and follow that decision. He further submits that the petitioners have challenged the policy decision of the Government which was conveyed to them vide letter dated 06.03.2007. The impugned decision is regarding economic policy of the Union of India. Unless that policy decision is absolutely arbitrary, that should not be called in question invoking the jurisdiction of the High Court under Article 226 of the Constitution of India and considering the background behind the policy decision which is in the interest of the country, that should not be questioned in jurisdiction under Article 226 of the Constitution. Even, so far as the balance of convenience and irreparable loss to the petitioners is concerned, the petitioners have failed to make out their case satisfying three tests for grant of stay. Therefore, he opposed the prayer regarding stay of the operation of the policy decision of the Union of India.

[21] Shri S.N.Shelat, learned senior advocate appearing for respondent - Indian Oil Corporation submits that Article 11 of the Agreement deals with the price of gas and Article 11(4) provides for revision of the contract price due to change in policy or change in law. He further submits that if the petitioners have any grievance against the rise in price under the contract, they can ask for reference of the matter for arbitration as Article 15 provides that if there is any dispute under the contract, that can be referred to arbitrator. He further submits that after receipt of the letter from the Petronet, and copies to the GAIL, IOC and BPCL, those letters were further sent by GSPCL to their customers i.e. petitioners regarding the rise in the price. Therefore, the petitioners are not affected as they will pass on their burden to their customers. He further submits that increase in the price has been made effective from 1.08.2007

after interim order of Their Lordships in the Transfer Petition. This policy has come into effect, and now higher price is being charged after the policy is made effective and in operation, there is no justification for stay of that policy decision. Learned Senior Advocate Shri S.N.Shelat further submits that fixed price case is based on the contract between the GAIL, IOC and BPCL on one side and GSPC and GSECL on the other. Virtually, challenge in these petitions is based on the basis of contract, and in case of economic policy decision and in contractual matters, the writ petition is not maintainable. Shri Shelat further submits that for grant of interim relief, that is, for stay of the operation of the policy decision of the Union of India, neither the petitioners have a prima facie case nor there is balance of convenience in favour of the petitioners and the petitioners will not suffer any irreparable loss, if the stay is not granted. Therefore, no case is made out for stay of operation of the policy decision of the Union of India.

[22] Shri Mihir Thakor, learned Senior Advocate for the respondents ?L GAIL and BPCL, submits that he adopts the arguments advanced by the learned Additional Solicitor General and the arguments advanced by Shri S.N.Shelat, learned Senior Advocate, and submits that when there is a clause in the agreement itself for revision of price and in the interest of the country the policy decision has been taken, Union of India has right to exercise its executive powers under Article 73 of the Constitution of India. In other words, he supported the policy decision of the Union of India. He, therefore, submits that there is no case for stay of operation of the policy decision of the Union of India.

[23] Shri Devang Nanavati, learned counsel appeared for respondent-Ratnagiri Gas Power Project Ltd and submits that he adopts the arguments advanced by the learned Additional Solicitor General and learned senior advocates Shri S.N.Shelat and submitted that the policy decision has been taken by the Union of India in the interest of country. He supports the reasonableness of the policy decision in question and submits that even on the given facts also, the policy decision is not arbitrary, therefore, writ petition is not maintainable. He submits that the petitioners have failed to make out any prima facie case and neither balance of convenience is in their favour nor they will suffer irreparable loss, if the stay is not granted. He further submits that this is not a fit case for stay of operation of the policy decision of the Union of India communicated vide letter dated 6.3.2007.

[24] Shri Nagendra Rai, learned Senior Counsel appeared on behalf of respondent-State of Maharashtra and submits that Dabhol Power Project failed, and the Government of India has taken a decision to restart the Dabhol Power Project and Rs.7012 crores were paid by the Indian financial institutions to the foreign lenders. The total costs for reconstruction of Dabhol Power Project is more than Rs.10,000 crores and out of which, Rs.1320 crores are financed by the Power Finance Corporation Ltd for

re-structuring Dabhol Power Project. Therefore, the financier concerned is Government concern. He submits that if gas is not supplied at a reasonable rate, it is not possible to run Dabhol Power Project by purchasing the total requirements of gas from the open market. Therefore, in the interest of the public at large, to get electricity, that too at a reasonable rate, it is necessary to run the Dabhol Project and for that purpose unless a reasonable rate is charged for supply of gas, survival of Dabhol project is not only difficult, but rather impossible. Loss to the Government means loss to the public. He submits that the Union of India has same powers under Article 73 of the Constitution as Parliament for enacting the laws, therefore, Union of India can exercise its executive powers and come out with a policy in such cases and invoke powers under Article 73 of the Constitution. He further submits that the closure of Dabhol Power Project will result in huge irreparable loss, but if the prise rise is implemented as per the policy decision, the petitioners will suffer some financial loss, which will be compensative. But, if Dabhol Power Project is closed, respondents will suffer irreparable loss. Therefore, it is not a fit case for stay of the policy decision of the Union of India dated 06.03.2007 communicated to the GAIL, IOC and BPCL.

