REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4273 OF 2010
(Arising out of S.L.P. (C) Nos. 14997 of 2009)

Reliance Natural Resources Ltd. .... Appellant (s)

Versus

Reliance Industries Ltd. .... Respondent(s)

WITH

CIVIL APPEAL NO. 4274 OF 2010
(Arising out of S.L.P. (C) No. 15033 of 2009)

CIVIL APPEAL NO. 4275-4276 OF 2010
(Arising out of S.L.P. (C) No. 15063-15064 of 2009)

CIVIL APPEAL NO. 4277 OF 2010
(Arising out of S.L.P. (C) No. 18929 of 2009)

I.A. NO. 1
IN
C.A.Nos.428-4281/2010 @ S. L. P. (C) .14414-14415/2010
@ CC NO. 16126-16127 of 2009

J U D G M E N T

P. Sathasivam, J.

1) I have had the benefit of reading the erudite judgment of my learned Brother, Hon. B. Sudershan Reddy, J. I am unable to share the view expressed by him on some points and must respectfully dissent.

2) Though the facts and provisions of the relevant law have been set out in the judgment prepared by B. Sudershan Reddy, J., keeping in view of the importance in the matter, I propose to refer all the details and deliver a separate judgment in the following terms:-

3) Leave granted.

4) *"The people of the entire country have a stake in natural gas and its benefit has to be shared by the whole country."*

- ***Association of Natural Gas & Ors. vs. Union of India & Ors. – (2004) 4 SCC 489 (CB).***

5) Being aggrieved by the judgment and order of the Division Bench of the High Court of Bombay dated 15.06.2009 in Appeal No. 1 of 2008 in Company Application No. 1122 of 2006 and in Company Petition No. 731 of 2005, Reliance Natural Resources Ltd. (in short "RNRL") has filed S.L.P.(C) Nos. 14997 & 15033 of 2009. Questioning the same common order of the Division Bench of the High Court, Reliance Industries Limited (in short "RIL") has filed S.L.P. (C) Nos. 15063-15064 of 2009. Since the Union of India intervened at the stage when the Division Bench heard Appeal Nos. 844 of 2007 and 1 of 2008, it also filed S.L.P.(C) No. 18929 of 2009. One Vishweshwar Madhavarao Raste also filed SLP(C)....CC Nos.16126-16127 of 2009. Since all the appeals arising out of the above special leave petitions emanated from the common order dated 15.06.2009 passed by the Division Bench and the issues raised in all these appeals are one and the same, all the appeals were heard together and are being disposed of by this common judgment.

6) Brief facts:

The case of RNRL:

(a) In 1973, late Dhirubhai Ambani set up the RIL consisting of Oil, gas, refining and exploration, textile, yarn, polyster, petrochemicals and communication business with his two sons Mukesh Ambani and Anil Ambani. In the year 1999, the Government of India announced a New Exploration and Licensing Policy, 1999 (in short "NELP"). This policy provided that various petroleum blocks could be awarded for exploration, development and production of petroleum and gas to private entities.

(b) It is the policy of the Government that Petroleum Resources which may exist in the territorial waters, the continental shelf and the exclusive economic zone of India be discovered and exploited with utmost expedition in the overall interest of India and in accordance with good International Petroleum Industry Practice.

(c) In the same year, i.e. 1999, RIL has formed a Consortium with NIKO. Their consortium was the successful bidder for Block KG-D6 and was called the Contractor.

(d) On 24.03.2000, Reliance Platforms Communications.com Private Limited was incorporated which was changed to Global Fuel Management Services Limited and now called "Reliance Natural Resources Limited (RNRL).

(e) A Production Sharing Contract (in short "PSC") has been entered into between the Government of India and the Contractor on 12.04.2000. The PSC, as recorded, is within the contract area identified as Block KG DWN-98-3. KG-D6 is situated offshore coasts of Andhra Pradesh in the Indian Ocean. Such blocks are called as "Deep Water Exploration Blocks". The exploration in such areas require employment of highly skilled and experienced technical personnel and an extremely expensive and time-consuming exercise. As recorded, all exploration expenses required to locate petroleum resources have to be borne by the Contractor. Therefore, the Contractor is bound to incur huge cost and resources for discovery of reserves in the area at their risk. The exploration activities are still in progress, the first gas deal expected in June, 2008. As per the PSC, all the expenses relating to the exploration, development and production of cost incurred by

the Contractor can only be recovered from the petroleum/gas actually produced and sold by the Contractor. The Contractor has freedom to sell the gas produced from the block subject to the adjustment and the terms of profit sharing between the Government and the RIL as set out in the PSC.

(f) On 06.07.2002, Mr. Dhirubhai Ambani passed away. Sometime thereafter, differences started between Mukesh Ambani and Anil Ambani over the management and control of the group companies. Both the brothers, at the relevant time, were looking after the affairs of RIL in all respects including the group companies.

(g) The provisions of the PSC were known to the respective Board of Directors as well as to both the brothers. Mukesh Ambani was the Managing Director and Anil Ambani was the Joint Managing Director of the RIL.

(h) In October, 2002, the Consortium (NIKO & RIL) announced discovery of significant result of KG-D6 Block. Sometime in the year 2003, the National Thermal Power Corporation Limited (in short "NTPC") floated a global tender for supply of gas to its power projects. The Gas Sale and

Purchase Agreement was annexed with the tender document. NTPC invited international competitive bids for supply of natural gas to its power plants located in the State of Gujarat to meet its fuel requirements. RIL succeeded in its bid to sell, transport and deliver 132 TBtu (means one trillion BTU (British Thermal Unit) or 1000000 MMBTU). NTPC, by letter dated 16.06.2004, confirmed RIL's deal.

(i) In June, 2004, RIL entered into a State Support Agreement with the Government of U.P. to make necessary arrangements for land, water and other facilities for Dadri Project.

(j) In a Board Meeting of Reliance Energy Limited (in short "REL") held on 20.10.2004, which was attended by Mukesh Ambani and other Directors of RIL, after reviewing the Dadri Project it was recorded that gas from KG Basin would be supplied for the power projects of REL. The Board of REL was assured about the availability of gas, its timing, adequate quality and requested quantity at a competitive price for the project.

(k) On 18.06.2005, the media released a statement informing the general public that an amicable settlement is arrived at in respect of all disputes between the Ambani Brothers. It was stated that Mukesh Ambani will take over the responsibility for RIL and IPCL and Anil Ambani will take over the responsibility for Reliance Infocomm Ltd., Reliance Energy Ltd. and Reliance Capital Ltd. On the same day, Anil Ambani resigned as Joint Managing Director of RIL.

(l) Both the brothers with the mediation of their mother Mrs. Kokilaben Dhirubhai Ambani arrived at a Memorandum of Understanding (MoU)/family arrangement dated 18.06.2005 and accordingly resolved their disputes amicably. Based upon the said MoU, both the brothers and the officials of RIL and other group companies, made various discussions, exchanged correspondences, e-mails and held conferences and meetings to implement the MoU and to resolve the disputes and to divide the various companies by a Scheme of Arrangement.

(m) On 11.08.2005, RNRL was acquired by RIL for the purpose of de-merger. The name was changed to Global Fuel

Management Services. RIL (de-merged company) moved a petition in the Bombay High Court bearing No. 731/2005 dated 24.10.2005 to obtain a sanction of Scheme of Arrangement (the Scheme) between RIL and four other companies viz., (i) Reliance Energy Ventures Limited, (ii) Global Fuel Management Services Limited, (iii) Reliance Capital Ventures Limited and (iv) Reliance Communication Ventures Limited. By order dated 09.12.2005, the Company Judge, Bombay High Court has granted sanction to the Scheme and *inter alia* directed that the shareholders of RIL would hold shares in each of the resulting companies in the ratio of 1:1 in addition to the shares held in the parent company (RIL). The scheme provides that RIL successfully bid for off-shore oil and gas fields; strategic investment in RIL which has engaged in power projects, in order to use part of gas discovered for the generation of power; appropriate gas supply arrangement will be entered into between RIL and Global Fuel Management Services pursuant to which gas will be supplied to RIL; refined gas based energy undertaking; after the record date the Board of the resulting companies shall be

re-constituted and shall thereafter be controlled and managed by Anil Ambani. A suitable arrangement would be entered into in relation to supply of gas for power projects of Reliance Patalganga Power Limited and REL with the gas based energy resulting companies.

(n) The Scheme sanctioned by the Company Judge provided for de-merger of four Undertakings of Reliance Industries Limited (RIL) and transfer of these Undertakings on a "Going concern" basis to four resulting Companies. They are:

(i) The Coal Based Energy Undertakings/Reliance Energy Ventures Limited.

(ii) Gas Based Energy Undertaking/Global Fuel Management Services Limited now known as "Reliance Natural Resources Limited (RNRL).

(iii) Financial Services Undertaking/Reliance Capital Ventures Limited.

(iv) Telecommunication Undertakings/Reliance Communication Ventures Limited.

The De-merged company-Reliance Industries Limited (RIL) is to retain all other businesses including Petrochemicals,

refining, oil and gas exploration and production, textile and other business. The Scheme became effective from 21.12.2005.

(o) A draft of GSMA (Gas Sale Master Agreement) and GSPA (Gas Sale Purchase Agreement) were e-mailed by an official of RIL to sole nominee of Anil Dhirubhai Ambani Group on the Board of RIL on 11.01.2006, drafts of GSMA and GSPA were approved by the Board of RIL at a time when the Board of RNRL was under the control of Mukesh Ambani. The nominee of Anil Dhirubhai Ambani Group had raised objections but the same were overruled. There was no sufficient time given to RNRL to read the draft. No independent or legal advise could be taken on behalf of RNRL. Basic clauses to the agreements are the bone of contention of the present litigation. Both the agreements alleged to have also been settled and executed on 12.01.2006. On the same day, a letter addressed by Mr. J.P. Chalasani, the nominee of ADAG on the Board of RNRL to other Directors on the Board of RNRL namely, Mr. Sandip Tandon and Mr. L.V. Merchant who were the nominees of Mukesh Ambani/RIL, stating therein that the proceeding in

the Board Meeting held on 11.01.2006 to consider the agreement with RIL in terms of the Scheme were illegal and void. By another letter dated 13.01.2006, a request was made to take the contents of letter dated 12.01.2006 with regard to the agenda-item No.8 (gas supply agreement) and be made part of the minutes of the Board Meeting.

(p) On 13.01.2006 by a letter addressed to Shri Chalasani, the minutes of the Board of Directors held on 11.01.2006 were informed that it would be tabled at the meeting of 13.01.2006. Some of the objections, as raised by Chalasani, were also recorded. On 26.01.2006, the GSPA copy was made available to ADAG for the first time. On 27.01.2006, the shares of the RNRL to the shareholders of RIL were allotted.

(q) On 07.02.2006, the Board of the RNRL was re-constituted in order to hand over the management and control of the resulting companies to Mr. Anil Ambani. On 14.02.2006, a letter addressed by RIL to the RNRL stating that a proforma gas sale and purchase agreement (GSPA) has been annexed to the above GSMA. The proforma contains the terms and conditions as mentioned in the GSPA signed by RIL on

12.12.2005 and forwarded to the NTPC. It was further informed that they agree to carry out the changes to the proforma GSPA annexed to the GSMA so that it reflects the same terms as contained in GSPA between NTPC and RIL as and when any changes are carried out to NTPC GSPA.

(r) On 28.02.2006, RNRL, by its letter to RIL, informed and elaborated various deviations in the GSMA from the agreed terms which were necessary for de-merging the business. A suitable draft agreement in compliance with the Scheme was also sent with the letter. On 12.04.2006, RIL made an application to the Ministry of Petroleum and Natural Gas (MoPNG) for approval of the gas price at which the sale of 28 MMSCMD of gas was agreed with the RNRL under the GSMA.

(s) On 09.05.2006, RNRL, by a letter, requested the MoPNG to accord approval to the application dated 12.04.2006 made by the RIL. On 26.07.2006, the MoPNG communicated to the RIL its refusal to approve the price of gas agreed between the RNRL and the RIL under the GSMA. On 31.07.2006, RIL forwarded a letter to the RNRL, a copy of letter dated 26.07.2006 received from the MoPNG rejecting the proposed

formula for determining the gas price as the basis of valuation of gas under the PSC.

(t) With these details, RNRL on 07.11.2006/08.11.2006, filed a Company application No. 1122 of 2006 under Section 392 of the Companies Act, 1956 (hereinafter referred to as "the Act") before the High Court of Bombay in which the following prayers were made:

> "(a)Order and Direct RIL to take all necessary steps in order to ensure actual supply of 28 MMSCMD or 40 MMSCMD of gas to RNRL on the NTPC Contract Terms and as per the commercial aspect set out in Para 8.3 hereinabove.
>
> (b)Order and Direct RIL to execute an amendment to the Gas Supply Master Agreement dated January 12, 2006 and to the Form of Gas Sale and Purchase Agreement attached in Schedule 3.2 thereto, to bring them in line with the Gas Supply Master Agreement and Form of Gas Sale and Purchase Agreement as set out in Ex. J to this Application.
>
> (c) restrain RIL from creating any third party interests or rights in respect of i) 28 MMSCMD of Gas to be supplied to the Applicant; (ii) 12 MMSCMD to be supplied to the Applicant on firm basis in case NTPC Contract does not materialize; and/or entering into any contract(s) and/or use or supply to any third party the said gas (28 MMSCMD or 40 MMSCMD, as the case may be) which is required to be supplied to the Applicant under the Scheme.
>
> (d) pending the hearing and final disposal of the application, direct RIL to supply the said 28 MMSCMD or 40 MMSCMD gas, as the case may be, to the applicant on the same terms as per NTPC Contract.
> (e) ad-interim reliefs in terms of prayer (c) and (d) above.
> (f) Such further orders be passed and/or directions be given as this Hon'ble Court may deems fit and proper."

7) In the said application of RNRL, it was highlighted that to make the Scheme as sanctioned by the High Court, effective and workable, it is necessary to direct the amendments and alterations to the GSMA dated 12.01.2006 and draft GSPA annexed to the GSMA, as both do not result in effective transfer of the business sought to be demerged and are not in compliance with the terms of the Scheme of Arrangement in its letter and spirit. The GSMA and GSPA are also not in compliance with the MoU which was the very reason of the Scheme of Arrangement as filed by RIL. Therefore, RNRL prayed for Company Courts' intervention to ensure that the Scheme is implemented effectively.

8) In addition to the above particulars, RNRL placed the following additional materials in support of their stand:

a) The Board of Directors of RIL were appreciative of the resolution of the issues between Shri Mukesh Ambani and Shri Anil Ambani and in their meeting held on June 18, 2005 noted the settlement and amicable resolution of the dispute providing for reorganization of the Reliance Group including the businesses and interests of RIL and adopted a resolution

thanking the efforts made by Smt. Kokilaben Dhirubhai Ambani in working towards the settlement.

b) The agreement arrived at between Shri Mukesh Ambani, Chairman and Managing Director of RIL and Shri Anil Ambani relating to the reorganization of the RIL Group envisaged the supply of gas from RIL's current and future gas fields for various projects of Reliance-Anil Dhirubhai Group. The said agreement contains the following clauses:-

(a) Quantum of Supply and Source of Supply

- Supply of 28 MMSCMD gas by RIL to Anil Dhirubhai Ambani Group (ADAG). This supply is subject to supply of 12 MMSCMD to NTPC.
- In the event that NTPC contract does not materialize or cancelled, the entitlement of NTPC to the said extent should go to the ADA Group in addition to its entitlement of 28 MMSCMD i.e. a total of 40 MMSCMD.
- ADA Group to have option to buy 40% of all balance and future gas from the current or future gas fields of MDA Group.
- Supply to be from the proven P1 Reserves of RIL whether from the KGD-6 Basin or elsewhere.

(b) Supply period 17 (Seventeen) Years.

(c) ADA Group's Purchase Obligation.

On take or pay basis.

(d) Price and Commercial Terms

- The firm quantity of 28 MMSCMD/ 40 MMSCMD at a price no greater than NTPC prices.
- Option gas at the market rate
- Other commercial terms-same as those of NTPC contract.

- Shall be in accordance with International Best Practices.
- Shall be bankable in International Financial Markets.

(e) Other terms governing the Arrangement.