[25] Shri S.B. Vakil, learned Senior Advocate appeared for respondent - Maharashtra State Electricity Distribution Company Limited and has submitted that the petitioners have filed the petitions by camouflaging its real cause of action of breach of contract by the respondents- GAIL, IOC & BPCL, they have challenged the policy decision of the Union of India. They have not claimed any relief against the respondents-GAIL, IOC, BPCL who are parties to the contract. Therefore, in fact, it is a case of dispute arising out of contract and in contractual matters, writ petition is not maintainable. When writ petition is not maintainable, he submits that no question of any stay in favour of the petitioners.

[26] He submits that when there is a clause in the agreement itself for change in the price on the basis of change in law or change in policy, the petitioners can not say that the respondents-GAIL, IOC, BPCL have committed any breach of contract and when the policy decision of Union of India is in the interest of public, there is no scope to challenge that policy decision, especially, economic policy decision and also in contractual matters, writ petition is not maintainable. He further submits that price can be changed on the basis of change in law or change in policy as clauses in the agreements provide for revision of price and when the order of the learned Single Judge has been stayed on application for transfer before Their Lordships, policy decision of the Union of India has been implemented and after implementation of the policy decision, there is no justification to stay that policy decision at this stage. Even otherwise also, the petitioners have failed to prove that they have prima facie case and

balance of convenience is in their favour and the petitioners have also failed to prove that they will suffer irreparable loss if stay is not granted.

[27] In rejoinder-affidavit, Shri S.N.Soparkar, learned Senior Advocate for GSPCL, submits that inspite of the fact that though there are agreements between Ras Gas and Petronet and agreements between Petronet and three Government companies i.e. GAIL, IOC, BPCL, but copies of those agreements have not been placed on record. He further submits that when the right under the contract has been trenched with by the Government by way of policy decision, writ petition is maintainable. He further submits that after receipt of the copy of the impugned communication regarding the policy decision, the petitioners have passed on the copies of that communication to their customers, but their customers opposed this rise in price. He further submits that this policy decision is only to give benefit to the Dabhol Power Project causing loss to the public of Gujarat. There are two different classes, i.e., new customers and old customers. Putting both of them at the same footing amounts to putting unequals as equals and there will be discrimination within the meaning of Article 14 of the Constitution of India.

[28] Shri B.J.Shelat, learned counsel for Gujarat Paguthan Energy Corporation Ltd., submits that in case of agreement between the petitioner and the GSPCL, there is no clause in that agreement regarding rise of price of gas supplied by the GSPCL to the petitioner. However, the petitioner has challenged the policy decision of the Union of India as that affects the price of gas supply to it by the GSPCL.

[29] Shri K.S.Nanavati, learned senior advocate appeared for the petitioners in SCA No.19046 of 2007 (GSFCL), 19047 of 2007 (GIPCL), 19049 of 2007 (GNVFCL), 19050 of 2007 (GACL), 23018 of 2007 (GUNL) and 23019 of 2007 (WELSPUN) and submits that the petitioners referred above entered into agreements with the GAIL and GSPCL. The policy of the Union of India, which has been conveyed by communication dated 6.3.2007, affects the interest of the petitioners as the policy decision gives rise in the fixed price, which was fixed for a period uptil 31.12.2008. Therefore, when a policy decision takes away the legal rights of the petitioners, writ petition is maintainable. He further submits that even as per Note-3 to Appendix-A of letter dated 22.07.2006 the transmission charges are increased. That letter refers only regarding revision in transmission charges and not the price revision. Therefore, agreements entered into with the GSPC, the Union of India has no right to take decision regarding the revision in the price affecting the interest of the petitioners. Therefore, writ petition is maintainable as the legal rights of the petitioners are affected and therefore, it is a fit case for stay of the operation of the policy decision of the respondent?⌊Union of India communicated by letter dated 06.03.2007.

[30] Before we proceed to see whether it is a fit case for stay of operation of communication dated 06.03.2007, we would like to see whether the Government has executive power under Article 73 of the Constitution of India to take policy decision in question.

[31] Article 73 provides for executive power of the Union of India and that shall extend to matters in which the Parliament can make laws. However, this power cannot be used by the Government contrary to the provisions of the Constitution or any law made by the Parliament. Therefore, there is no doubt in our minds that the Central Government has the power to take policy decision in matters enumerated in Lists I and III. Entry No.53 in List I - Union List relates to regulation and development of oil-fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law. Therefore, it leaves no room of doubt that the Central Government can exercise its executive powers under Article 73 of the Constitution as regards the subject matter, which is a petroleum product, but, the question is in what manner the executive powers can be exercised.

[32] When the Central Government has executive powers under Art. 73 of the Constitution, it should exercise that power in a particular manner and if the executive power is not used in a manner intended, Court can interfere in that case. The Apex Court in some cases has considered the scope of interference.

[33] In the case of M/s. Bishamber Dayal Chandra Mohan Vs. State of U.P. ?∟ AIR 1982 SC 33, in paragraph 27, Their Lordships have observed as under:-

> ?S27. The quintessence of our Constitution is the rule of law. The State of its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts.??

[34] In the case of Bishambhar Dayal Chandra Mohan and ors. Vs. State of U.P. - (1982) 1 SCC 39, in paragraph 41, with regard to the executive powers under Article 73 of the Constitution of India, again it has been held by Their Lordships that executive powers under Article 73 of the Constitution cannot be exercised unless authorities have some power under the provisions of the Parliament or law made by the Parliament or law made by the Legislature. The relevant observation is as under:-

> ?S41. ... The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear fr om the opening words, is subject to other provisions of the Constitution.??

[35] In Bishan Das and ors. Vs. State of Punjab and ors. - AIR 1961 SC 1570, in paragraph 14, it has been observed by Their Lordships that the legal rights cannot be taken of the citizen in the name of executive powers under Art. 73 of the Constitution of India. The relevant observation in para 14 reads as under:-

> ?S14. ..... As pointed out by this Court in Wazir Chand Vs. State of Himachal Pradesh, 1955-1 SCR 408: (AIR 1954 SC 415), the State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts.??

[36] In the case of Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India ?∟ (2006) 10 SCC 1, Their Lordships have considered the executive power of the Government and the parameters for judicial review and observed in paragraph 56 as under:-

> ?S56. ..... The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.??

[37] In Satya Narain Shukla Vs. Union of India and ors ?∟ (2006) 9 SCC 69, in paragraph 16, Their Lordships were of the view that executive powers of the Government of India extends to the same subject and to the same extent as that of Parliament so long as it does not violate any legislation made by Parliament or the Constitution. It has been observed in para 16 as under:-

> 16. It is now well established that the Central Government's executive power extends to the same subjects and to the same extent as that of the Parliament as long as it does not infringe any provision of any law made by the Parliament or of

the Constitution. In Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab3, this Court has observed (vide para 12): 3 AIR 1955 SC 549.

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes residue of government functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

[38] Thus, it is clear that Central Government has executive power under Article 73 and can take policy decisions including on the subject matter of petroleum. However, the policy decision is subject to judicial review, but to what extent that policy decision can be interfered depends upon the facts of each case.

[39] Now, it brings us to the issue whether writ petition is maintainable to consider for the purpose of judicial review. Before we go into the facts of these cases, we would like to refer some observations of the Apex Court.

[40] In the case of Naraindas Indurkhya Vs. State of Madhya Pradesh and ors. - AIR 1974 SC 1232, in paragraph 10, Their Lordships have observed that by exercise of executive power, legal right of any citizen should not be infringed. The observations made by Their Lordships are as under:-

?SThere was, of course, then no statutory provision, like Section 4, sub-sec. (1) of the Act of 1973, which empowered the State Government to prescribe any text books and the prescription of these 28 text books had, therefore, no legal force. But that does not mean that the State Government was not entitled to prescribe these 28 text books in exercise of its executive power under Article 162 of the Constitution. The executive power of the State Government under Article 162 extends to all matters with respect of which the State Legislature has power to

make laws and since education is a subject which falls within Entry 11 of List II of the Seventh Schedule to the Constitution, the State Government could apparently in exercise of its executive power prescribe these 28 text books, provided that in doing so it did not trench on the rights of any person. It is now well settled by the decision of this Court in Ram Jawaya v. State of Punjab (1955) 2 SCR 225 = (AIR 1955 SC 549), that the State Government can act in exercise of executive power in relation to any matter with respect to which the State Legislature has power to make laws, even if there is no legislation to support such executive action, but such executive action must not infringe the rights of any person. If the executive action taken by the State Government encroaches on any private rights, it would have to be supported by legislative authority, for under the rule of law which prevails in our country every executive action which operates to the prejudice of any person must have the authority of law to support it. Vide paragraph 27 of the judgment of this Court in Bennet Coleman and Co. v. Union of India, (1972), 2 SCC 788 = (AIR 1973 SC 106). The executive action of the State Government in entering upon the business of printing publishing and selling text books in Ram Jawaya's case, (1955) 2 SCR 225 = (AIR 1955 SC 549) though not supported by legislation, was upheld because it did not operate to the prejudice of any person. This court took care to point out that if it were "necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed". The same view was reiterated by this Court in State of Madhya Pradesh v. Thakur Bharat Singh, (1967) 2 SCR 454 = (AIR 1967 SC 1170) where referring to the decision in Ram Jawaya's case this Court pointed out that in that case it specifically held that "by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen: the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights." It would, therefore, seem that the State Government could prescribe these 28 text books in exercise of its executive power provided that such action did not infringe the rights of any one.??

[41] The Court cannot examine the policy decision of the Government unless the decision is contrary to statutory provision, contrary to the provisions of the Constitution of India and whether the Court can examine relevant merit of different economic policies in case of decision on economic policies, in Balco Employees' Union (Regd.) Vs. Union of India and ors. - (2002) 2 SCC 333, in paragraph 93, Their Lordships have observed as under:-

?S93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1.3.2001.??

[42] In the case of M.P. Oil Extraction & anr. Vs. State of M.P & ors. - 1997 (7) SCC 592, Their Lordships have held in paragraph 41 that the executive authority of the State, unless the policy framed is absolutely arbitrary or capricious or offending some provisions of the Constitution of India, it should not be interfered with.

?S41. ..... Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Art. 14 of the Constitution or such policy offends other constitutional provisions or comes in conflict with any statutory provision, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State . This Court, in no uncertain term, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of three organs of the State i.e. legislature, executive and judiciary in their respective field of operation needs to be emphasized. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional schemes so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective field.??