- Reliance ADA Group shall have the option to take delivery of gas at Kakinada on the East Coast and may construct its own pipeline. However, REL would still have to pay the transportation cost for supply to the West Coast even if the facility is not used, but will have the right to deal with the capacity as it deems fit and to sell or assign the same to another party.
- The gas supply/option agreements would be between RIL and a 100% subsidiary of RIL, which would be demerged to the Reliance—ADA Group as part of the Scheme and not with REL.
- In relation to applicable governmental and statutory approvals, without in any manner mitigating RIL's responsibility, RIL and Reliance—ADA Group, give an irrevocable Power of Attorney to the Reliance—ADA Group to apply for and obtain all such governmental and regulatory approvals as are necessary on its behalf.

c) The understanding and agreements relating to the supply of gas as part of the reorganization of RIL are set out in the Information Memorandum filed for the benefit of the shareholders and investors by RNRL with the Bombay Stock Exchange and of the RNRL. Consequently, as part of the reorganization of the business and undertakings of RIL, the power business of RIL including the Gas Based Power Business, described in the Scheme as the Gas Based Energy Undertaking, was also to be demerged. The Gas Based Energy Undertaking of RIL to be demerged under the Scheme

consisted of the business of supply of gas for power projects REL and of Reliance Patalganga Power Ltd., through suitable arrangements.

d) The Scheme also explains:

(i) Gas Based Energy Resulting Company
(ii) Gas Based Energy Undertaking

e) The Scheme provided for suitable arrangements whereby the RNRL would receive gas from RIL and supply the same, as RIL would otherwise have done, for the power projects of REL.

f) In the year 2003, NTPC had floated a global tender for supply of gas to its power projects to be located at Kawas and Gandhar in the State of Gujarat. RIL, who emerged as the successful bidder, had at the time of submission of bids unconditionally accepted all the terms and conditions mentioned in the draft GSPA. In accordance with the agreed position/settlement, the gas was to be supplied by RIL to the RNRL at the price and terms no less favourable than those of NTPC and the gas supply agreement between RIL and the RNRL would be as per the said NTPC contract terms. RIL, by letter dated 14.02.2006, signed by one K. Sethuraman, Authorised Signatory of RIL, communicated that he was

directed to confirm that RIL would agree to carry out amending changes to the proforma of GSPA annexed to the Gas Supply Master Agreement (GSMA) so that it reflects the same terms as are contained in the GSPA for 12 MMSCMD between NTPC and RIL as and when changes are carried out to NTPC GSPA.

g) The Scheme also provided that post the demerger of the Demerged Undertakings of RIL, Shri Anil Ambani would obtain control and management of the businesses and undertakings being demerged.

h) Further, the agreement had to reflect an interest in gas produced by all the gas fields of RIL so as to ensure that gas upto the agreed quantity i.e. 28 MMSCMD or 40 MMSCMD, as the case may be, would be made available to RNRL in priority to any other sale or use by RIL except for the gas to be used for RIL itself for operation and transportation and for the gas to be supplied to NTPC. The interest of RNRL was thus to extend to gas fields other than the KG-D6.

i) The GSMA and the form of GSPA significantly depart from the Draft Agreement to the NTPC request for bids and unconditionally accepted by RIL.

9) **The case of RIL**:-

a) A Scheme for the demerger of a large company with majority of shares being held by the public and by institutions, has to be in larger public interest as well as in the interest of the company. It must necessarily safeguard the interest of large body of shareholders of the Demerged Company as also the shareholders of the Resulting Companies. Any settlement of the disputes stated to have taken place between or amongst the promoters has, as a necessity, to abide by the final decision of the Board of the Demerged Company and such adaptations as may be necessary to protect and further the interests of the large body of shareholders or public interest.

(b) Once the Scheme as was placed before and duly approved by; the shareholders (99% shareholders approved the Scheme) which suggests that the Scheme had the support not merely of the General Body of shareholders but also the members of the promoters' family-all anterior or underlying agreements

become irrelevant. The senior-most member of the family who resolved all the disputes has, at no point, contested the Scheme as being inconsistent with any arrangement that may have been arrived at. The present application is a thinly disguised attempt to reopen the Scheme after it has been fully implemented in a manner that is completely inconsistent not only with the demerger of the businesses but the provisions of Section 392 of the Companies Act, 1956.

c) That none of the heads of so-called Agreement are a part of the Scheme as proposed by the Board of Directors of RIL and approved by the creditors and general body of shareholders. These allegations have no place in an application made for implementation of the Scheme as sanctioned by the High Court. The averments made therein are completely extraneous and irrelevant. The issues, if at all, as between Shri Mukesh Ambani and Shri Anil Ambani were personal to the Ambani family and the Board of RIL was not aware of the details of the settlement between Shri Mukesh Ambani and Shri Anil Ambani.

d) The Vice Chairman and Joint Managing Director of RIL, at the relevant time, Shri Anil Ambani was or in any event, should be deemed to be fully aware of the nature of the rights of RIL in relation to exploration and production of gas from various gas-fields as also the provisions of the Production Sharing Contract (PSC). Significantly, the Production Sharing Contract for Block KG-D6 was executed way back in the year 2000. Being Board managed company, the business and affairs of RIL are under control and supervision of the Board of Directors and in fact the Minutes of the Board meeting clearly show that in all matters in which Shri Mukesh Ambani was or could be said to be an interested director, he had refrained from participating in the deliberations and voting on the resolutions. The terms and conditions on which the gas was to be supplied to the power plants of Reliance Patalganga Power Limited and REL was to be at the discretion by the Board of Directors of the Demerged Company who were not bound by any "agreement" as between two groups of promoters. The Board of Directors of Demerged Company was obliged and in fact had at all times kept the interests of the

general body of shareholders as being a paramount importance and had taken such decisions as in the best judgment of the Board, accorded to their duty as the Board with the shareholders interests being of utmost importance.

10) After considering the claim of both the parties viz., RNRL and RIL the **"Company Judge has arrived at the following conclusions"**:

> "184. The conclusions are:
>
> (1) The present company application under Section 392 of the Companies Act is maintainable.
>
> (2) The Company Court, however, under Section 392 of the Companies Act cannot direct or dictate to maintain or amend or modify and/or insist for a particular clause or clauses of such gas supply agreement or such other commercial agreement/contract.
>
> (3) The GSMA as formed and finalized in the Board of Director's Meeting of RIL on 11.01.2007 and modified on 12.01.2007 is in breach of the Scheme.
>
> (4) The MoU (Memorandum of Understanding/Family Arrangement) and its content are binding to both parties RIL and RNRL and all the concerned, Mr. Mukesh Ambani and his group of Companies and Mr. Anil Ambani and his group of Companies have already acted upon at the pre and post stages of the MoU and the pre and post stages of the Scheme accordingly.
>
> (5) The term "suitable arrangement" as referred in the Scheme needs to read and interpret by taking into account the terms of the MoU as well as the Scheme as referred above. It is also necessary for the complete and full working of the Scheme.
>
> (6) The terms as mentioned in the MoU and GSMA need to be suitable for both the parties subject to the Government's

> policies and national, international practice in supply of gas or such other products.
>
> (7) The contract of such nature is subject to the Government's approval in view of NELP & PSC and such related Government policies, but keeping in view the several factors including the freedom and right of the contractor/RIL and the limited and restricted scope of interference in such permissible commercial aspects of the contractor, unless, it is in breach of any public policy and public interest.
> (8) The supply of gas contract/agreement needs to be clear and bankable documents for all the concerned parties."

Finally, the Company Judge directed the parties to re-negotiate for a "**suitable arrangement**".

11) As discussed earlier, aggrieved by the said order/directions of the Company Judge, RNRL has filed Appeal No. 1 of 2008, RIL has also filed Appeal No. 844 of 2007 before the Division Bench. During the course of hearing, considering the public/national importance, the Division Bench permitted the Union of India to intervene and put forth their stand.

12) The Division Bench framed the following **"issues for consideration"**:

(1) Whether the Company Court has jurisdiction to entertain the Application filed by RNRL under the Companies Act, 1956?

(2) What is a "suitable arrangement" between the two Companies in the matter of supply of gas for the power projects of the Resulting Companies and its affiliates?

13) **Answers by the Division Bench**:

(a) The Division Bench has answered the first issue in the affirmative. The reasoning of the Division Bench, however, is different from that of the Single Judge. The Company Judge had held that the Application was maintainable under Section 392 read with Section 394 of the Companies Act. The Division Bench however found the Company Application to be maintainable on the basis of Clauses 17, 18, 20 to 24 of the Scheme of Demerger itself.

(b) On the second issue, the Division Bench held as follows:

(i) The suitable arrangement was required to be made by engrafting the MoU on the GSMA,

(ii) As far as the fixation of price is concerned, the Government has the power to fix the price, but only for its "take" of the gas, and

(iii) Although the Government could lay down the Gas Utilization Policy, such Utilization Policy would apply only to the gas available for allocation after certain quantity of gas which according to the Division Bench, "stood allocated" to

RNRL as per the MoU. The Gas Utilization Policy could apply only to the balance quantities.

(iv) There was nothing in the PSC that prevented the Contractor from selling gas at a price lower than the price approved by the Government and RIL could fulfill its obligation of supply of gas at a price of US $ 2.34 per mmbtu.

14) Aggrieved by the above directions/conclusions RNRL, RIL as well as U.O.I. have filed these appeals by way of special leave petition before this Court.

15) Heard M/s Ram Jethmalani and Mr. Mukul Rohatgi, Mr. Ravi Shankar Prasad, learned senior counsel for RNRL, M/s Harish N. Salve, and Mr. Rohington F. Nariman, learned senior counsel for RIL and Mr. Gopal Subramanium, learned Solicitor General, M/s Mohan Parasaran and Mr. Vivek Tankha, Additional Solicitor General for the Union of India.

16) **Historical background:**

Up to the early 90's, prior to the NELP and pre-NELP years, natural gas was being produced only from the fields operated by the Government companies, namely Oil & Natural Gas Corporation (in short 'ONGC') and Oil India Limited (in

short 'OIL), out of blocks which were given to these companies by the Government on nomination basis. Since these fields were given on nomination basis and only to Government Companies, the Government's power to regulate the Natural Gas Sector was absolute.

Later, it was decided to open the sector to Private Sector Investment during the mid 1990s when private investment was sought on competition basis and certain blocks were awarded to Private Sector companies under a Production Sharing Contract (better known as the pre-NELP Production Sharing Contracts). This was done to increase private investment in this sector since the exploration and production of oil and gas is associated with considerable risk and no investment would have been attracted if the APM regime continued. However, the Contractors who signed the PSC were required to sell all the gas produced and saved to the Gas Authority of India Limited, a PSU, and did not have marketing freedom as regards natural gas.

The pre-NELP regime was replaced by the NELP regime under which the PSC relevant to the present case was entered

into between a Joint Venture composed of RIL and NIKO Resources Limited and the Government of India. In the NELP-1 PSC, marketing freedom has been given to the contractor to a limited extent subject to the overall regulation of the Government.

17) **Constitutional and other statutory Provisions:**

> "**Article 297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union** - (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.
>
> (2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.
>
> (3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament."

18) Article 39(b) of the Constitution envisages that the State shall, in particular, direct its policy towards securing the ownership and control of material resources of the community as so distributed as best to sub-serve the common good.

19) This Court, in the case of ***State of Tamil Nadu vs. L. Abu Kavur Bai***, (1984) 1 SCC 515 at 549 held that the

expression 'distribute' under Article 39(b) cannot but be given full play as it fulfills the basic purpose of re-structuring the economic order. It embraces the entire material resources of the community. Its goal is so to undertake distribution as best to sub-serve the common good. It re-organizes by such distribution the ownership and control. To distribute, would mean, to allot, to divide into classes or into groups and embraces arrangements, classification, placement, disposition, apportionment, the system of disbursing goods throughout the community.

20) In ***Salar Jung Sugar Mills Ltd. etc. vs. State of Mysore & Ors.***, (1972) 1 SCC 23 at page 36 paragraph 38, this Court held as under:

> **"38...**.....Delimiting areas for transactions or parties or denoting price for transactions are all within the area of individual freedom of contract with limited choice by reason of ensuring the greatest good for the greatest number by achieving proper supply at standard or fair price to eliminate the evils of hoarding and scarcity on the one hand and availability on the other."

21) In ***Tinsukhia Electric Supply Company Ltd. vs. State of Assam & Ors.***, (1989) 3 SCC 709, this Court affirmed the views expressed in the above cases in the context of electricity supply and also affirmed the Government's role in the securing

and distributing of the resources of the community that best sub-serves the common good.

22) This Court in numerous decisions has laid down that in the award of tenders and the distribution of national property and State largesse, the State is bound to follow the dictate of Article 14.

23) In ***Ramana Dayaram Shetty vs. International Airport Authority of India & Ors,*** (1979) 3 SCC 489, this Court has pointed out that :

> ".....The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory "

24) In ***Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries***, (1993) 1 SCC 71, this Court observed as follows:

> "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for

> public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. ……."

25) The Oil Fields (Regulation & Development) Act, 1948 and the Petroleum and Natural Gas Rules, 1959, make provisions, *inter alia*, for the regulation of petroleum operation and grant of licence and leases for exploration, development and production of petroleum in India. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Maritime Zones Act, 1976 provides for the grant or a licence of Letter of Authority by the Government to explore and exploit the resources of the Continental Shelf and Exclusive Economic Zone and any Petroleum operation.

26) Under the Companies Act, there are no provisions except Sections 391 to 394 which deal with the procedure and power of the Company Court to sanction the Scheme which falls within the ambit of requirements as contemplated under these sections. Since the Company Judge as well as the Division Bench of the High Court proceeded on the basis that it has ample power and jurisdiction to supervise the Scheme as sanctioned under Sections 391 to 394 of the Companies Act, it is but proper to refer those sections which are as under:

"391. Power to compromise or make arrangements with creditors and members

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the Tribunal directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 351, and the like.

(3) An order made by the Tribunal under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each copy in respect of which default is made.

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of.

392. Power of Tribunal to enforce compromise and arrangement : (1) Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it-

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of the Companies

(Amendment) Act, 2001 sanctioning a compromise or an arrangement.

393. Information as to compromises or arrangements with creditors and members - (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391,-

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect; and in particular, stating any material interests of the directors, managing director or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests of the compromise or arrangement if, and in so far as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture-holders of the company, the said statement shall give the like information and explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

(4) Where default is made in complying with any of the requirements of this section, the company, and every officer

of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees; and for the purpose of this sub-section any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be punishable under this sub-section if he shows that the default was due to the refusal of any other person, being a director, managing director, manager or trustee for debenture holders, to supply the necessary particulars as to his material interests.

(5) Every director, managing director, or manager of the company, and every trustee for debenture holders of the company, shall give notice to the company of such matters relating to himself as may be necessary for the purposes of this section; and if he fails to do so, he shall be punishable with fine which may extend to five thousand rupees.

394. Provisions for facilitating reconstruction and amalgamation of companies

(1) Where an application is made to the Tribunal under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal-

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company");

the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies; shall be sanctioned by the Tribunal unless the Court has received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order; that property shall be transferred to and vest in and those liabilities shall be transferred to and become the liabilities of the transferee company and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(4) In this section-

(a) "property" includes property rights and powers of every description; and "liabilities" includes duties of every description; and

(b) "Transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not.

394A. Notice to be given to Central Government for applications under sections 391 and 394
The Tribunal shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."

27) **ISSUES ARISING IN THE PRESENT APPEALS:**

a) Whether the Company Petition filed by RNRL under Section 392 of the Companies Act, was maintainable?

b) Even if the Company Petition was maintainable, whether the challenge raised by RNRL to the GSMA, that it is not a "suitable arrangement" was maintainable particularly

in view of the fact that on merits, the Company Judge had found, these objections to be unsustainable?

c) Whether the MoU entered into amongst the family members of the Promoter was binding upon the corporate entity – RIL?

d) Whether the terms of the MoU are required to be incorporated in the GSMA as held by the Division Bench?

e) Whether the provisions in the GSMA requiring Government approval for supply of gas to RNRL is unreasonable and that its inclusion renders the GSMA as not a "suitable arrangement" as contended by RNRL?

f) Having insisted upon a Gas Sale and Purchase Agreement (GSPA) in conformity with the NTPC draft GSPA dated 12th May, 2005 which contained an unequivocal stipulation for Government approval for quantity, tenure and price, whether it is open to RNRL to now contend that the Government approval for supply of gas is not required and further that the provision requiring Government approvals should be deleted from the GSMA/GSPA?

g) Whether it is necessary for this Court to go into the interpretation of the provisions of the PSC?

h) i. Whether the approval of the Government is required to the price at which gas is sold by the contractor under the PSC?

ii. Whether the Government has the right to regulate the distribution of gas produced which it has exercised by putting in place the Gas Utilization Policy under which sectoral and consumer-wise priorities (to the quantities specified) have been identified and notified to RIL?

iii. Whether the Contractor has a physical share in the gas produced and saved which it can deal with at its own volition?

i) In view of the Gas Utilization Policy and the Pricing Policy of the Government, whether the "Suitable Arrangement" for supply of gas to Dadri Power Plant of REL can only be on the same terms as are applicable to other allottees of gas and that too to the extent of the quantity of gas that

may be allocated by the Government as and when the Dadri Power Plant is ready to receive gas?