[43] In Jagdish Mandal Vs. State of Orissa ?L (2006) 14 Scale 224, the Apex Court has observed that when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind, a contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions and principles of equity and natural justice stay at a distance. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual dispute. The tenderer or contractor with a grievance can always seek damages in a civil Court.

[44] In Noble Resources Ltd. Vs. State of Orissa ?L AIR 2007 SC 110, in paragraphs 15 and 31, Their Lordships taken the view that in contractual matters writ petition does not lie, but it does not mean that in no circumstances writ petition is not maintainable and have held as under:-

> ?S15. It is trite that if an action on the part of the State if violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.??

[45] In Pallavi Refractories and ors. etc. Vs. Singareni Collieries Co.Ltd. etc. - J.T 2005 (1) SC 107, in paragraph 13, Apex Court considered in what cases judicial review is permitted and Their Lordships have observed as under:-

> ?S13. ..... In case the Legislature has laid down the pricing policy and prescribed the factors which should guide the determination of the price then the court will, if necessary, enquire into the question whether policy and factors were present to the mind of the authorities specifying the price. The assembling of raw materials and mechanics of price fixation are the concern of the Executive and it should be left to the Executive to do so and the courts would not reevaluate the consideration even if the prices are demonstrably injurious to some manufacturers and producers. The court will however examine if there is any hostile discrimination.??

[46] The Apex Court has also considered this aspect in the case of State of Orissa Vs. Gopinath Dash ?L AIR 2006 SC 651, and in paragraphs 5, 6 and 7, it has been observed as under:-

> ?S5. While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Ashif Hamid v. State of J. and K. (AIR 1989 SC 1899), Shri Sitaram Sugar Co. v. Union of India (AIR 1990 SC 1277)). The scope of judicial

enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy-decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy-decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.??

[47] In Kerala State Electricity Board and anr. Vs Kurien E. Kalathil and ors. - (2006) 6 SCC 293, considering the difference between a statutory contract and a contract under the Contract Act for the purpose of scope of judicial review, Their Lordships have observed in paragraph 10 as under:-

?S10. ..... Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.??

[48] In case of State of Gujarat and ors. Vs. Meghji Pethraj Shah Charitable Trust and ors . - (1994) 3 SCC 552, Their Lordships in paragraph 22 has observed that in contract matters, the writ is not maintainable. Paragraph 22 reads as under:-

?S22. ..... It is not also an executive or administrative act to attract the duty to act fairly. It was as has been repeatedly urged by Shri Ramaswamy ?L a matter

governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field especially where the matter is governed by a non-statutory contract.??

[49] When there is a clause to refer the dispute to arbitration, namely when alternative remedy is available, the writ is not maintainable. In the case of State of U.P. and ors. Vs. Bridge & Roof Company (India) Ltd. - (1996) 6 SCC 22, in paragraph 21, Their Lordships have observed as under:-

?S21. ..... The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226.??

[50] In National Highways Authority of India Vs. Ganga Enterprises and anr. - (2003) 7 SCC 410, Their Lordships have held that in contractual matters, normally writ petition is not maintainable. Their Lordships have observed in paragraph 6 as under:-

?SThe respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz. (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a bench of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to question(b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB Vs. Kurien E. Kalathil, State of U.P. Vs. Bridge & Roof Co. (India) Ltd. and Bareilly Development Authority Vs. Ajai Pal Singh. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum.??

[51] The relevant facts in these petitions are that the leading case among these Petitions pertain to M/s. Gujarat State Electricity Corporation Limited and M/s. Gujarat

State Petroleum Corporation Limited. GSECL entered into a Gas Sales Agreement dated 09.02.2004 with GAIL (India) Limited for supply of Re-gasified Liquefied Natural Gas. In this agreement, there is Article No. 9 which deals with the price at which RLNG is to be supplied by GAIL to the petitioner-GSECL. Under this agreement, the fixed price is valid up to 1st January 2009. Under sub-clause 9.2.5 of Article 9 of the Agreement, this price fixed is subject to any change in the Government policies or law. Clause 9.2.5 provides that if at any time, due to change of law or change in policy of Government/statutory authority or formation of Regulatory authority, any revision in price is necessitated, the revision in the various price elements shall be effected. On the same day, i.e. on 09.02.2004, a side-letter to the Agreement was addressed to the petitioner-GSECL by the respondent-GAIL stating that in consideration of mutual agreements contained in the Agreement, clause 9.2 of Article No. 9 has been amended. Under this amended Clause 9.2, they have given details of price, which includes Foreign Currency Component (USD) and Indian Rupee Component (IRC) and further that the prices will remain valid up to 1st January 2009.

[52] Thereafter, by another letter dated 22.07.2006, the respondent-GAIL informed the petitioner-GSECL that the buyer and the seller have agreed to amend Clause 9.2.1 of the Agreement dated 09.02.2004. There is Appendix ?SA?? to the said letter dated 22.07.2006 and in Note No. 3 of the Appendix it is stated that if at any time, due to change of law or change of policy of Govt./Statutory authority/Regulatory authority, any revision in Price is necessitated; the same shall be effected as per the directives on the matter, meaning thereby, that the power of revision of prices according to the respondents is restored under Note No.3 of the Appendix ?SA?? to letter dated 22.07.2006.

[53] The case of the petitioners is that Note No. 3 in Appendix ?SA?? to the letter dated 22.07.2006 does not empower the petitioners or the Government, i.e., the Union of India, to revise the price fixed uptil 31.12.2008, while the case of the respondents is that when in the letter dated 22.07.2006 there is a provision for revision of price, the respondents, especially, the Union of India, can exercise its power under Article 73 of the Constitution of India and the Central Government can take a policy decision to revise the price by way of pooling the price of old customers and the new customers. The case of the petitioners is that firstly the Central Government has no power to take away the legal right accrued to the parties under the contract by way of exercising the executive powers under Article 73.

[54] The other leading case of the petitioner-Gujarat State Petroleum Corporation Limited relates to an Agreement dated 07.02.2004 with respondent-GAIL (India) Limited for supply of gas. Under Article 11 of this agreement, the contract price was fixed and the price was valid upto 31.12.2008. However, this price is subject to change

as per Clause 11.4 that in case there is a change in the policy of any Government or law, the price can be modified and the seller-GAIL can request for revision of the contract price.

[55] The system of supply of gas ultimately burdens end user of gas for generation of electricity and make use of it in fertilizer plants also. Ras Gas of Qatar supplies gas to a local Company, i.e., respondent no.2-Petronet LNG Limited. Petronet after converting it into RLNG supplies it to GAIL, IOC and BPCL at a fixed price. GAIL in turn supplies it to GSPCL, GSECL and Gujarat Industries Power Company Limited. GIPCL further supplies it to Gujarat Paguthan Energy Corporation Private Limited and Essar Power Limited. GPECPL supplies gas to Gujarat Urja Vikas Nigam Limited.

[56] The Government of India by its letter dated 6th March 2007 addressed to the Managing Director & CEO, Petronet LNG Limited conveyed the policy decision of the Government of uniform pooled price, meaning thereby, that after this policy decision, uniform pooled price shall be charged from the old customers as well as the new customers of the gas supplied by Petronet to GIL/IOC/BPCL. This uniform pooled price has resulted in the rise of price of gas to the old customers because gas supplied by Ras Gas to Petronet is at an agreed fixed price uptil 31.12.2008. A subsequent agreement was also entered into between Ras Gas and Petronet, but for a higher price of the Liquified Petroleum Gas. Since both the prices are pooled together, the price at which gas was available to the old customers will rise and that is the root cause for dispute between the petitioners, i.e. the old customers and GAIL, IOC and BPCL.

[57] Mr. S.B. Vakil, learned Senior Advocate appearing for the respondent no.8-Maharashtra State Electricity Distribution Company Limited (for short `MSEDCL'), submits that the Petition has been drafted cleverly and knowing fully well that if the petitioners, who are parties to the Agreement challenge the action of the respondents nos. 3, 4 and 5, the petition will not be maintainable because the matter falls under the subject matter of contract, and therefore, the petitioners have only challenged the policy decision of the respondent no.1-Union of India, which resulted in the price rise of gas supplied by GAIL to the petitioners. He further submits that though initially the petitioner joined the respondents nos. 3, 4 and 5 to the petition, but later on requested for deleting them as parties-respondents to avoid the chance of dismissal of the petition on the very ground that in contractual matters writ petition is not maintainable. However, before Their Lordships, the original petitioner- did not object to the respondents nos. 3, 4 and 5 being rejoined as parties-respondents to the petition.

[58] There is no dispute of the fact that as per the old rates gas is being supplied to the petitioners at US$ 2-3 per MMBTU which is effective till 31.12.2008 as per the Agreement, but after pooling of the prices, it will increase by about 52% of the price

payable under the Gas Supply Agreement. The case of the petitioners is that when no party is willing to purchase gas in 2004, they were prepared to purchase it at a fixed price for the period uptil 31.12.2008 and an impression was given to them that there will be no change in the gas price as it is fixed for a fixed period, but by the decision of the Union of India, if the prices are pooled up, that rate will increase to US$ 4.3272 per MMBTU. The case of the petitioners is that presently they are getting gas supplies at a cheaper rate under the contract, therefore, their legal right is disturbed by Government policy decision.

[59] Even otherwise also, due to shortfall in supply, they are purchasing gas from the open market at market price, which is at US$ 9-10 per MMBTU. The petitioners further submit that when the decision to increase the price of gas is only to give benefit to Dabhol Power Project, the Government cannot put the petitioners to loss by upsetting the legal rights of the petitioners for the benefit of Dabhol Power Project.

[60] The petitioners submit that assuming that the Central Government has executive power under Article 73 to make policy decisions as can be done by the Parliament in respect of subjects in List I of VIIth Schedule, the policy decision can be examined whether it is absolutely arbitrary.

[61] It is true that in cases of economic policy decisions and contractual matters normally writ petition is not maintainable. That can be a rule, but if it is found that the policy is absolutely discriminatory and arbitrary or the policy takes away the legal right of the citizens or discriminatory in light of Article 14 of the Constitution of India, in that case writ petition is maintainable.

[62] The prices of gas is pooled in respect of the new customers and old customers, which are two different classes, meaning thereby, treating the unequals as equals is discrimination within the meaning of Article 14 of the Constitution of India. Further, though there is arbitration clause under the agreements, but the petitioners do not want any relief against the respondents, i.e., Petronet, GAIL, IOC and BPCL nor they challenge any clause of the agreements nor their case is that it is a breach of contract on the part of the respondents, i.e., Petronet, GAIL, IOC and BPCL. Therefore, it is not a case of simple contractual matter. Their price under the contract is affected by a third party, i.e., the Central Government by way of policy decision for pooling of prices of gas being supplied by Petronet. Therefore, writ petition is maintainable.