28) All these issues can be answered in the following broad headings:

(A) Maintainability of the company petition:

i) It has been argued before this Court that the original company application was not maintainable as the Company Judge (single Judge) did not have any jurisdiction. It has been argued that the jurisdiction of the Court can only be found under Section 394 of the Act and Section 392 is completely inapplicable. RIL has argued this because the wording of both the provisions suggests that Section 392 provides much wider power to the Court with respect to making additions in the Scheme. Section 392 (1)(b) states that the Court "may give such directions in regard to any matter or making such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement". On the other hand, Section 394 restricts this power essentially to "incidental, consequential and supplemental matters only". Mr. R.F. Nariman, learned senior

counsel appearing for RIL concentrated his argument with reference to Sections 391 to 394 of the Companies Act. According to him, Section 392 of the Act had no predecessors either in English Law or in the Companies Act of 1913. The reason why the Legislature appears to have felt the necessity of enacting Section 392 is to bring Section 391 on par with Section 394. Section 394 applies only to Companies which are re-constructing and or amalgamating, involving the transfer of assets and liabilities to another Company. It is thus, applicable to a species of the genus of Company referred to under Section 391. Section 394, sub-section 1 specifically gives the Company Court the power not merely to sanction the compromise or arrangement but also gives the Company Court the power, by a subsequent order, to make provisions for "such incidental, consequential and supplemental matters as are necessary to secure that the re-construction or amalgamation shall be fully and effectively carried out" [Section 394(1)(vi)]. This power is absent in Section 391, so that companies falling within Section 391, but not within Section 394, would not be amenable to the Company Court's

jurisdiction to enforce a compromise or arrangement made under section 391 and to see that they are fully carried out. Hence, the power under Section 392 has to be understood in the above context, and is of the same quality as the power expressly given to the Company Court post-sanction under Section 394.

ii) It is pointed out by Mr. Nariman that on the facts of the present case, Section 392 does not apply at all, for the reason, that the sanctioned scheme on record is a scheme to which both Sections 391 and 394 apply. That being the case, in order to fully and effectively carry out an arrangement which has been sanctioned under Sections 391 to 394, the Company Court enjoys jurisdiction under Sections 394(1)(i) to (vi) itself. He pointed out that this becomes clear beyond doubt from a reading of sub section 3 of Section 392. He also pointed out that Section 153-A of the 1913 Act is conspicuous by its absence in sub-section(3) of Section 392. According to him, this makes it clear that where a compromise or arrangement has been sanctioned under Section 153 A of the previous Act, the provisions of Section 392 of 1956 Act will not apply,

making it clear that where a scheme is governed by the provisions of Section 394, Section 392 would have no application.

iii) The learned Single Judge founded his power to give relief in the Company Application filed by RNRL in Section 392 on the ground that the applicants cannot be rendered remediless. For this, Mr. Nariman pointed out that the Company Judge was not correct for the simple reason that the remedy lies in Section 394(1) sub-clause (vi) which gives ample power to the Company Court to fully and effectively carry out the scheme governed by the provisions of Section 394. He also pointed out that the marginal note can be looked at to indicate the drift of the Section.

iv) It is the claim of the RIL that the power to enforce the compromise or arrangement includes the power to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise or arrangement. However, Mr. Nariman further pointed out that the power to make modifications does not extend obviously to make substantial or substantive

modifications to the scheme itself which has been passed by at least 75% of the shareholders in exercise of their right of Corporate Democracy. In the present case, the Scheme was passed by an overwhelming majority of more than 99% of the equity shareholders of RIL. He further pointed out that apart from the language of Section 392 the power under Section 392 cannot possibly be a greater power than the power under Section 391 to sanction the original scheme. In ***Miheer H. Mafatlal*** vs. ***Mafatlal Industries Limited*** (1997) 1 SCC 579, this Court delineated the extent of power of the Company Court under section 391 in para 29 thus:

> **"29.** However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that

> extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act which reads as under……..
>
> …….Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement……. "

v) Again in ***S.K. Gupta & Anr***. Vs. ***K.P. Jain & Anr***. (1979) 3 SCC 54, this Court dealt with the creditors' scheme propounded under Section 391 to get a particular Company out of winding up. Observations made in paragraphs 13 and 15 of this judgment, if read out of context, would make it clear that this Court has extended the power under section 392 to make modifications which would include additions and omissions to the scheme at will. This is not the correct

purport of the observations in para 13 and 15. In fact, the judgment very clearly states that the limit on the Court's power is always to see that the modifications are done for the proper working of the scheme and not for any other purpose. A very important paragraph of the judgment is para 27 where this Court ultimately observed "strictly speaking, omission of the original sponsor and substituting another one would not change the 'basic fabric' of the scheme". This judgment therefore, must be understood as construing Section 392 in a manner that would not permit the Company Court to so modify a scheme as to change its basic fabric.

vi) Another judgment of this Court is in ***Meghal homes (P) Ltd.*** vs. ***Shree Niwas Girni K.K. Samiti & Ors.*** (2007) 7 SCC 753 which squarely raises the issue as to whether in the guise of modifying a scheme, the Company Court can substitute a portion of the original scheme. This Court said an emphatic no:-

> "53. But before that, we think that another step has to be taken in this case. What has now been accepted by the Division Bench, is not the scheme as modified by the General Meeting as contemplated by Section 391 of the Act. At least two of the modifications having ramifications are based on undertakings or statements made on behalf of LBPL and there appears to be difference of opinion on that modification even among the Somanis. There is also the question whether the proposals of a person who is not one of

those recognised by Section 391 of the Act, could be accepted by the Company Court while approving a scheme. We are of the view that the scheme with the modifications as now proposed or accepted, has to go back to the General Meeting of the members of the Company, called in accordance with Section 391 of the Act and the requisite majority obtained.

54. It was argued on behalf of the respondents that under Section 392 of the Act, the court has the power to make modifications in the compromise or arrangement as it may consider necessary and this power would include the power to approve what has been put forward by LBPL who has come forward to discharge the liabilities of the Company on the rights in the properties of the Company other than in the office building and in the godown, being given to it for development and sale. As we read Section 392 of the Act, it only gives power to the court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. This is only a power that enables the court to provide for proper working of compromise or arrangement, it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in terms of Section 391 of the Act.

55. A modification in the arrangement that may be considered necessary for the proper working of the compromise or arrangement cannot be taken as the same as a modification in the compromise or arrangement itself and any such modification in the scheme or arrangement or an essential term thereof must go back to the General Meeting in terms of Section 391 of the Act and a fresh approval obtained therefor. The fact that no member or creditor opposed it in court cannot be considered as a substitute for following the requirements of Section 391 of the Companies Act for approval of the compromise or arrangement as now modified or proposed to be modified.

56. In *Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.*this Court had insisted that the procedural requirements of Section 391 must be satisfied before the court can consider the acceptability of a scheme even in respect of a company not in liquidation. Therefore, we are not in a position to accept the argument on behalf of the respondents that the scheme now as modified by the decision of the Division Bench need not go back to the General Meeting of the members in terms of Section 391 of the Act. We must also remember that at least before us there are serious objections to the modifications by one of the Somanis who are the promoters of the Company in liquidation and the sponsors of the arrangement and that objection cannot be brushed aside.

57. We find that the modifications proposed alters the position of the shareholders vis-à-vis the Company. Instead of the Company reviving the spinning unit as recommended

> by the State Bank of India Capital Markets Limited, as adopted in the General Meeting, now the Company will have nothing to do with the mill lands and the whole of the mill lands will pass on to LBPL on LBPL paying a value of Rs 97.50 crores to SCML and LBPL will start an industry of its own in that property. This cannot be considered to be a modification in the scheme necessary for the proper working of the compromise or arrangement. This is a modification of the scheme itself. Same is the position regarding the provision of replacing the resolution passed that if any surplus amounts are available, SCML would start a viable industry in any part of the State of Maharashtra, by a commitment that SCML would establish an industry in any part of the State of Maharashtra on an investment of Rs 20 crores. This again is an obligation cast on the members of SCML and we are of the view that this cannot also be taken to be a modification which the court can bring about on its own under Section 392 of the Act on the pretext that it is a modification necessary for the proper working of the compromise or arrangement. We have no hesitation in holding that in any event, the Division Bench of the High Court ought to have directed a reconvening of the meeting of the members of the Company in terms of Section 391 of the Act to consider the modifications and ensured that the approval thereof by the requisite majority existed."

vii) Mr. Nariman has submitted that the Company Judge in the present case referred to ***S. K. Gupta's (supra)*** case and finally held that since Sections 391 to 394 are interconnected it would be able to grant relief asked for in a Company Application filed under Section 392. It is the claim of the Mr. Nariman that it is not only incorrect but it would not be possible in exercise of power under Sections 392 or 394 to modify the terms of clause 19 of the Scheme. Insofar as the Division Bench, according to him, goes into various clauses of the Scheme to say that the subsequent power of modification

of the Scheme itself is contained in these Clauses, more particularly, clause 22. He contended that even if it is to be applied, no modification can be made under it without the consent of the parties to the Scheme. According to him, if the conclusion of the Division Bench is accepted, the resultant order of the Division Bench is contrary to Clause 22 in that it would not be possible to read the MoU dated 18.06.2005 into Clause 19 of the Scheme without the consent of the Shareholders and the Board of Directors of RIL. He insisted that the Division Bench of the High Court was bound by the judgment in ***Meghal Homes*** where the jurisdiction of the Company Court under Section 392 was clearly spelt out.

viii) Learned senior counsel for RNRL submitted that RNRL seeks to enforce the terms of the Scheme of Arrangement as sanctioned by the Bombay High Court vide its order dated 09.12.2005. As per the said Scheme, RIL was required to execute a suitable arrangement for supply of gas to RNRL. However, RIL has wrongfully caused the execution of a document the effect of which would be that the business of supply of gas, as contemplated in the Scheme of Arrangement,

would not be transferred to RNRL. He further argued that the timing and manner of the impugned agreement as well as several clauses of the Scheme render the same virtually unworkable. In these circumstances, it is pointed out that RNRL has approached the Company Court seeking suitable reliefs under Section 392 of the Companies Act.

ix) In the earlier part, the judgment of this Court in ***S.K. Gupta (supra)*** has been discussed. It is the duty of the Court to ensure that the Scheme is fully implemented. Learned senior counsel for the RNRL pointed out that in this case it would imply that this Court must ensure that the gas based energy undertaking is, in fact, transferred to RNRL as contemplated under the Scheme. For this purpose, the Court has the jurisdiction and power to direct modification of the GSMA which was required to be executed pursuant to clause 19 of the Scheme. Learned senior counsel further contented that Section 392 shows the width of the power and the ultimate consequence envisaged under the Companies Act for non implementation of the Scheme. The only limitation on the power of the Court is that it cannot change the basic structure

or character or purpose of the Scheme. It was further pointed out that subject to this, the power is of widest amplitude and unlimited. On behalf of the RNRL it was pointed out that the decision of this Court in ***Meghal Homes (supra***) is not applicable to the present case, firstly, this judgment accepts the principle that the Court has wide power under Section 392 though the same are circumscribed, secondly, the said judgment does not refer to ***Gupta's case*** which was a binding decision of a three-Judge Bench. Further, in ***Meghal Homes (supra)*** the challenge was the power of the Court to sanction the Scheme and not power to direct modification to an already sanctioned Scheme.

x) In the light of the stand taken by both parties, this Court analyzed the relief sought for in the Company Application and the relevant materials placed before the Company Judge. Section 392 creates a duty to supervise the carrying out of the compromise or arrangement. This power and duty was created to enable the Court to take steps from time to time to remove all obstacles in the way of enforcement of a sanctioned scheme. While sanctioning, it shall anticipate some hitches

and difficulties which it can remove by the order of the sanction itself but clause 1(b) makes it clear that this power can also be exercised after the scheme has once been sanctioned. So long as the basic nature of the arrangement remains the same the power of modification is unlimited, the only limit being that the modification should be necessary for the working arrangement.

xi) In view of the above discussion, this Court holds that Section 392 is applicable to the Company Application filed by RNRL. This is more so because the Company Court has originally sanctioned the scheme under both Sections 391 and 394. Further, the position derived from ***Gupta (supra)*** the power of the Court under Section 392 is wide enough to make any changes necessary for the working of the Scheme. Therefore, Court does have jurisdiction over the present matter. However, it is made clear that the power of the Court does not extend to re-writing the Scheme in any manner.

xii) Furthermore, in the Companies Act, there is no provision except Section 391 to Section 394 which deal with the procedure and power of the Company Court to sanction the

Scheme which fall within the ambit of the requirements as contemplated under these sections. In the absence of any other provisions except Section 392, it is difficult to accept the contention as raised that the present application under Section 392 of the Companies Act is without jurisdiction. On the other hand, Section 391 to Section 394 has ample power and jurisdiction to supervise the scheme as sanctioned under the Companies Act. As rightly observed by the Company Judge, the exigencies, facts and circumstances, play dominant role in passing appropriate order under Sections 391 to 394 after sanctioning of the Scheme. The Company Court is not powerless and can never become functus officio. Sections 391 to 394 are interconnected and it can pass appropriate order for sanctioning of any Scheme including of arrangement, demerger, merger and amalgamation. Therefore, the application filed by RNRL under Section 392 is maintainable. Nevertheless, as observed earlier, the power of the Court does not extend to re-writing the Scheme in any manner.

(B) Memorandum of Understanding (MoU)

i) In order to understand the position of RNRL and RIL as well as "suitable arrangement" under the "Scheme", it is but proper to refer the contents of MoU (placed before the Division Bench of the High Court) which are as under:

"STRICTLY CONFIDENTIAL

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (this "MoU") is made at Mumbai this___ day of June, 2005 amongst Kokilaben D. Ambani ("Kokilaben"), Mukesh D. Ambani ("Mukesh") and Anil D. Ambani ("Anil") (each of Kokilaben, Mukesh and Anil hereinafter referred to individually as a "Party" and collectively as the "Parties.")
WHEREAS

A. After the demise of Shri Dhirubhai H Ambani (late Dhirubhai) on July 6, 2002, Kokilaben is the head of the Ambani family and has complete moral authority over the family. Her four children, Mukesh, Anil, Dipti and Nina have, by Deed of Release dated October 17, 2002, released their entire interest in the estate of late Dhirubhai in her favour.

B. Mukesh and Anil have been managing the various businesses of the family comprised in the Reliance Group (the "Businesses"). Differences have arisen between them in this behalf, and having regard to recent events and with the intervention of Kokilaben, the Parties have now agreed that the best way forward would be to have a segregation of the ownership and Businesses into two groups, with one group owned, managed and controlled by Mukesh and the other owned, managed and controlled by Anil. Most of the key principles relating to the segregation of certain family assets including controlling interest in the Businesses and companies have been agreed to between the Parties.

C. Mukesh and Anil have also expressed their unconditional trust in Kokilaben and agreed that she shall play a final and decisive role in resolving any open issues in the process of settlement, and that they shall abide by all decisions made by her to facilitate early closure of the settlement.

D. The Parties are now desirous of formally recording their agreement in this behalf."

ii) It has been the consistent position of RNRL that the MoU signed between Mukesh Ambani and Anil Ambani is binding, and therefore, the "suitable arrangement" under the "scheme" should be nothing but the MOU itself. On the other hand, RIL has consistently argued that the MOU is not binding for them since it is merely a non-legal instrument between certain family members. Therefore, it was argued that it will not bind the companies and the shareholders who have a completely different personality.

iii) Mr. Ram Jethmalani, learned senior counsel appearing for the RNRL strongly relied on the following decisions of this Court with reference to the importance of family arrangement (MoU) and its effect and value.

1. ***Kale & Ors.*** vs. ***Deputy Director of Consolidation & Ors.***, (1976) 3 SCC 119 (Paragraphs 9, 17, 19, & 42) which states as under:

" 9.....A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.....

17. In *Krishna Biharilal* v. *Gulabchand,1971 1 SCC 837,* it was pointed out that the word "family" had a very wide connotation and could not be confined only to a group of persons who were recognised by law as having a right of succession or claiming to have a share.

19. Thus it would appear from a review of the decisions analysed above that the courts have taken a very liberal and broad view of the_validity of the family settlement and have always tried to uphold it and maintain it. The central idea in the approach made by the courts is that if by consent of parties a matter has been settled, it should not be allowed to be reopened by the parties to the agreement on frivolous or untenable grounds.

42.....As observed by this Court in *T.V.R. Subbu Chetty's Family Charities case*, that if a person having full knowledge of his right as a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponents at the relevant time, he cannot be permitted to go back on that agreement when reversion actually falls open."

2. ***K.K. Modi*** vs. ***K.N. Modi & Ors.***, (1998) 3 SCC 573

(Paragraphs 33 & 52) which states as under:

> "33. In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. ……
>
> 52. Group A contends that there is no merit in the challenge to the decision of the Chairman of IFCI which has been made binding under the Memorandum of Understanding. The entire Memorandum of Understanding including clause 9 has to be looked upon as a family settlement between various members of the Modi family. Under the memorandum of Understanding, all pending disputes in respect of the rights of various members of the Modi family forming part of either Group A or Group B have been finally settled and adjusted. Where it has become necessary to split any of the existing companies, this has also been provided for in the Memorandum of Understanding. It is a complete settlement, providing how assets are to be valued, how they are to be divided, how a scheme for dividing some of the specified companies has to be prepared and who has to do this work. In order to obviate any dispute, the parties have agreed that the entire working out of this agreement will be subject to such directions as the Chairman, IFCI may give pertaining to the implementation of the Memorandum of Understanding. He is also empowered to give clarifications and decide any differences relating to the implementation of the Memorandum of Understanding. Such a family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of Understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. The respondents may make appropriate

> submissions in this connection before the High Court. We are sure that they will be considered as and when the High Court is required to do so whether in interlocutory proceedings or at the final hearing."

iv) However, Mr. Harish N. Salve, learned senior counsel for the RIL while drawing our attention to Section 36 of the Companies Act, 1956, submitted that the Memorandum and Articles shall bind the company and its members. According to him, the Articles of Association are the regulations of a company which are binding on the company and its shareholders. He, therefore, pointed out that nothing outside the Articles can bind a shareholder vis-à-vis the company. In support of the above stand, he heavily relied on paragraph 9 of the judgment of this Court in ***V.B. Rangaraj*** vs. ***V.B. Gopalkrishnan & Ors.*** , AIR 1992 SC 453 which reads as under:

> "9. .....the private agreement which is lied upon by the plaitniffs whereunder there is a restriction on a living member to transfer his shareholding only to the branch of family to which he belongs in terms imposes two restrictions which are not stipulated in the Article. Firstly, it imposes a restriction on a living member to transfer the shares only to the existing members and secondly the transfer has to be only to a member belonging to the same branch of family. The agreement obviously, therefore, imposes additional restrictions on the member's right to transfer his shares which are contrary to the provisions of the Art.13. They are, therefore, not binding either on the shareholders or on the company....."

29) It is seen from the above decision that the agreement between the two groups of shareholders which impose certain restrictions on the transferability of the shares held by them was not binding either on the company or its shareholders because the restrictions so imposed by the agreement were contrary to the provisions of the Articles, sale of shares held by one of the two groups in breach of the agreement could not, therefore, be held to be valid. He also pointed out that the agreement between the shareholders is not binding on the company unless the company adopts it and it is incorporated in the Articles of Association. Based on the above principles, he pointed out that the de-merger Scheme was based on the MoU and be treated as guidance to the term suitable arrangement. He also pointed out that a family arrangement or the MoU has not been referred to at any stage in the Scheme or in any representation made to the Stock Exchange and the same is contrary to the RNRL's own pleading and their case. Mr. Harish Salve also relied on various exerts from some of the letters/e-mails from Exhibit "F" filed by RNRL. Some of the letters/e-mail dated 30.07.2005 from Mr. Harish

Shah (RIL) to Mr. Venkat Rao (REL); e-mail dated 06.10.2005 from Mr. Cyril Shroff to Mr. Sandeep Tandon/RIL; e-mail dated 29.11.2005 from Mr. Cyril Shroff to Mr. Anil Ambani; e-mail dated 14.12.2005 from RIL to Mr. J.P. Chalasani and e-mail dated 27.12.2005 from Mr. Sandeep Tandon (RIL) to Mr. Venkat Ponanda etc. but not disputed the contents of the letters or correspondences and e-mails referred therein. The existence of letters/correspondence and e-mails remain unchallenged.

30) In the light of the stand taken by both sides, this Court analysed the contents of MoU and the subsequent arrangement after exchange of various letters/e-mails as well as deliberations among the officials of both the entities. It is clear that both parties acted upon the said family arrangement/MoU dated 18.06.2005. The above referred letters and e-mails, further confirmed that there is an arrangement made and agreed between the RIL and ADAG (RNRL), it is also clear and show that the discussion between the group of officials was intended to expedite the implementation of the MoU by producing a "suitable

arrangement". Though copy of the MoU was not part of the record before the Company Judge, by consent, the above extracted portion was placed before the Division Bench at the time of hearing of the appeal. It cannot be accepted that neither RIL nor its Board Members were aware of the contents of the MOU. In fact, the Company Judge has pointed out that a specific reference was made in the Company Application No. 1122 of 2006 and there is no specific denial by the RIL. The Press Release at the instance of their mother Smt. Kokilaben Ambani (Exh. "D") about the family arrangement/MOU cannot be over-looked. It is clear that because of the efforts of Smt. Kokilaben Ambani, the mother of Mukesh Ambani & Anil Ambani, the family settlement has been arrived at and followed by the Scheme of De-merger. It is also clear from the materials i.e. exchange of letters and e-mails and the deliberations by the officials of both entities and their Board of Directors as well as the shareholders have agreed for the Scheme. Further it was demonstrated that after execution of MOU, both the parties have been entering into contracts and agreements as an independent entity. As pointed out that

except the gas supply agreement all other companies as found are working and running their affairs smoothly.

31) Before the Division Bench, it was submitted by RIL that the MoU amongst the promoters does not bind the corporate entity RIL. It was not open to RNRL to produce the documents at the stage of appeal which were not placed before the learned Single Judge. The MoU was clearly in the private domain and was never placed in the corporate domain even though such course of action was suggested by Mr. Cyril Shroff, the Solicitor appointed to draw the Scheme of Demerger. It was also the stand of the RIL that MoU was never placed before its Board of Directors and contents thereof were not known to the Board. The correspondence contained in Exhibit F of the Company Application, at best, goes to show that MoU was the broad structure on which the demerger was to be worked out.

32) On the other hand, learned senior counsel appearing for the RNRL demonstrated the existence, effect, sanctity and the binding nature of MoU. It is their definite case that the existence of MoU was specifically pleaded in para 6.6 of the Company Petition. Learned Company Judge found that the

MoU existed and that the terms of MoU had to be implemented. Inasmuch as the relevant part of MoU concerning the gas business have already been placed before the Division Bench in appeal with the consent of the parties and the relevant terms relating to price, tenure, volume etc. are admitted between the parties, it is only the interpretation thereof which is to be considered. Further, the MoU itself seeks to divide the business into two groups i.e. Anil Ambani Group and Mukesh Ambani Group wherein both individuals would control and supervise various businesses through various corporate entities. The implementation of the MoU resulted in the scheme under Section 391 of the Act before the Company Court. Apart from this, it was pointed out that the Board of RIL made a public announcement on 18.06.2005 i.e. soon after the execution of MoU on the same day publicly acknowledging, with gratitude to their mother, Smt. Kokilaben that a settlement of disputes has been reached between the members of the family. Further, Exhibit F reflects the knowledge of the terms of MoU with the senior officials of both sides wherein efforts were being made to work out mutually

negotiated GSMA/GSPA which would be in line with MoU.

33) Apart from the above factual details, Mr. Ram Jethmalani, learned senior counsel appearing for RNRL explained the Doctrine of Identification and submitted the family arrangement was arrived at and signed by Smt. Kokilaben Ambani, Shri Mukesh Ambani and Shri Anil Ambani. Among the three, Shri Mukesh Ambani was and is the Chairman and Managing Director of RIL. As per the Doctrine of Identification, a company is identified with such of its key personnel through whom it works. Mr. Jethmalani further pointed out that his actions are deemed to be action of the company itself, hence, RIL is deemed to be aware of and bound by the actions of the Managing Director. In support of the principle "Doctrine of Identification", he relied on decisions of this Court, namely, ***Union of India*** vs. ***United India Insurance Co. Ltd.,*** (1997) 8 SCC 683 at page 695, ***Assistant Commissioner, Assessment-II, Bangalore & Ors.*** vs. ***M/s Velliappa Textiles Ltd. & Ors***, AIR 2004 SC 86 para 16, ***R. vs. Mc Donnell***, (1966) 1 All. E.R. 193 at page 196 & 202, ***J.K. Industries Ltd. & Ors. vs. Chief Inspector of***

Factories and Boilers & Ors. (1996) 6 SCC 665 paragraphs 44 & 45.

34) In the light of the stand taken by RIL and RNRL, the contents of various clauses in MoU particularly with regard to distribution of gas and also the conclusion arrived by the Company Judge and the Division Bench of the High Court have been carefully verified.

35) Firstly, the MoU is not technically binding between RIL and RNRL. It is not in dispute that MoU is between three persons and the personality of the company must be construed separate from these persons. The principle emphasized by Mr. Jethmalani i.e. Doctrine of Identification may be applicable only in respect of small undertakings but in the case of RIL and RNRL, the companies have more than three million shareholders, in such a situation, one cannot make the companies' personality the same as that of persons involved.

36) Secondly, in the light of the conduct of Mukesh Ambani, Chairman of RIL, MoU was definitely the instrument which was the basis of the scheme. Therefore, it can be used as an

external aid for the interpretation of "suitable agreement" under the scheme. To put it clear, the MoU is one of the ways in which the intention of the parties can be made clear with regard to what was considered suitable. Nevertheless, there is no specific requirement that the GSMA must confirm completely with the MoU.

37) Thirdly, it must be pointed out that apart from the MoU, "suitable arrangement" must be understood in the context of government policies, production sharing contract (PSC) between RIL and the Government, national interest and interest of the shareholders. Therefore, in our view MoU is one of the means of construing suitability of the arrangement and not the sole means.

(C) GSMA and GSPA: whether they qualify as suitable arrangement:

38) Subsequent to the formation of the Scheme, the Board of Directors of RIL framed the GSMA and GSPA. As per the Scheme clause VIII and sub-clause (xvii), the Board of Directors of each of the resulting companies to be re-constituted in such manner as is agreed between each

resulting companies and Anil Ambani and thereupon each of the resulting companies shall be controlled and managed by Anil Ambani. The demerged company constituting the remaining Undertakings shall continue to be controlled and managed by Mukesh D. Ambani. As per the preamble of the Scheme and even otherwise the RIL being contractor in pursuance to the PSC, remained under the control of Mukesh D. Ambani having object to commence the production and sale of gas and further as REL has announced setting up of Gas Based Power Generation of India. RIL proposed to use part of its gas discovered for the generation of power for which purpose an appropriate gas supply arrangement agreed to be entered into between RIL and Global Fuel Management Services Limited (now RNRL) pursuant to which gas agreed to be supplied to REL for their power projects including Reliance Patalganga Power Limited, for the generation of power. This business of supply of gas to REL for their power projects is an integrated and/or constitute the Gas Based Energy Undertaking of RIL. The intention, therefore, throughout was even under the Scheme to reorganize and segregate the

business and undertakings to provide focused management attention. In this background it was contended by learned senior counsel appearing for RNRL that it was necessary that RIL should have given full and proper opportunity to the RNRL before passing such resolution hurriedly on 11.01.2006 and before executing such GSMA and GSPA in question. As per clause 19 as recorded the suitable arrangement should be suitable to both the parties in all respects. In this aspect, the decision as taken hurriedly on 11.01.2006, therefore, was one sided, specifically taking into consideration the background and/or events followed upto the sanctioning of the Scheme. As noted, the control over the Board of the RNRL on 10.01.2006 was of RIL, as control over has not been handed over to Anil Ambani. On 26.01.2006, final copy of GSPA was made available by nominee of RIL to nominee of Ambani Group. The drafts of GSMA and GSPA were only circulated on 10.01.2006 through mail. It is to be noted that shares of RNRL were allotted/transferred to Anil Ambani only on 27.01.2006 i.e. after the Board meeting held on the same day. The New Board was re-constituted in accordance with clause

17 of the Scheme on 07.02.2006. As per clause 6, RIL continued to manage the resulting companies till the effective date in the capacity of trustees. Therefore, it is the claim of RNRL that the Board of the Meeting and the Resolution and/or execution of the said GSMA on 11.01.2006/12.01.2006 before the actual transfer of control of the resulting companies to Anil Ambani and before re-constitution of the Board as per clause 17 of each resulting companies were against clauses 17 and 19 and the basic purpose of the Scheme in so far as the supply of gas is concerned.

39) It was pointed out by the learned senior counsel for the RNRL that pending the decisions and discussion on various aspects of gas supply agreement hurriedly in spite of objection by them, the Board on 12.01.2006 took a decision by majority and approved the GSMA and GSPA. It was contended by RNRL that such decision cannot be said to be bona fide. The Resolution dated 12.01.2006 without new Board of Directors of resulting companies is not as per the agreed terms of the Scheme. It was also their claim that the decision as taken hurriedly on 12.01.2006 raises various doubts and it is one

sided and it safeguards only the interest of RIL and not in the interest of RNRL or resulting companies as it was by the Board of Directors of the RIL, the trustee company after the Scheme, but before the nomination or formation of Board of Directors of RNRL. It was argued that the procedure as followed to adopt or resolve or execute the GSMA was unfair and unjust. In those circumstances, it was projected before the Company Judge as well as the Division Bench that whether the parties have committed any breach of clauses of the Scheme which is creating hurdle.

40) The Division Bench has concluded that the allocation of gas to RNRL for its resulting companies, i.e., supply of gas for power project of Reliance Patalganga Power Limited and REL with the Gas Based Energy Resulting Company, a suitable arrangement which is required to be made by incorporating the same in the GSMA and GSPA according to the MoU reached between the parties on 18.06.2005. It is useful to extract the relevant portion of the MoU relating to gas supply which reads as under:

"II. GAS Supply

(i) An expert international firm will be appointed to evaluate the nature and extent of gas reserves particularly at KGD6 and all other gas fields from which RIL produces gas from which gas could be supplied to Reliance Energy Limited ("REL"), for all its projects (including without limitation its proposed Dadri Power Project). The expert shall be appointed by ICICI Bank Limited in consultation with both groups (who must agree within 72 hours hereof) and if they are unable to agree, an international energy consultancy firm, as may be nominated by the energy/E&P department of ICICI Bank Limited will nominate an international expert who will carry out this survey and provide an independent report. Such international consultancy firm shall not have any conflict of interest. The report of such agency could consider the DGH letter as one of the inputs and its decision shall be final as to the quantity and nature of reserve (including matters such as P, P2, P3 reserves) and this would be the factual basis for the rest of the decisions. The Mukesh Ambani Group will now move expeditiously for facilitating such verification and is to provide all information for this purpose.

(ii) On the assumption that only 12 MMSCD is the current P1 reserve and other reserves are in the stages of discovery, arrangements as to quantity of "net gas" (RIL's entitlement of gas as reduced by the quantity of the gas required for operation and transportation) are as follows:

(a) The first right would be to NTPC under its existing draft supply agreement to the extent of 12 MMSCD. This would be for delivery on the west coast. In the event that the NTPC contract does not materialize or its cancelled, the entitlement of NTPC to the said extent shall go to the Anil Ambani Group in addition to its entitlement of 28 MMSCD in (b) below.

(b) Thereafter, and subject to availability of adequate P1 reserves the next 28 MMSCD would go to REL. No sooner the P1 reserves (determined as per (i) above), are identified (whether from KGD6 or elsewhere), this would be included in a binding gas supply agreement in favour of REL. This would be at prices no greater than NTPC prices.