[63] Now, this brings us to the issue whether on the given facts is there any case for stay of the operation, implementation and execution of the communication dated 06.03.2007. For granting interim relief, it is to be seen (a) whether the petitioners have a prima facie case, (b) whether balance of convenience is in favour of the

petitioners and (c) whether the petitioners will suffer any irreparable loss or injury if stay is not granted.

[64] Before we consider the case of the petitioners for grant of stay, we would like to refer to some cases relied on by the learned counsel for the parties for our guidance to see whether the petitioners have a prima facie case.

[65] For grant of the stay and to see whether there is prima-facie case, Their Lordships in the case of Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd. - (1999) 7 SCC 1, in paragraph 24 have given the factors to consider before stay is granted.

> ?S(i) extent of damages being an adequate remedy;
>
> (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;
>
> (iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
>
> (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case ?L the relief being kept flexible;
>
> (v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
>
> (vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;
>
> (vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.??

[66] The case of the petitioner-GSPCL is that the petitioner has entered into an Agreement with GAIL vide agreement dated 07.02.2004 for supply of gas and that agreement was for a term uptil 31.12.2008 and gas be supplied to it at the rate fixed under the agreement. There is no dispute on this fact. The relevant clause under the agreement which deals with the price is Article 11. Clause 3 of Article 11 provides that the price fixed shall be valid up to 31.12.2008, but that price can be revised if there is any change in law or change in policy as provided under clause 4 of Article 11. For ready reference clause 4 of Article 11 reads as under:-

?S11.4 Change in Law

If at any time due to a change in law or a change in the policy of any Government, including due to the re-flagging of any LNG Tanker required by a change in law or a change in policy, or due to any modification to a LNG Tanker arising from a change in the regulations or policies of either of the ports at Ras Laffan, Qatar, or Dahej, Gujarat, India, Seller incurs an increase or decrease in its costs or expenses, or an increase or decrease in its net after tax return in any year, Seller may request a revision of the Contract Price to reflect any such increase or decrease.??

[67] There is also a provision in the agreement to refer the dispute, if any, to an arbitrator.

[68] Petronet has entered into another agreement with Ras Gas, Qatar, under which Ras Gas sells gas at a higher price, i.e., at the market rate, which comes roughly to US$ 10.5. At this cost, it is not possible to put on track some of the new power plants in the country, one of them being Dabhol. Therefore, the Government of India in the interest of public has taken a policy decision to pool the price of gas, i.e., the price at which gas is sold as per earlier agreement to the old customers and the price which is to be charged from the new customers like Dabhol Power Project. This pooling resulted in price rise from US$ 2-3 per MMBTU to US$ 4.35 per MMBTU.

[69] The case of the petitioners is that when there was agreement for a fixed price for supply of gas for a fixed period, i.e., uptil 31.12.2008, the right to receive gas under that agreement cannot be taken away by exercising the executive power under Article 73 of the Constitution. The further case of the petitioners is that the gas received by them from GAIL/IOC/BPCL under the agreement does not meet their complete requirements, therefore, the petitioners are also procuring gas from the open market at the prevalent market rate, then why Dabhol Power Project or any other power project cannot purchase gas from the open market at the prevalent market price, or in any case, if the Government has any sympathy with the Dabhol Power Project, it can subsidize gas supply to Dabhol Power Project in order to put it on track. Kawas and Gandhar are the other power projects which need gas at cheaper rates.

[70] It is true that the Central Government has executive power under Article 73 of the Constitution to issue any order or take any policy decision to the extent of power of Parliament to make laws in respect of the subjects enumerated in List I and List III of the 7th Schedule to the Constitution of India. Entry No.53 in List I - Union List covers the item in question, i.e., petroleum and petroleum products. It is also true that under the agreement, there is a provision to revise the price, if there is any change in law or in the policy. Here, the Government has taken a policy decision to pool the prices under

the old contracts and under the new contracts and to supply gas at a uniform pooled price to old customers as well as to the new customers.

[71] In spite of the fact that Central Government has executive power to take policy decision and revise prices under the agreements entered between the sellers-GAIL/IOC/BPCL on the one hand and the petitioners on the other, but their legal rights under the contracts are affected by this policy decision of the Central Government, which has been communicated vide communication dated 06.03.2007. Though there is arbitration clause under the agreement, but this clause in the agreement in respect of the disputes arising between the parties. However, in the present case, the decision of a third party, i.e., the Central Government's decision, which has affected the rights of the parties to the agreement. Even if the parties refer the dispute to an arbitrator, there is a clear clause in the agreement that in case of policy decision of the Government, price can be revised. Prima facie, it appears that even if the parties go for arbitration, the petitioners may not get any relief because the clause regarding revision of price in the agreement comes in their way and the present revision is purely based on change in policy. Thus, it appears that unless the petitioners challenge the policy of the Government, they cannot get any relief.