(c) Thereafter and for the entire future of the balance reserves (including new discoveries of gas from new explorations and/or bids as may be submitted from time to time), the quantity of gas would, at the option of the Anil Ambani Group (exercised from time to time), be split in the ratio of 60:40 with 60% to Mukesh Ambani Group and 40% to Anil Ambani Group. Subject to the above, after the 28 MMSCD to REL, the next order of priority would be of RIL for its captive consumption for Mukesh Ambani Group Companies to the extent of a maximum of 25 MMSCD. Such 25 MMSCD will be set off against 60% entitlement of the Mukesh Ambani Group. An expert appointed by ICICI Bank Limited will provide guidance, within a period of 45 days from this MOU, on the appropriateness of the amount of 25 MMSCD or captive consumption, and in the event that the amount considered necessary by such expert is materially less than 25 MMSCD, Kokilaben will reconsider the issue. Thereafter, the next order of priority would be at Anil Ambani Group's option, go to Anil Ambani Group. All such gas shall be supplied at market rates.

By way of examples:

- If the P1 reserves are identified at 60 MMSCD, the sequence would be NTPC-12, REL-28 and RIL (captive)-20.
- In case the reserves are 100, the sequence would be NTPC-12, REL-28,

RIL(captive)-25, Anil Ambani Group (second installment)-16.67 and in so far as the balance 18.33 is concerned, the same would be shared in the ratio of 60:40. This shall be an option but not an obligation.

(iii) For the first 28 MMSCD, the price and the commercial terms shall be the same as those applicable to NTPC.

(iv) REL shall have the option to set up its own pipeline from the gas field to its plant at its own cost. This shall not make a difference to the price for the gas supplied by RIL to REL.

(v) REL shall have the option to take delivery of gas at Kakinada on the East Coast and may construct its own pipeline. However, REL would still have to pay the transportation cost for supply to the West Coast even if the facility is not used, but will have the right to deal with the capacity as it deems fit and to sell or assign the same to another party, on the West Coast or otherwise.

(vi) 50% of the commitment for supply of gas would be supplied in the financial year 2008-09 and the balance 50% in 2009-10.

(vii) As soon as the P1 reserves are identified, a binding gas supply agreement, in accordance with international best practices, bankable in the international financial market would be finalized and entered into, not later than 45 days from the date of this MoU. As stated above, the NTPC supply agreement would be a general guidance for the same and shall as far as possible be the basis for such contracts, and the terms of such contracts shall be no less favourable than those of the NTPC contract. Mukesh will provide the Production Sharing Contract and also correspondence with NTPC and the latest version of the draft contract to the

Anil Ambani Group. The gas supply working group to discuss details.

(viii) Kokilaben recognizes that a long terms, stable source of gas from RIL, which has the largest find of gas, was absolutely essential for the growth plans of the Anil Ambani Group and in order to enable Anil to carry REL to even greater heights. Kokilaben has, therefore, specially stressed and impressed upon Mukesh and Mukesh shall personally ensure that at the time of finalization of the binding gas supply agreement the terms provide the required conform and stability in these agreements, even if that means some departure from the NTPC standard.

(ix) The gas supply/option agreements would be between RIL and a 100% subsidiary of RIL, which would be demerge to the Anil Ambani Group as part of the Scheme of Arrangement. Such agreements would not be with REL.

(x) The gas supplied to the Anil Ambani Group by the Mukesh Ambani Group shall not be used for trading, other than trading within the Anil Ambani Group.

(xi) Swapping of gas is permitted.

(xii) (a) In relation to applicable governmental and statutory approvals, without in any manner mitigating RIL's responsibility to jointly work towards obtaining such approvals, RIL will, if so required by the Anil Ambani Group, give an irrevocable Power of Attorney to the Anil Ambani Group/REL to apply for an obtain all such governmental and regulatory approvals as are necessary on its behalf.

(b) The definitive agreements will reflect that the Mukesh Ambani Group will act in utmost good faith and will make best endeavours to work for and obtain such approvals. If there is any action taken in bad faith for not obtaining/scuttling the obtaining of such approvals, Kokilaben reserves her ability to

> intervene again and the Anil Ambani Group would also have a claim for damages."

A perusal of above-mentioned clauses show that there is a fixed quantum of gas which stands allocated to RNRL, i.e., 28MMSCD to REL and in the event NTPC contract does not materialize or is cancelled, the entitlement of NTPC to the said extent shall go to the RNRL in addition to its entitlement of 28 MMSCD in addition to this allocation from the cost and profit gas which will be available for sharing with the Union of India by RIL. It is further seen that for entire future of the balance reserves the quantity of gas be shared in the ratio of 60:40, i.e., 60 % to Mukesh Ambani Group and 40% to Anil Ambani Group.

41) On going through the materials placed by RNRL, RIL, the Company Judge and the Division Bench reached the following conclusions:

(a) GSMA/GSPA was hurriedly framed which reflects *mala fides* on the part of RIL.

(b) There is no fraud on the part of RIL in terms of Section 17 of the Contract Act as alleged by RNRL.

(c) The dispute in the present case is about conditions of supply (rate, quantity, tenure etc.) and the non-compliance of the GSMA with MoU.

(d) GSMA/GSPA is not "suitable arrangement" as they are not true to the MoU.

(e) The Court, under Section 392, does not have the power to add clauses and/or amend clauses.

(f) The parties must negotiate the contents of "suitable arrangement" in the Scheme, since the Court is not an expert in such things.

42) On the very same issue, after analyzing all the materials, the Division Bench agreed with the Company Judge that MoU was binding on the parties by giving different reasons. On this conclusion, the Division Bench ruled that all the aspects of GSMA relating to supply of gas, tenure, pricing etc. must then be the same as provided under the MOU. The Division Bench also held that there is no absolute freedom to market the gas as argued by RNRL. Under Articles 21.6.2(b) and (c) of the PSC, the Government shall regulate the sale on the basis of a formula. But at the same time, the Division Bench held that

there is nothing in the PSC to restrict the sale of gas by the contractor at a price lesser than that approved by the Government. In those circumstances, the Division Bench has concluded that the Contractor has freedom to sell gas at arms length price to the benefits of the parties to the PSC out of their share of profit gas to which Article 21.6 of the PSC applies. The Division Bench has finally held that "suitable arrangement" should be entered into by the parties on the basis of the MOU.

43) On consideration of the above analysis, it is quite reasonable that the test must be formulated to determine what "suitable arrangement" means. The determination of "suitable arrangement" must not only include the MoU but other considerations also. Among various considerations, the prime aspect relates to the role of the Government, the proper interpretation of PSC relating to pricing and valuation, national interest relating to the interest of consumers and protection of natural resources. At the same time, the other consideration must relate to the interest of RNRL, i.e., whether

the GSMA results in RNRL becoming a shell company and whether the GSMA is a bankable agreement.

44) Insofar as the workability of GSMA, RNRL has fourfold objections. They are: 1) that the "suitable arrangement" under the scheme is nothing but the MoU; 2) that the GSMA is not a bankable agreement; 3) malafide on the part of RIL to bring in an illegal gas agreement; 4) Pursuant to the stand of the RIL and its response, RNRL has raised six points of protestation. The GSMA was put into the place in pursuance of Clause 19 of the scheme. Clause 19 of the scheme provides that in order to effectuate the demerger or RIL, a suitable agreement has to be formulated. In other words, the position of RNRL is that "suitable arrangement" within the meaning of Clause 19 is supposed to be the MoU. Such an arrangement must be suitable for RNRL. According to RNRL, since GSMA is not a replication of the conditions of the MoU and that it is not a bankable agreement it will reduce RNRL into a shell company. GSMA violates the scheme and must be replaced taking into account the various points of protestation raised by them. On the other hand, it is the claim of RIL that since the MoU is not

a binding document, there is no requirement that the GSMA must replicate the MoU. Further, they questioned the stand of RNRL that the GSMA is not suitable for RNRL. Further, they put-forth their case that the GSMA is in consonance with the obligations of RIL to the Government under the BSE and the requirements flowing from the decisions of EGOM.

SUITABLE ARRANGEMENT:

45) Suitable Arrangement under Clause 19 of the scheme must not be merely suitable for RIL alone. In other words, it has a broader meaning. Such an arrangement must be suitable for the interest of shareholders of RNRL as reflected by MoU and RIL, the obligations of RIL under the PSC, the National Policy of gas including the decisions of EGOM and Gas Utilization Policy (GUP) and the broader national and public interest.

46) There is a need to construct a suitable arrangement under Clause 19. The broader construction of suitable arrangement is that the arrangement must be suitable not only for RIL and RNRL but also suitable with respect to the government's interest under PSC, in consonance with the

decisions of EGOM or any other gas utilization policy as well as larger national interest. This is because gas is an essential natural resource and is not owned by either RIL or RNRL. The Government holds this natural resource as a trust for the people of the country. Supply of gas is a matter of national interest and in the present case, due to the very nature of the companies involved, there are huge number of shareholders and people who will be indirectly affected by the policies of the companies. Therefore, the arrangement flowing from Clause 19 must be suitable for interest of all the above-mentioned persons.

47) Keeping the said object in mind, Clause 19 must be interpreted by taking into account 1) the interest of RNRL as reflected by the MoU; 2) the interest of the shareholders of RIL and RNRL; 3) the obligations of RIL under PSC; 4) the national policy of gas including the decisions of EGOM and Gas Utilization Policy; and 5) broader national and public interest.

(D) PRODUCTION SHARING CONTRACT (PSC):

48) Some of the salient features of the PSC are as follows:

i) Clause 6 of the Preamble makes it clear that discovery and exploitation will be in the over all interest of India.

ii) Article 8.3(k) makes the contractor is to be mindful of the rights and interest of the people of India in the conduct of petroleum operations.

iii) Article 10.7(c) (iii) the contractor is duty bound to ensure that the production area does not suffer any excessive rate of decline of production or an excessive loss of reservoir pressure.

iv) Article 32.2 makes it clear that the contractor is not entitled to exercise the rights, privileges and duties within the contract in a manner which contravenes the laws of India.

v) Article 21(1) mandates that the discovery and production of natural gas shall be in the context of government's policy for the utilization of natural gas. The above clauses in the form of articles make it clear that PSC is subject to the Constitution of India, the Oil Fields Act, 1948, the Petroleum and Natural Gas Rules, 1959, the Territorial Waters, the Continental Shelf and

Exclusive Economic Zone and other Maritime Zones Act, 1976 and also the gas utilization policy.

vi) Article 27(1) deals with title to petroleum under the contract areas as well as natural gas produced and saved from the contract area vests with the Government unless such title has passed in terms of PSC. As per Clause (2), title remains with the Government till the time the natural gas reaches the delivery point as defined in the PSC.

49) Therefore, it is not permissible for RIL to enter into a contract with RNRL to supply fixed quantity of gas as the gas continues to be the property of the government till the time it reaches the delivery point and thus, RIL has no right to dispose of the same without the express approval of the Union of India.

50) This Court in ***State of Tamil Nadu*** vs. ***L. Abu Kavur Bai***, (1984) 1 SCC 515 at 549 held "to distribute would mean to allot, to divide into classes or into groups and embraces arrangements, classification, placement, disposition, apportionment and the system of disbursing goods through out the community.

51) In the light of the above, the Executive of the Union of India enjoys its Constitutional powers under Article 73 and Article 77 (3) in order to fulfill the objectives of the Directive Principles of State Policy relating to distribution of Natural Gas. This Natural Gas is a material resource under Article 39(b). in view of this, along with the contemplation of a Government's Policy for the utilization of Natural Gas under Article 21.1 and the decision of this Court referred to above, the Executive decided that distribution would include within its ambit acquisition, including acquisition of private owned material resources. The framing of the "Gas Utilization Policy" in identifying the priority sectors, and allocating the requisite quantities in accordance with the needs of the said sectors and subjecting marketing freedom to the order of priority and guidelines framed is very much in accordance with law. Consequently, Article 21.1 and Article 21.3 should be read in consonance with the Gas Utilization Policy and the latter is neither inconsistent with the provisions of the Constitution, nor the Oil Field Regulation Act, 1948, Petroleum and Natural

Gas Rules 1959 and the Articles of the Production Sharing Contract referred to above.

52) To put it clear, both in terms of the Gas Utilization Policy and the Production Sharing Contract, Government in the capacity as an Executive of the Union can regulate and distribute the manner of sale of Natural Gas through allotments and allocation which would sub-serve the best interest of the country.

53) At the outset, it is to be noted that the price determined by the Government is not the subject matter of either the Company Application nor is it an issue which arises out of the impugned judgment. There is no duly constituted proceeding where any challenge has been laid to Government Policy, price fixation, grant or refusal of approval. Further, without such a proceeding in existence and without NTPC being a party in the present proceedings, any issue touching upon the validity of price fixation or price formula does not arise.

54) The price of $ 4.20/mmbtu is based on the formula approved by the Government under its powers pursuant to the

terms of the PSC. The policy of the Government is not under challenge or adjudication before the Court.

55) Mr. Gopal Subramanium, learned Solicitor General explained that up to early 1990s, prior to NELP and pre-NELP years, gas was being produced only from the fields operated by the Government companies, viz., ONGC and OIL, out of blocks which were given to these companies by the Government on nomination basis. Such gas was subjected to administered price regime. This was because, firstly, the fields were given on nomination basis and not on competition basis and secondly, to the Government companies which are subject to directions of the Government. Government, at that time, was guided primarily by the needs of the consumers who naturally liked to get the gas as cheap as possible. Therefore, the basis for Administered Price Mechanism (APM) pricing was cost-plus. Cost of production plus marginal profits as may be determined by Government was the sale price. Fields were given to Government-owned companies on nomination basis till early 1990s. There was, however, the problem of augmenting the production. Exploration and Production was at the core of

energy security and hence it was decided to open the fields to Private Sector investment. During mid-1990s, known as pre-NELP years, private investment was sought on competition basis and certain blocks were awarded to them under a Production Sharing Contract. The pricing formula was specifically mentioned in such contracts. This was a major departure from a cost-plus or APM regime. It was thought that without this, private investment will not take place. Pre-NELP regime was further improved to NELP regime. Sourcing of investment, technology and efficient operations from companies within the country and from outside on a level playing field with domestic public sector companies was the main feature of the NELP regime and, therefore, the 'arm's length' price, which is another name for market price, was introduced in the PSCs of NELP. Exploration and production of oil and gas is associated with considerable risk and no investment would have come if product prices were subjected to cost-plus or administered price regime. So, the NELP pricing regime provides for arm's length price which is another name for market price. But since the gas market is not fully

developed unlike markets for crude oil, it is stipulated in the PSC that there will be a formula or basis for the determination of the prices which shall be approved by the Government prior to sale and for granting this approval, Government can not be arbitrary but shall take into account the prevailing policy, if any, on pricing of natural gas, including any linkages with traded liquid fuels. The relevant PSC provisions in NELP-I which guide the pricing of KG D-6 gas, are as follows:

> "Article 21.6.1 – The Contractor shall endeavour to sell all Natural Gas produced and saved from the Contract Area at arms-length prices to the benefits of Parties to the Contract.
>
> Article 21.6.2 – Notwithstanding the provision of Article 21.6.1, Natural Gas produced from the Contract Area shall be valued for the purposes of this Contract as follows:
>
> (a) Gas which is used as per Article 21.2 or flared with the approval of the Government or re-injected or sold to the Government pursuant to Article 21.4.5 shall be ascribed a zero value;
>
> (b) Gas which is sold to the Government or any other Government nominee shall be valued at the prices actually obtained; and
>
> (c) Gas which is sold or disposed of otherwise than in accordance with paragraph (a) or (b) shall be valued on the basis of competitive arms length sales in the region for similar sales under similar conditions.
>
> Article 21.6.3 – The formula or basis on which the prices shall be determined pursuant to Articles 21.6.2 (b) or (c) shall be approved by the Government prior to the sale of Natural Gas to the consumers/buyers. For granting this approval Government shall take into account the prevailing

> policy, if any, on pricing of Natural Gas including any linkages with traded liquid fuels, and it may delegate or assign this function to a regulatory authority as and when such an authority is in existence."