[72] When the petitioners have a legal right to get gas at a fixed price under the agreement uptil 31.12.2008 and if that right has been interfered with by invoking the executive power of the Government under Article 73, as stated above, we have taken the view that writ petition is maintainable. Considering the facts of the case whether the petitioners have a prima facie case, our answer is in affirmative, but on the given facts petitioners do not have fair chance to succeed.

[73] Now, it brings us to the next condition for stay, whether balance of convenience is in favour of the petitioners. Gas is imported from Ras Gas, Qatar. Ras Gas supplies it to Petronet and Petronet in turn supplies it to GAIL/IOC/BPCL and they in turn supply the same to consumers including GSPCL, GSECL, etc. and they further supply it to various corporations or companies for production of fertilizer or for generation of power.

[74] In this process, whatever cost they incur for procuring the gas will add up to the price and ultimately the last consumer, who consumes the electricity or power or purchase a fertilizer bears it. Consumers, in fact, are the public in general. Therefore, in this case, under various agreements, one goes on passing its burden to the other and ultimately the burden is borne by the end user, i.e., the customer, who may be from Gujarat, Maharashtra or any other State, i.e. the public. The case of the petitioners is that if the prices are pooled, the petitioners will have to bear the additional burden of about Rs.300 crore, while the case of the respondents is that if the price is not pooled, it will result in closure of not only Dabhol Power Project, but also

the other new industries to whom gas will be supplied at market price and if Dabhol alone is closed, there will be a loss of about Rs.10,000/- cores of public money, which has been invested in the Dabhol Power Project. Ultimately, it has to be seen as to what is in the public interest, whether the prices should be pooled up or not. From the above facts, it appears that balance of convenience is in favour of policy decision taken by the Central Government and communicated to the petitioners vide letter dated 06.03.2007. Otherwise also, when the policy decision is implemented after the order of Their Lordships, stay of that policy decision, by way of interim order, does not appear to be justified. Even otherwise, on implementation of the policy decision, burden of additional cost is passed on to the customers at the end. On that count also, in our view, the balance of convenience is not in favour of the policy decision.

[75] Now, next comes the issue whether the petitioners will suffer irreparable loss if interim relief is not granted by way of staying the operation of the communication dated 06.03.2007. The only grievance of these petitioners is that the pooling of gas prices charged to the old customers and new customers gives rise to the price of gas being supplied to them by GAIL/IOC/BPCL. It is true that by pooling of prices the petitioners will have to pay higher price for supplies of gas, but that will result in a loss in terms of money and if ultimately it is found that the policy decision is arbitrary and quashed finally, the petitioners will be compensated in terms of money by direction of the Court. Whatever higher price that they pay will be calculated and even interest on that money also can be paid under the directions of the Court. Therefore, the petitioners do not suffer any irreparable loss, if the communication dated 06.03.2007 is not stayed. On the contrary, if the policy decision of the Central Government is not implemented and gas is supplied at the market price to the Dabhol Power Project for generation of power, the said Power Projects will be closed down. The loss on closer of that plant alone will be more than Rs.10,000 crores and if the communication is not stayed, the petitioners at the most will have to bear an additional cost of Rs.300 crores which can be compensated. On these facts, whether interim relief staying operation of communication dated 06.03.2007 should be granted or not, we would like to refer to some cases where Their Lordships have considered the scope of executive power of the Government and the parameters for judicial review for granting interim stay.

[76] In State of U.P. Vs. Ram Sukhi Devi ?⌊ AIR 2005 SC 284, in paragraph 8, Their Lordships have observed as under:-

> ?S8. ..... The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned single Judge as to why the Government order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions

observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason that that of a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations.??

[77] The same view has been taken by Their Lordships in the case of Bank of Maharashtra Vs. Race Shipping and Transport Co. Pvt. Ltd. - AIR 1995 SC 1368. The relevant observations are made in para 12, which are as under:-

?S12. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations.??

[78] In National Textile Corpn. Ltd. Vs. M/s. Haribox Swalram & ors. - JT 2004 (4) SC 508, in paragraph 17, Their Lordships have observed as under:-

?S17. ..... It is well settled that in order that a mandamus be issued to compel the authorities to do something, it must be shown that there is a Statute which imposes a legal duty and the aggrieved party has a legal right under the Statute to enforce its performance. The present is a case of pure and simple business contract. The writ petitioners have no statutory right nor any statutory duty is cast upon the appellants whose performance may be legally enforced. No writ of mandamus can, therefore, be issued as prayed by the writ petitioners.??

[79] In Gagandeep Pratishthan Pvt. Ltd. & ors. Vs. Mechano & anr. - (2002) 1 SCC 475, Their Lordships have taken the view that the Court before grant of any relief, should consider the contention of delay and maintainability of the appeal, and observed in paragraph 6 as under:-

?S6. In view of the peculiar facts of this case without going into the merits of the contentions raised by the counsel for the appellants, we think it is just and fair that we should not at this point of time interfere with the impugned order though the High Court could have avoided passing such orders in proceedings where the maintainability itself was being seriously questioned, be that as it ma, we at this stage think it appropriate that the High Court should consider the question of condonation of delay and the objection of the appellants herein in regard to maintainability of the appeal first, before proceeding with the appeal any further.

we also think it to be just and proper that any further interim orders if necessary in the appeal before the High Court in regard to the suit property should be made only after deciding the question of delay and maintainability of the appeal and the order already made should be confined to the appointment of a Receiver and filing of his report only, meaning thereby that the impugned order be confined to the appointment of Receiver for the purpose of filing his report as directed by the Court and nothing beyond that, at this stage.??