It is further pointed out that in accordance with this approach, Government asked the Contractor to submit a formula on arm's length basis. EGOM was constituted by the Government of India in August, 2007 which looked into the pricing and utilization of gas in terms of the Government's rights and obligations under the PSC. RIL submitted a formula based on Arm's Length principle, having obtained quotations from users of gas. The proposal of RIL was examined by Committee of Secretaries (COS) and later by PM's Economic Advisory Council. EGOM, assisted by their views, approved a newly suggested formula with certain modifications, on 12/09/2007. The price formula approved by the EGOM which is to be applicable uniformly to all sectors is as follows:

Price (in US$ per mmbtu) = 2.5 + (Crude Price $^{0.15}$ – 25)

56) It is further pointed out that the said exercise was undertaken by the government on an independent application of mind and government differed from the Contractor and the

contractor relented leading to a lower price being fixed at $4.2 instead of $4.32 claimed by the contractor. This formula is valid for 5 years as per the EGOM decision. According to the formula, the price may vary between US $ 4.2 to US $ 2.5/mmbtu during a period of 5 years. With crude prices of US $ 60/barrel or more, the price will be US $ 4.2/mmbtu; for US $ 25/barrel, it will be US $ 2.5/mmbtu. The formula, thus, imposes a ceiling on gas price at US $ 4.2/mmbtu. EGOM also decided on gas utilization policy in May 2008 whereby the priority sector and consumers were decided.

57) It is also brought to the notice of this Court that EGOM consisted of the Chairman (External Affairs Minister), who was a very senior Minister in the Council of Ministers, Ministers of the consuming sectors (such as Fertilizer and Power), the Minister from producing Sector (i.e., Petroleum & Natural Gas), and the Ministers in charge of Ministry of Finance, Law and Corporate Affairs, besides Planning Commission.

58) The pricing formula/basis as per the PSC has to be:

a) Firstly on arm's length basis,

b) Secondly, to the benefit of the contractor as well as the Government;

c) Thirdly, having linkages with traded liquid fuels, and

d) Fourthly, Government will have to perform Regulator's function till one is appointed for the purpose.

59) The following table will indicate the pricing prevalent in India in respect of gases from other fields (excluding, of course, the gas from the Government companies' fields, which are at administered prices):

(in US$/mmbtu)

PMT (weighted)	5.51
Rawa	3.5
Rawa Satellite	4.3
Lakshmi	4.75
Weighted average	5.28

60) The fixation of price arose before the EGOM only in August, 2007 when the price formula was considered. As shown above, all prices prevailing in India and abroad indicated a price which was in the region of $ 4.2. The Contractor had asked the Government to approve it for RNRL in 2006, but the Government rejected it as it was a related

party transaction. 'Arms length sales' has been defined in **Article 1.8** of the PSC as follows:

> "Arms Length Sales" means sales made freely in the open market, in freely convertible currencies, between willing and unrelated sellers and buyers and in which such buyers an sellers have no contractual or other relationship directly or indirectly, or any common or joint interest as is reasonably likely to influence selling prices and shall, inter alia, exclude sales (whether direct or indirect, through brokers or otherwise) involving Affiliates, sales between Companies which are Parties to this Contract, sales between governments and government-owned entities, counter trades, restricted or distress sales, sales involving barter arrangements and generally any transactions motivated in whole or in part by considerations other than normal commercial practices."

61) Mr. Gopal Subramanium reiterated that the submissions made pertaining to the PSC are without prejudice to the stand of the Government vis-à-vis NTPC and also without prejudice to the submission that this Court is not called upon in the present proceedings to interpret the PSC.

62) In the case on hand, Price formula was approved by Government in September, 2007 when it was expected that gas would be produced from the basin in June, 2008. The utilization of 40 mmscmd of gas was decided upon in the months of May, 2008 in terms of sectors and units to which

gas would be supplied. As the production stabalized and further volumes of gas were known to become available, the government recently decided on the utilization of a further volume of 19.826 (+0.875) mmscmd on firm basis + 30.00 mmscmd on fallback basis in October, 2009. As emphasized earlier, it is up to the owner (the Government) to decide as to how to utilize the gas and at what price it can be sold and this has been done in accordance with Production Sharing Contract (PSC) which has a statutory basis. The PSC under Article 21.1 makes it clear that the Contractor is bound by the Government's policy for utilization of natural gas.

63) The position is that under Article 21.6.1 of the PSC, the gas must be sold at an arm's length price. Article 21.6.2 states that notwithstanding 21.6.1, if the gas is sold not to the Government or its nominee, it must be sold on the basis of "competitive arm's length sales in the region for similar sales under similar conditions". Importantly, Article 21.6.3 states that the basis on which such prices are to be determined shall be approved by the Government prior to the sale. In the present case, the formula submitted by RIL was looked into by

EGOM and examined by the Committee of Secretaries and PM's Economic Advisory Council. Due to this the price was determined to be $ 4.20, on the basis of the formula, price equivalent to 2.5 + (Crude Price-25)$^{0.15}$.

64) Another important consideration to be kept in mind is that the PSC overrides any other contract which may be entered into for the supply for gas. This principle flows from the following a) the natural resource, gas, is held by the Government and trust on behalf the people. Therefore, for legal purposes, the Government owns the gas till it reaches its final consumer; b) the PSC is the basis on which the contractor exercises his right over the supply of gas. Since it is the very basis of such a right, the contractor does not have the competent power to give any rights which do not accrue to it under the PSC.

65) One of the main purposes of the PSC is pricing and distribution of gas. Though there is "freedom of trade" within the PSC, but this freedom is exercised by the contractor through a transparent bidding process and non-interference of the Government in the administration of gas supply. As a

matter of policy also, the Government must be free to determine the valuation formula as well as the price. Therefore, keeping these considerations in mind, the Government's interpretation of the PSC as has been lucidly demonstrated by the learned Solicitor General is valid. Thus the Government has the power to determine valuation as well as price for the purpose of the PSC.

66) It is also relevant to answer a fundamental question that is whether the power of the Government under the PSC to determine the valuation as well as pricing is the selling price or is it the price only for the determination of the share of the Government or is it the price at which RIL must sell the gas to RNRL. The Division Bench of the High Court has held that even if the price is to be determined by the Government, there is no reason why RIL cannot sell the gas to RNRL at a lower price than that. This position is unsustainable for two reasons:

1) The power of the Government under the PSC is quite broad and includes the power to regulate the price and distribution of gas. Such a power requires

determination of price of supply and not only for the determination of the share of the Contractor but also for the Government. Thus keeping the objectives of the PSC in mind, it would not be possible to restrict the power of the Government.

2) The arrangement in pursuance of Clause 19 of the Scheme must be suitable for the shareholders of RIL as well. The position of RIL is that if gas is sold at $2.34 that is at a price lower than the one decided by the Government, there will be a disconnect between the actual amount which the Contractor will earn from the sale of gas and the amount which will be deemed to have been earned by the Contractor under the PSC. Due to this, the Contractor would be losing out on its own profits which RIL claims would be halved. It is also the grievance of RIL that the Court must take into account the fact that the PSC provides for the legitimate rights of the Contractor to earn certain profits. If these profits are reduced to such a degree, it would affect the interest of the shareholders of RIL.

3) On the other hand, the position of RNRL as argued before us is that the GSMA is not suitable for them because it was not a bankable contract and that the MoU is the suitable arrangement. The question remains whether the GSMA is unsuitable due to it not being a bankable contract or it reducing RNRL to a shell company.

BANKABLE CONTRACT:

67) The question of bankability has been argued in detail by RIL. Mr. Salve, learned senior counsel pointed out that GSMA cannot be considered a non-bankable contract. On behalf of RIL, it was pointed out that the question of bankability has to be seen in the context of the Power Project that would be and or should be promoted by the RNRL. There is no evidence whatsoever to show that financing of any power project was declined because gas supply arrangement was considered to be non-bankable. It bears emphasis that under the GSMA in respect of specific power projects, a GSPA qua that project would be entered into.

68) Normally, a banker financing a non-recourse project (i.e. a situation where the finance for the project can only be recovered from the project and not from the assets of the owner of the project beyond those of the project itself) would insist on full security not only from the physical assets but also from revenue streams (normally the sale price of electricity would be required to be put in escrow) as well as firm supply contract of scarce resources like coal supply or gas supply or other such valuable resources supply contract. The banker could assign this resource to some other liquid buyer and thereby recover its debt. Similarly, if the banker is unable to recover its debt because of the default by raw-material supplier (on which the project is based), the banker could directly recover the liquidated damages, in repayment of its debts from such raw material supplier. These are general features of "banker contracts".

69) RNRL's case is that the project being promoted require bankable contracts because they were "*non recourse projects*" i.e. these projects would be self sustainable project which were by themselves to be commercially and economically feasible

not requiring any support or guarantee from the parent i.e. no recourse to parent company in case of default. There is no such understanding either in the MoU or in the Scheme.

70) RIL facilitates for production of gas and REL's Dadri power plant was to be completed in the same time frame. When RIL has put its equity and also borrowed money and completed the project, RNRL is not even in initial stage of construction of its power project. Obviously to secure finance for a project RNRL would *inter alia* have to establish that gas was available for that project on suitable terms. For that purpose, RIL had proposed in the GSMA that it would enter into a specific gas supply contract that would have a definite tenure, definite price and definite quantity. The submission that the GSMA is not a bankable agreement has to be seen in this context.

71) It was pointed out by RIL that whether or not the contract is bankable is not a question of law but a question of fact. There are two ways to determine this, namely –

a) by way of fact evidence showing that banks/financial institutions/Funding agencies had

rejected the project on account of unsuitability of certain clause of GSMA; or

b) expert evidence suggesting that on the basis of such GSMA it could not be possible for RNRL to raise funds for the gas based power project.

72) It was further pointed out that RNRL has acted in furtherance of GSMA. It applied for grant of permission to lay pipelines on an assertion that the GSMA is a suitable and valid binding contract. In its letter dated 18th December, 2006 after filing of the petition RNRL sought Government's approval for laying pipeline. RNRL has acted under the price approval clause of the GSMA by seeking approval of the price of US $ 2.34. RNRL had also moved the Government for seeking approval of the price of US $ 2.34 by their letter dated 17th July, 2007.

73) While RNRL had all along been contending that for want of bankable gas supply agreement it could not establish a power plant including Dadri. In fact, money has already been raised $ 510 m for Dadri Plant by way of External Commercial Borrowings. This position was candidly accepted by RNRL.

Reliance Power Ltd., the company that is now promoting Dadri has raised Rs.11000 crores from the public. The shortage of funds is an excuse – it is simply not true.

74) Furthermore, according to RIL, it is a fact that other gas based power plants has been set up in the country without having any long term supply of gas contrary to what is being alleged by RNRL. It is, therefore, submitted that the contention that GSMA is not a bankable document is without any factual basis.

75) RNRL has enumerated the following main elements which have, according to them, resulted in the agreement being not bankable :-

1. Price- price of US $ 2.34 wrongly subjected to government approval
2. Term- as per the formula (clause 3b) given in the GSMA, the term of supply comes to be just 1 to 4 years instead of 17 years. Whereas the NTPC contract contains a clear period of 17 years.

3. Quantity- as per the formula in clause 3.1 (c) of the GSMA, RNRL would receive only 6 MMSCMD of gas instead of 28 even if the total production is 38.

4. Capping of liability- clause 14.3 (i) of the GSMA limits the liability of the seller i.e. RIL to maximum of 6 months only.

5. By quoting clause 13.8 and 13.9 of the GSMA submitted that as a result of these clauses if the government does not accept the price which is the basis for determination of the government's share in Profit petroleum under the PSC, the GSMA then will stand annulled.

76) In view of all these arguments and counter-arguments regarding the unsustainability of the arrangement under the GSMA, we hold that it is not proper for the court under Sections 391-394 to make modifications of this nature in the Scheme. These changes must be arrived at by the parties themselves through negotiation. Furthermore, we hold that such negotiations must be done within the ambit of the Government policies, including the over-riding effect of the

PSC (including the Development Plan under Article 10.7), EGOM decisions and other related national policies.

(E) <u>ROLE OF GOVERNMENT:</u>

77) Though in the earlier part, we have adverted to certain aspects about the government's role since the above issue is relevant for disposal of the dispute between the two entities, it would be beneficial to once again narrate certain facts and decide the issue.

78) In 1999, NELP announced to award petroleum blocks for exploration, development, production of petroleum and natural gas. RIL with NIKO were the successful bidders for block KG-D6. Pursuant to the same, the government and the contractor (RIL & NIKO) entered into a Production Sharing Contract (PSC). In 2002, RIL & NIKO announced discovery of significant result from KG-D6 block.

79) In 2003, NTPC floated a global tender for supply of gas to their power projects. RIL succeeded in its bid to sell, transport and deliver 132 Trillion British thermal unit (TBtu) or 1000000 MMBTU. NTPC confirmed the same on 16th June 2004. In a board meeting of Reliance Energy Limited (REL) held in 2004

which was attended by Mukesh Ambani and other members of RIL recorded that gas from KG basin would be supplied for the power projects of REL. In 2005, MoU was arrived at by both the parties and Anil Ambani resigned as a Joint Managing Director of RIL. Thereafter, a scheme of arrangement was moved and the companies decided to move Bombay High Court for sanction of the scheme of demerger. The High Court approved the scheme. The scheme provided that an appropriate gas supply arrangement will be entered into between RIL and RNRL.

80) The learned Company Judge in his order has concluded that the GSMA is not in terms of the scheme. MoU is binding on both parties. The terms as mentioned in MoU and GSMA need to be suitable for both the parties subject to government policies and national and international practice in supply of gas or such other products. The Company Judge further said that such a contract is subject to government's approval in view of NELP & PSC, but keeping in view the several factors including freedom and right to the contractor/RIL and the

limited and restricted scope of interference in such commercial aspects, unless, it is breach of any public policy or interest.

81) When the matter was taken up before the Division Bench, the Division Bench had permitted the Union of India to join as intervener in the appeals for the limited purpose of assisting the court in the matter relating to Production Sharing Contract between the union and the RIL with particular emphasis to Article 21 of the contract as the Division Bench was of the view that the pricing and distribution of gas has far reaching consequences.

82) Before the Division Bench, on behalf of the Union of India, it was submitted that India has been facing a chronic shortage of natural gas due to demand and paucity of supply. Under NELP, the government has given contractors the freedom to market gas as well as oil in India in accordance with the terms and conditions provided in the PSCs. This freedom is not absolute and certain restrictions have been imposed upon viz; the prices at which the sale takes place have to be arms-length prices and are subject to approval by the government. The gas can only be sold in accordance with

the government approved price formula and the approved gas utilization policy. The stand of the government was that the Government of India continues to be the owner of the gas till the delivery point. It was further pointed out that by private negotiations no party can decide as to how natural resources which are national assets vesting in the Government of India are to be dealt with and that the price which has been arrived at is binding on the contractor and no party can raise a challenge regarding the same in a company petition.

83) The Division Bench, by the impugned order, has concluded the terms as mentioned in the MoU and GSMA need to be modified suitably for both the parties subject to the government's policies and national, international practice in supply of gas and such other products. The contract of such nature is subject to government's approval in view of NELP and PSC and such related government policies, but keeping in view the several factors including the freedom and the right of the contractor/RIL and the limited and restricted scope of interference in such permissible commercial aspects of the contractor, unless, it is in breach of any public policy and

public interest. As regards the tenure of the gas supply, the Division Bench observed that the MoU clearly carves out that the NTPC supply agreement would be a general guidance for the same and shall as far as possible be the basis for such contracts and the terms of such contracts will be no less favorable than those of NTPC contract. The NTPC contract clearly provides 17 years as the period for which RIL will supply gas. With regard to the price at which the gas has to be supplied to REL for all its projects including its affiliates would be subject to and under the terms of production Sharing contract which REL has entered with the ministry of petroleum and NIKO resources limited on 12th April, 2000. In terms of article 21.6.3 the contractor shall be at the liberty to market the gas but then the same will have to be regulated on the basis of formula on which the price shall be determined pursuant to articles 21.6.2 (b) and (c) to be approved by the government prior to the sale of natural gas to the consumer/buyer. The Division Bench has made it clear that there is no specific provision under the production sharing contract to prevent the contractor to sell the gas at lesser price

than what is fixed by the government for valuation of gas to the extent of its share and further observed that that the contractor has freedom to sell gas at arm's length prices to the benefit of the parties to the production sharing contract out of their share of Profit gas to which art. 21.6 Of the PSC applies.

84) It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the Public Trust Doctrine (PTD). Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application.

85) Constitution Bench of this Court in ***Association of Natural Gas v. Union of India*** **(2004) 4 SCC 489**, while quoting ***Re: Cauvery Water Dispute Tribunal*** AIR 1992 SC 522 held that:

> 45. In ***Re: Cauvery Water Dispute Tribunal*** **(Supra)** the right to flowing water of rivers was described as a right 'publici juris', i.e. a right of public. So also the people of the entire country has a stake in the natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development. If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share. This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that

> "natural gas' is included in Entry 53 of List I. Thus, the legislative history and the definition of 'petroleum', 'petroleum products' and 'mineral oil resources' contained in various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States - all these factors lead to the inescapable conclusion that "natural gas" in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union.

With relation to the Public Trust Doctrine, this court in ***M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388** held:

> 17. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit then- use for private ownership or commercial purposes.
>
> 27. Our legal system-based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the Government to

provide complete protection to the natural resources as a trustee of the people at large.

86) RIL's right of distribution is based on the PSC, which itself is derived from the power of the Government under the constitutional provisions. Thus the very basis of RIL's mandate is the constitutional concepts that have been discussed by now, including Article 297, Articles 14 and 39(b) and the Public Trust Doctrine. Therefore, it would be beyond the power of RIL to do something which even the Government is not allowed to do. The transactions between RIL and RNRL are subject to the over-riding role of the Government.

87) It is relevant to note that the Constitution envisages exploration, extraction and supply of gas to be within the domain of governmental functions. It is the duty of the Union to make sure that these resources are used for the benefit of the citizens of this country. Due to shortage of funds and technical know-how, the Government has privatized such activities through the mechanism provided under the PSC. It would have been ideal for the PSUs to handle such projects exclusively. It is commendable that private entrepreneurial

efforts are available, but the nature of the profits gained from such activities can ideally belong to the State which is in a better position to distribute them for the best interests of the people. Nevertheless, even if private parties are employed for such purposes, they must be accountable to the constitutional set-up.

88) The statutory scheme of control of natural resources is governed by a combined reading of the Oil Fields (Regulation and Development) Act, 1948; the Petroleum and Natural Gas Rules, 1959; and Maritime Zones Act.

89) As pointed out earlier, the proper interpretation of PSC gives the power to the Government not only to determine the basis of valuation of gas, but also its price. According to Article 21 of PSC, before the contractor sells the gas, the price of such gas must be approved by the Government.

90) It has been argued by RNRL that the decision of the EGOM (Empowered Group of Ministers) does not apply to the rights of RNRL under the Scheme. This argument is based on the text of the decision which states that the pricing decided upon by EGOM is "without prejudice" to the rights of the

parties in the two cases pending before the Bombay High Court, i.e. RIL v. NTPC and RIL v. RNRL. This is contested by both the Government and RIL. This position of RNRL is unsustainable. As pointed out by RIL the right interpretation of "without prejudice" in the EGOM decision is that even though EGOM intended it resolution on pricing to apply to RNRL, it left the question of the rights of the parties accruing from the MoU, the Scheme or the interpretation of PSC to the court. In other words, the court is to determine whether the Government has the power to determine the valuation and pricing of the gas. This determination by the court is not affected by the EGOM decision, as it would depend solely on the interpretation of the provisions of the PSC itself. But once it is determined that the Government does have the power to determine the price of gas, EGOM's decision regarding the price would be applicable. The same goes for the general gas utilization policy and the policy of the Government with regard to pricing. Therefore, once the PSC is read to give power to the Government to determine the price of gas, these policy statements will be applicable.

91) From the above analysis, the following are the broad sustainable conclusions which can be derived from the position of the Union:

1) The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest.

2) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatize some of its functions. For this reason, the constitutional restrictions on the government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests.

3) The broader constitutional principles, the statutory scheme as well as the proper interpretation of the PSC mandates the Government to determine the price of the gas before it is supplied by the contractor.

4) The policy of the Government, including the Gas Utilization Policy and the decision of EGOM would be applicable to the pricing in the present case.

5) The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas.

92) **Summary of our conclusions:**

A. Question of Maintainability of the Company Application

RNRL filed an application under the Companies Act arguing that GSMA put in place by RIL does not satisfy the Scheme of demerger. The Scheme under question was approved by the Company Court on the previous occasion under Sections 392 and 394. Therefore, contrary to RIL's argument, Sections 392 and 394 are applicable.

Further, the power of the court under Sections 391 to 394 of the Companies Act is wide enough to make necessary changes for working of the Scheme. This power is specific to the facts and circumstances of the case at hand. Nevertheless, this power does not extend to making any substantial or substantive changes to the Scheme.

Therefore, the Company Court enjoys jurisdiction to entertain the application under Sections 392 and 394 of the Companies Act.

B. Binding Nature of the Memorandum of Understanding

The MoU was signed as a private family arrangement or understanding between the two brothers, Mukesh and Anil Ambani, and their mother. Contents of the MoU were not made public, and even in the present proceedings, they were revealed in parts. Clearly, the MoU does not fall under the corporate domain - it was neither approved by the shareholders, nor was it attached to the scheme. Therefore, technically, the MoU is not legally binding.

Nevertheless, cognizance can be taken of the fact that the MoU formed the backdrop of the Scheme, and therefore, contents of the Scheme have to be interpreted in the light of the MoU.

C. Considerations to determine "suitable arrangement" under Clause 19 of the Scheme.

"Suitable arrangement" under clause 19 of the Scheme must not be merely suitable for RIL. It has a broader meaning. Such

an arrangement must be suitable for the interests of the shareholders of RNRL as reflected by the MoU, and RIL; the obligation of RIL under the PSC; the national policy on gas including the decisions of EGOM and the Gas Utilization Policy; and the broader national and public interest.

D. Proper Interpretation of the PSC

The objective of the PSC *inter alia* is to regulate the supply and distribution of gas. Keeping this objective in mind, Article 21 of the PSC must be interpreted to give the power to the Government to determine both the valuation and price of gas. It is not feasible to restrict the power of the Government in such matters of national importance, especially when the governing contract, the PSC, also provides for it.

E. Role of the Government

In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer.

A mechanism is provided under the PSC between the Government and the Contractor (RIL, in the present case). The PSC shall over-ride any other contractual obligation between the Contractor and any other party.

F. Relief

a) Though the Contractor (RIL) has the marketing freedom to sell the product from the contract area to other consumers, this freedom is not absolute. The price at which the produce will be sold to the consumer would be subject to government's approval. The tenure of such contracts can't be such that it vitiates the development plan as approved by the government. Therefore, the GSMA and the GSPA entered into with RNRL should fix the price, quantity and tenure in accordance with the PSC.

b) The EGOM has already set the price of gas for the purpose of the PSC. The parties must abide by this, and other conditions placed by the Government policy. The GSMA/GSPA deeply affects the interests of the shareholders of both the companies. These interests must be balanced. This balance cannot be struck by the court as the court does not have the

power under Sections 391-394 to create new conditions under the scheme. In view of the same, RIL is directed to initiate renegotiation with RNRL within six weeks the terms of the GSMA so that their interests are safeguarded and finalize the same within eight weeks thereafter and the resultant decision be placed before the Company Court for necessary orders.

c) While renegotiating the terms of GSMA, the following must be kept in mind:

1) The terms of the PSC shall have an over-riding effect;
2) The parties cannot violate the policy of the Government in the form of the Gas Utilization Policy and national interests;
3) The parties should take into account the MoU, even though it is not legally binding, it is a commitment which reflects the good interests of both the parties;

d) The parties must restrict their negotiations within the conditions of the Government policy, as reflected *inter alia* by the Gas Utilization Policy and EGOM decisions.

93) With the above directions/observations, all the appeals and I.A. No.1 are disposed of. No order as to costs.

.....CJI.
(K.G. BALAKRISHNAN)

.....J.
(P. SATHASIVAM)

NEW DELHI,
MAY 7, 2010.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4273 OF 2010
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NO. 14997 OF 2009

RELIANCE NATURAL RESOURCES LTD. ....APPELLANT

VERSUS

RELIANCE INDUSTRIES LTD. .....RESPONDENT

WITH

CIVIL APPEAL NO.4274 OF 2010
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NO. 15033 OF 2009

RELIANCE NATURAL RESOURCES LTD. ....APPELLANT

VERSUS

RELIANCE INDUSTRIES LTD. ....RESPONDENT

WITH

CIVIL APPEAL NOs. 4275-4276 OF 2010
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NOs. 15063-64 OF 2009

RELIANCE INDUSTRIES LTD. ....APPELLANT

VERSUS

RELIANCE NATURAL RESOURCES LTD. ....RESPONDENT

WITH

CIVIL APPEAL NO. 4277 OF 2010
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NO. 18929 OF 2009

UNION OF INDIA ....APPELLANT

VERSUS

RELIANCE INDUSTRIES LTD. & ANR. ....RESPONDENTS

WITH

I.A. NO. 1

IN

CIVIL APPEAL NOs.4280-4281 OF 2010
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) Nos.14414-14415/2010
@ CC 16126-16127 OF 2009

VISHWESHWAR MADHAVRAO RASTE ....APPELLANT

VERSUS

RELIANCE INDUSTRIES LTD. & ORS. .....RESPONDENTS

JUDGMENT

B. SUDERSHAN REDDY, J.

I.A. No. 1 for permission to file Special Leave Petition is allowed.

2. We grant special leave and proceed to dispose of all the appeals.

PART I

PROLOGUE

"Jus publicum privatorum pactis mutari non potest."

Public law cannot be changed by private pacts.

- Digest of Justinian

> *"Political democracy cannot last unless there is at its base social democracy…. On the social plane, we have in India a society based on the principle of graded inequality, which means elevation of some and degradation of others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty…. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up"*.

3. Those who know the Constitutional history of India recognize the above to be the wise words of Dr. Ambedkar, one

of our founding fathers. Those who are concerned about the welfare of our people, and the future of our nation, his second warning will always be a matter of intense intellectual disquiet: *"Indeed if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."* It is never enough to have a written constitution. We need people who, in the course of working the Constitution, to borrow a memorable phrase from Granville Austin, will exhibit qualities of great integrity and a deeply felt ethical urgency to ameliorate the social and economic conditions in which our people live and suffer. That obligation arises from the very politico-constitutional ideals and structures upon which the State has been formed and the future of the nation premised. In disputes such as the one before this Court, the lens of the Constitution has to be used to examine the implications with respect to achievements of such ideals and the strength of our institutions. The power that is vested in the State, and exercised by its agents, is the power of all the people and not just of those with great wealth and status. The vesting of such powers is an act of faith and of trust, two qualities that are to be earned, sustained and nurtured.

Continuance of such faith and trust undoubtedly depends, in the least, on the belief that people have that such powers are being exercised to further the Constitutional goals. To the extent that the people begin to believe that their faith and trust were misplaced, and that their collective powers are being improperly used for the benefit of the few, as opposed to being used for public welfare and interests, one may reasonably conclude that at least the effective functioning of the State would have been compromised. Those with knowledge of history, and an inclination to learn from, it would necessarily be concerned about the situation today and potential consequences in the future. For them the words of Dr. Ambedkar would appear to be prescient and wise.

4. The wisdom of the ages, garnered through eons of humanity's collective struggles to find for all a life of dignity and fraternity – a dignity that arises from and is informed by liberty, equality, and justice in all walks of life and a fraternity that seeks to promote such dignity for all is the fire in which the Constitution of India has been forged. The very structure and text of the Constitution, when viewed through the lens of history

and the working of the instrument itself, clearly demonstrates that it crystallizes collective human wisdom in its triadic ethical foundations. Those foundations are: (i) the Preamble that soars in eloquence in its articulation of collective human aspirations as national goals and sets out the raison d'etre for the nation itself; (ii) the Fundamental Rights, that provide various necessary freedoms for the individuals and social groups, and places upon the State certain affirmative obligations to eliminate those institutional and socio-economic conditions limiting such freedoms, so that all can strive towards the achievement of the goals set forth in the Preamble; and (3) the Directive Principles of State Policy, fundamental to governance and necessary for the achievement of all round socio-economic development so that the goals of the Preamble can be secured, and the effective exercise of the Fundamental Rights by all can be ensured.

5. It was recognized early in our struggle for freedom that, as India awakens politically an explosive situation could develop if the contradictions were not resolved soon. Thus, it was felt that the State ought to play a key role in ensuring that all the people are assured, a life informed by liberty, equality, justice

and fraternity, so that their dignity, as individuals and as social beings, can be secured. To this effect, the State has been given the powers to place reasonable restrictions even on the Fundamental Rights of the individuals for the achievement of broader good for all, the powers to enact socio-economic legislation to effectuate re-distribution of wealth and ensure equitable access to material resources and to frame policies that ameliorate the harsh consequences of the civil and the market spheres of social action that people participate in. Where such power is vested in trust by the people, it implies, as a necessary corollary, a trust that such powers will be fully used to further the Constitutional goals within the four corners of Constitutional permissibility. Availability of such powers to use, in a practical sense, implies that those powers have not been abjured or derogated from.

6. The dawn of independence evoked much hope; and also much anxiety, especially amongst scholars and observers from the West, about the feasibility of the experiment of India as a Constitutional democracy. Yet, in our seventh decade of freedom and the sixtieth year of constituting ourselves as a

Sovereign, Socialist, Secular, Democratic Republic, it is apparent that we have survived, and indeed by and large flourished as a political democracy. In part, this was surely on account of the great moral integrity and wisdom that our founding fathers and early political leadership brought to the table, and the efforts they put in towards building the institutions of our democracy. Additionally, credit must also go to the socio-political and economic policies initiated and implemented, of course with varying degree of success and failure, for sustaining the hope that the promises enshrined in the Constitution are at least being sought to be achieved. However, a much larger measure of credit ought to go to the people: those people who turn up in ever larger numbers to the voting booths and continue to retain trust in the basic principles of democracy, notwithstanding their abysmal lot in life. Yet, when the State attempts to alleviate just a part of the burden of their continued dehumanized condition, such attempts are decried as populist by the elite of this country.

7. So, willy-nilly, we come back to the question asked by Dr. Ambedkar: how long will our people bear the contradictions of endemic and gross inequalities? An aspiring and youthful

population can be a great boost to the economy and the society. It would be tautological to state that the GDP would grow rapidly with a larger proportion of the people in the productive phases of their lives. But, the same youth unemployed or underemployed, malnourished and without the capacity or hope to lead or achieve a dignified life, can be the most dangerous of all forces.

8. A small portion of our population, over the past two decades, has been chanting incessantly for increased privatization of the material resources of the community, and some of them even doubt whether the goals of equality and social justice are capable of being addressed directly. They argue that economic growth will eventually trickle down and lift everyone up. For those at the bottom of the economic and social pyramid, it appears that the Nation has forsaken those goals as unattainable at best and unworthy at worst. The neo-liberal agenda has increasingly eviscerated the State of stature and power, bringing vast benefits to the few, modest benefits for some, while leaving everybody else, the majority, behind.

> *"… these global imbalances are morally unacceptable and politically unsustainable."*[1] *(emphasis added).*

9. We have heard a lot about free markets and freedom to market. We must confess that we were perplexed by the extent to which it was pressed that contractual arrangements between private parties with the State and amongst themselves could displace the obligations of the State to the people themselves. Judge Richard Posner, one of the doyens of the free market ideology and responsible for building the intellectual foundations of the neo-liberal segments of the law and economics jurisprudence, had this to say about the recent global financial crisis and it is worth quoting him *in-extenso*:

> *"Some conservatives believe that the depression is the result of unwise government policies. I believe it is a market failure. The government's myopia, passivity, and blunders played a critical role in allowing the recession to balloon into a depression, and so have several fortuitous factors. But without any government regulation of the financial industry, the economy would still, in all likelihood, be in a depression. We are learning from it that we need a more active and intelligent government to keep our model of capitalist economy from running*

1 Quoted in Joseph Stiglitz, Making Globalization Work: The Next Steps to Global Justice, p. 8, Allen Lane (2006).

> *off the rails. The movement to deregulate the financial industry went too far by exaggerating the resilience—the self-healing powers—of laissez-faire capitalism*".[2]

10. History has repeatedly shown that a culture of uncontained greed along with uncontrolled markets leads to disasters. Human rationality, with respect to pursuit of lucre, is essentially short run. So long as there appear to be possibilities of making profits, especially windfall profits, the fears that the competitors would reap them will drive businesses into taking greater and greater risks; in fact, even by self-enforcement of blindness to the potential for market collapse. To say that it was a failure of regulation is trite. Markets failed because regulation had practically ceased to exist. Finally veering around to the view that regulation of markets is absolutely essential, after spending a lifetime arguing for the opposite, and noting that the capacity for self-regulation was highly over-rated, Judge Posner in his own inimitable manner says:

> "*If you're worried that lions are eating too many zebras, you don't say to the lions, 'You're eating too many zebras'. You have*

2 Richard A. Posner: "A Failure of Capitalism: The Crisis of '08 and the Descent Into Depression", p. xi. Harvard University Press (2009).