[80] When the Court found that the writ petition is not maintainable, can the Court grant any relief in the name of interim relief, Their Lordships in the case of G.E. Power Controls India Ltd. Vs. S. Lakshmipathy & ors. - (2005) 11 SCC 509, in paragraph 7 have observed as under:-

?S7. .... If the High Court had held that it was unable to grant relief in respect of orders of transfer under Article 226 of the Constitution, it certainly was not in a position to adjudicate upon or grant relief in respect of orders of termination of service or abandonment of the service as the case may be.??

[81] For grant of interim relief, the plaintiff should show that he has a prima-facie case and defendant is also entitled to show that plaintiff is not likely to succeed in the Suit. Therefore, at the time of deciding the injunction, the Court should also see whether the plaintiff is likely to succeed or likely to fail in the suit. That issue has been considered by this High Court in the case of State of Gujarat Vs. Mangal Traders ?L 1987 (1) GLH 49, and in paragraph 15, it has been observed as under:-

?S15. ... While granting the injunction, the plaintiffs have to make out a prima facie case on all material issues in the suit in order to show that they are likely to succeed in the suit. On the other hand, the defendant is entitled to show that the plaintiffs are not likely to succeed in the suit and, therefore, the interim injunction shall be refused. Therefore, while deciding the injunction application and the revision arising from such application, the Court has to consider even prima facie case as to whether the plaintiffs are likely to succeed or likely to fail in the suit.??

[82] In the case of Union of India & ors. Vs. Oswal Woollen Mills Ltd. - (1984) 2 SCC 646, Their Lordships in paragraph 4 have observed that normally, stay should not be granted in the cases where statutory order has been passed in the interest of public. The relevant portion reads as under:-

?SA statutory order such as the one under Clause 8-B purports to be made in the public interest and unless there are even stronger grounds of public interest, an ex-parte interim order will not be justified. The only appropriate order to make in such cases is to issue notice to the respondents and make it returnable within a short

period. This should particularly be so where the offices of the principal respondents and relevant records lie outside the ordinary jurisdiction of the court. To grant interim relief straightaway and leave it to the respondents to move the court to vacate the interim order may jeopardise the public interest. It is notorious how if an interim order is once made by a court, parties employ every device and tactic to ward off the final hearing of the application. It is, therefore, necessary for the courts to be circumspect in the matter of granting interim relief, more particularly so where the interim relief is directed against orders or actions of public officials acting in discharge of their public duty and in exercise of statutory powers. On the facts and circumstances of the present case, we are satisfied that no interim relief should have been granted by the High Court in the terms in which it was done.??

[83] In Central Dairy Farm Vs. Glindia Ltd. & ors. - (2004) 1 SCC 55, Their Lordships have taken the view that the term of the agreement between two parties should not be frustrated by statutory intervention of the State by issuance of Notification, and observed in paragraph 17 as under:-

?S17. .... In the instant case, the prices of cream and paneer were fixed through mutual negotiations between authorized representatives of the two companies and with the assistance of the authorities of the State. Such binding terms of agreement reached between the two companies could not be frustrated by statutory intervention of the State by issuance of Notification for fixation of prices under Section 15 of the Act.??

[84] In Ashok Kumar Jain Vs. Neetu Kathoria & ors. - (2004) 12 SCC 73, Their Lordships have taken the view that when writ is not maintainable, the Court should not deal with other points on merits, and observed in paragraph 11 as under:-

?S11.... In our view, the Division Bench was right in recording such a finding, but thereafter it was not necessary to deal with other questions on merits. It is a different matter that the Division Bench has also not accepted the findings on merits as recorded by the learned Single Judge. Be that as it may, we feel it not necessary to go into the merits of those points any more, once we accept the ground that the writ petition was not entertainable.??

[85] To sum up, considering the facts discussed above and the case law referred, we conclude the issue as under:

(a) The Central Government has executive power under Entry No.53 in List I of VIIth Schedule to exercise its executive power in respect of regulation and development of oil-fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be

dangerously inflammable. The Central Government was competent to take this policy decision in question.

(b) For stay of operation, execution and implementation of the impugned communication, the essential requirements are that there should be a prima facie case in favour of the petitioners, balance of convenience should be in favour of the petitioners and if stay is not granted there will be irreparable loss to the petitioners. In our view, balance of convenience is in favour of the respondents and the petitioners will suffer no irreparable loss if stay of operation of the impugned communication is not granted.

(c) In case of economic policy decision matters and dispute in respect of contractual matters, there is rare chance of interference by the Courts. Here, in fact, the petitioners have not challenged the contractual dispute between the parties to the contracts, but they have challenged the policy decision of the Central Government. That challenge is based on the basis of the agreements, therefore, the matters virtually come within the scope of contractual matter.

[86] Considering the overall view, the facts and the case law referred, the petitioners have hardly any chance to succeed in their petitions. Thus, in the result, no case is made out for stay of the impugned communication.

[87] Accordingly, the prayer for stay of the operation, execution and implementation of the impugned communication dated 06.03.2007 is rejected.