> *to build a fence around the lions. They're not going to build it.*"[3]

11. Historically, and all across the globe, predatory forms of capitalism seem to organize themselves, first and foremost, around the extractive industries that seek to exploit the vast, but exhaustible, natural resources. Water, forests, minerals and oil - they are all being privatized; and not yet satisfied, the voices that speak for predatory capitalism seek more, ignoring the lessons from history and current experiences. One of the lessons of history is that, barring a few, most of the countries endowed with vast and easily exploitable natural resources have fared far worse than those with smaller endowments, on almost every social and economic indicia. As Joseph Stiglitz points out:

> *"[T]here is a curious phenomenon….. 'resource curse.' It appears, that on average, resource rich countries have performed worse than those with smaller endowments – quite the opposite of what might have been expected……..[B]ut even when countries as a whole have done fairly well, resource rich countries are often marked by large inequality: rich countries with poor people…. [T]wo-thirds of the people"* in an oil rich country that is also a member of a global oil producing countries group *"live in poverty as*

3 Richard A. Posner, ibid.

> *the fruits of the country's oil bounty go to a minority…… These puzzles cry out for an explanation, one that will allow countries to do something to undo the resource curse….. We understand in particular that much of the problem is political*[4] *in nature……. [W]hen compared to countries dependant on the export of agricultural commodities, mineral and oil exporting countries suffer from unusually high poverty, poor health care, widespread malnutrition, high rates of child mortality, low life expectancy, and poor educational performance – all of which are surprising findings given the revenue streams of resource-rich countries."* [5]

12. We draw attention to this problem, because, even though it is often associated with those countries that depend mostly on earnings from export of natural resources, similar effects can also arise from activities within the domestic economy. Take the case of India itself. We cannot by any stretch of imagination claim that we are a resource poor country. Yet, as we cast a glance across the face of our land, the greater incidence of social unrest, and movements for greater self determination, seem to occur by and large in states and regions that have plenty of natural wealth and paradoxically suffer from low levels of human development. We hasten to add that we are

4 The word political is being used in a technical sense to denote the state and all of its institutions, rather than merely political parties or to denounce the normative desirability of democratic political processes.

5 Joseph E. Stiglitz, Making Natural Resources into a Blessing rather than a Curse, in "Covering Oil" Ed. Svetlana Tsalik and Anya Schiffrin, Open Society Institute (2005), p. 13-14.

not suggesting that absence of resources would lead to a better situation. Rather, it is to point out that the problems arise because exploitation of those resources occurs without appropriate supervision by the State as to the rates of exploitation, equitable distribution of the wealth it generates, collusions between the extractive industry and some agents of the State and the consequent evisceration of the moral authority of the institutions of the State.

13. The crux of the problem is, as Prof. Terry Lynn Karl says:

> *"….utilizing petroleum wealth effectively is not easy…… Because the institutional setting is generally incapable of dealing with economic manifestations of resource curse, it ends up transforming them in a vicious development cycle or "staple trap."*[6]

14. One would have expected, that with the resources being owned by the people as a nation, it would be the State public institutions that would actually operate the extraction industry. For a few decades that was the case, and it was beset by problems of administrative apathy and even pilferage. Over

6 Terry Lynn Karl "Understanding the Resource Curse" in Covering Oil (Open Society Initiative, 2005).

the past two decades vast tracts of Nation's resources have again begun to be licensed for exploitation by private parties. Be that as it may, it must be emphasized that the on going process cannot dispense with the role to be played by the State. Strong State institutions are even more necessary when we are dealing with Nation's resources and we allow contractors to exploit them.

15. The law is for the benefit of the people. Even where it does not work in its full measure all the time, the public nature of law is still capable of exerting moral authority and bringing comfort to the people. But, when law is pushed into unseen categories, effectively hidden from public gaze, it raises suspicion - especially when it purports to deal with the collective resources of the people. When the threshold of public scrutiny is crossed, it raises vital issues regarding our continued fealty to democratic values, constitutionalism, accountability, transparency and the rule of law. Jody Freeman and Martha Minnow write:

> *"[T]he primary concern, voiced in recent years by critics in public policy circles and in academia, is that the ubiquity of governance by private contractors strikingly outstrips our legal and political capacities of oversight meant to ensure that the contractors'*

execution of those governmental functions complies with democratic norms."[7]

16. We are not saying that markets have no role to play in a developing economy or that private initiative be suppressed and that all markets are essentially and only tools for expropriation and continuance of social injustices. We are stating that our Constitution posits that markets can be inimical to social justice, especially when left unregulated. Laissez faire market is a myth and it is, as Prof. Cass Sunstein points out:

"….a grotesque misdescription of what free markets actually require and entail. Free markets depend for their existence on law…… moreover, the law that underlies free markets is coercive in the sense that in addition to facilitating individual transactions, it stops people from doing many things they would like to do. This point is not by any means a critique of free markets. But it suggests that markets should be understood as a legal construct, to be evaluated on the basis of whether they promote human interests, rather than as a part of nature and the natural order….. markets are a tool, to be used when they promote human purposes, and to be abandoned when they fail to do so… Achievement of social justice is a higher value than the protection of free markets; markets

7 Government by Contract: Outsourcing And American Democracy, Ed. Jody Freeman and American Democracy.

are mere instruments to be evaluated by their effects."[8]

17. The Constitution of India postulates that monopolies, created by an inequitable distribution of resources and their concentration in the hands of the few, are inimical to democracy and the values of equality and justice in all spheres of social action. They were the lessons of history. While large economic organizations might be necessary to accomplish certain kinds of tasks, it is imperative that the State always be watchful that they do not take over the essential functions of the State, especially of policy formulation. In its dealings with such entities, the State should always be mindful that it does not convey that its public law duties could be bought or abrogated in any manner.

18. One may ask why in a Company Petition such a discussion of constitutional values has had to come about. Such is the nature of the dispute itself. The Company Petition, and the Scheme of Arrangement that it arises from, ostensibly, are to be dealt under Sections 391 through 394 of the Companies Act; but, involve at their foundations, a claim by Reliance Natural

8 Cass Sunstein: Free Markets and Social Justice (Oxford University Press, 1997)

Resources Limited that it is entitled to receive, on account of a private pact between members of the Ambani family, vast quantities of natural gas, amounting to a significant portion of what would be available for the entire country, at a low price and for a long time, de-hors any policy made by the Government of India. It claims that the GoI has a right to enter into and has actually entered into a contract that allows, Reliance Industry Limited to produce and decide how to use a precious and a scarce natural resource belonging to the people of this nation without any governmental supervision. Further, RNRL also claims, that its vested interest in such vast quantities of natural gas is such, that subsequently framed governmental policy cannot have a bearing on such an entitlement irrespective of public interest implications.

19. Apart from the above, this particular case also implicates aspects of accountability of members of the managements of corporations, who are also promoters and powerful shareholders, to the Board of Directors and other shareholders. One of the principal claims of RNRL in this case is that a private pact between the family members of the Ambani

family can bind the Board and the Company, in the context of reorganization of the company without the shareholders having any knowledge of the extent of value that is actually likely to be demerged, even if such likely value runs into many thousands of crores of rupees and possibly hundred fold more than the assets and liabilities that were actually shown as being demerged in the Scheme document placed before the shareholders.

20. For a long time now, it has been well recognized that the modern industrial and post-industrial corporations control such a large extent of economic and social spheres that their activities necessarily have a wide and pervasive impact on the lives of most of the people of the country. We recognize that, in many normal instances, when issues of public interest are not apparent on the face of the record, then a Company Petition is normally, and rightly, treated as a matter of corporate law. However, when the conflict involves the right to use vast swaths of a national natural resource that is owned by the people, public law is necessarily implicated to a small or a large extent. Further, when publicly listed companies, with many millions of shareholders of ordinary people, do not reveal the full extent of

value that is to be transferred, it would obviously implicate the broader principles of corporate law.

21. That is why we began this section with an epigraph, *"Jus publicum privatorum pactis mutari non potest"* from the Digest of Justinian. Natural Gas belongs to the people of India, and vests in the Union of India, to be held for the purposes of the Union. The Constitution of India commands the Government to frame policy to prevent the distribution of such resources in a manner that may be inimical to national development. Ultimately, the residual owners of a company are its shareholders, and they have a right to know what is happening to the company and its assets, including assets by way of contractual rights, so that they can take an informed decision about a proposal that is put up for their consideration. For the past three hundred years of evolution of corporate law, the principal theme has been the protection of those who give their wealth and resources in trust to a company. Managements and Board of Directors of companies have a fiduciary responsibility to the shareholders, and neither the processes nor the substantive objectives of protection of the shareholders can be derogated from.

22. A number of acronyms have been used in this judgment. A glossary is annexed herewith for referral.

23. It is with the above observations we shall now proceed to consider the facts and the issues that arise for our consideration.

PART II

THE FACTUAL MATRIX

24. In April 2000, a consortium of companies, Reliance Industries Limited and NIKO, together forming the Contractor, entered into a Production Sharing Contract with the Union of India to explore for and produce Petroleum, which includes both crude oil and natural gas as applicable, in a block KG-DWN-98/3, located off the eastern sea shore of Andhra Pradesh. This block has been referred to as KG-D6 by the parties and we shall adopt that nomenclature; however, the judgment and decision shall be understood as being applicable to the entire KG-DWN-98/3 block.

25. In 2002, RIL announced the discovery of a very large reservoir of natural gas in KG-D6. In the same year Shri.

Dhirubhai Ambani, the founder of RIL, passed away and subsequently the management of RIL was led by Mukesh D. Ambani, the elder son, as the Chairman and Managing Director and Anil D. Ambani, the younger son, as the Vice-Chairman and Joint Managing Director. On May 21, 2003, RIL submitted its conclusions to GoI that the reservoir discovered was a commercial discovery, which was subsequently certified to be so by GoI on 10.01.2004.

26. In May 2004, RIL submitted to the Management Committee of the PSC an Initial Development Plan, *inter-alia*, describing the nature of the discovery, the potential extent of natural gas that could be extracted, the kind of infrastructure and expenditure necessary for the same, and the potential market for natural gas in India. It was stated that natural gas produced from KG-D6 could be used by entities operating in the power and fertilizer sectors located in Andhra Pradesh, Maharashtra, Karnataka, Gujarat and Uttar Pradesh. It was stated that such users could use up to 82 MMSCMD of natural gas. It was also stated that NTPC's demand could be as much as 17 MMSCMD. The production of natural gas was projected to be possibly 40

MMSCMD and that it could go up to 80 MMSCMD a few years later. It was also stated that natural gas supply in India was highly constrained and the short fall had led to many units that use natural gas as a fuel or feedstock being stranded. RIL also stated that it expected to be the exclusive agent for selling natural gas produced from KG-D6. This Initial Development Plan was approved by the Management Committee of the PSC in November 2004. The GoI issued a Petroleum Mining Lease with respect to KG-D6 on 02.03.2005.

27. In the meantime, in mid 2003 RIL bid in response to an international tender floated by the National Thermal Power Corporation and won the bid on the substantial terms that it would supply 12 MMSCMD, for seventeen years, at a well head price of USD 2.34/mmBtu, plus transportation and marketing charges for a total of USD 3.18/mmBtu at the Delivery Point at Kakinada. Negotiations began to execute a full fledged gas supply and purchase agreement and various drafts were produced, including the drafts of May, 2005 in which governmental approvals were stated to be required for RIL to supply natural gas to NTPC.

28. From the record it is also clear that between 2002 and 2005 various discussions were conducted in RIL and the Reliance Group about using the natural gas that was likely to be produced from KG-D6, to support various internal business divisions and undertakings, such as petro-chemicals, captive power plants, the power plant of Reliance Patalganga Power Limited and power plants to be set up by Reliance Energy Limited. An announcement was made that a 3500 MW power generating plant was to be set up in Dadri, Uttar Pradesh using natural gas.

29. On July 27, 2004, in a Board Meeting of RIL it was decided that, in light of the fast emerging opportunities and exigencies and to facilitate quick response, all the powers of the Board be vested in MDA except those powers that the Board was required, by the Companies Act, 1956 and the Articles of Association, to retain. This exacerbated an already festering dispute between the two brothers, necessitating the intervention of their mother, Smt. Kokilaben D. Ambani leading to a Memorandum of Understanding, dated June 18, 2005, that was drafted with the help of lawyers and marked strictly confidential. Only a portion of the MoU was placed on record in the later

stages of proceedings before the Division Bench. It is an admitted fact that it has been executed by and between the mother and her two sons only.

30. The MoU provided that - with disputes between the brothers, the other matters of family assets, and interests in various businesses being settled - the best way forward would be by way of a scheme of reorganization in which the energy producing, financial services and the telecommunications divisions were to be demerged to the ADA Group for ownership and control. The remaining divisions were to be with the MDA Group, including petroleum exploration and production division. The MoU specifically provided that the approvals of statutory and regulatory bodies, the shareholders and the boards of Directors of various companies would be conditions precedent for operationalising the reorganization. It was also specifically stated that personnel of both MDA Group and ADA Group would participate in the process of preparation of the Scheme so that their mutual interests could be protected. It was also agreed that the same lawyer who drafted the MoU would also draft the Scheme.

31. In addition, the MoU also had a section titled "Gas Supply" in which it was provided that, from all P1 reserves of existing and any future gas fields from which RIL may produce natural gas: (i) 12 MMSCMD would be supplied to NTPC; however, if the contract did not go through, then that would be supplied to the ADA Group; (ii) in addition, another 28 MMSCMD would be supplied to REL. The quantity of gas referred to in (ii) was to be at a price no greater than the price for supply of gas to NTPC and the terms of such supply were to be the same as to NTPC and even surpass them to provide ADA Group an added level of comfort. Further, with respect to all other future production of natural gas by RIL, under any contract and in any gas field, it was to be split in a 60:40 ratio between the MDA Group and the ADA Group. This right was an option right exercisable by the ADA Group and to be supplied to it at the then prevailing market prices and has been referred to as the Option Volumes by the parties. The gas supplied to ADA Group was only meant for trading within the group.

32. In addition to the above, and in the same section "Gas Supply", it was also stated, after KDA exhorted her elder son to

ensure that stability was given to the ADA Group with respect to gas supply, that the MDA Group would act in "utmost good faith" and exert their "best endeavours" to work for and obtain all the necessary governmental and regulatory approvals. It was also provided that the ADA Group would be given an irrevocable power of attorney to be able to independently pursue the same, though that was not to mitigate the burden to be borne by the MDA Group. KDA reserved the right to intervene and it was stated that ADA Group would have a right to damages in the event that MDA Group did not act in good faith. The binding gas supply agreements were to be executed within 45 days.

33. KDA issued a press statement, the day that the MoU was executed, stating that the differences between her sons were settled and that ADA will be responsible for Reliance Infocom, Reliance Energy and Reliance Capital. On the same day the Board of Directors of RIL also met. The minutes reveal that MDA stated in broad terms the terms of the settlement – that the energy, telecom and financial businesses were to be demerged to ADA, with himself remaining in charge of the other businesses. Thereupon he placed a copy of the press statement of KDA and

left the meeting stating potential conflict of interest issues. Other Directors continued and after expressing their thanks to KDA, it was recorded that some Directors felt that any reorganization be undertaken only if it is in the best interests of all the shareholders. To this effect it was resolved that a Corporate Governance and Stakeholders Interface Committee comprising independent Directors examine in depth all the issues relevant for reorganization and suggest a proposal to the Board, including any scheme. It was also resolved that the said committee of independent Directors also be assisted by professionals, such as chartered accountants, solicitors, merchant bankers etc., including the lawyer who had drafted the MoU.

34. Based upon such authorization the CG Group proceeded to perform its assigned duties, assisted by various professionals, and with the active participation of personnel of both ADA and MDA groups. On August 3, 2005 Term Sheets were prepared and executed by representatives of the two groups and it was provided therein that the Scheme would be based on the terms agreed. With regard to the principal disclosures to be made in the scheme, it was decided that one of them would be

about the fuel agreement for supply of gas that was to be executed. It was also provided that the Scheme would be framed in such a manner that the Resulting Companies, which were all to be 100% subsidiaries of RIL, would be listed on the same stock exchanges as RIL, and that after issuance of shares by the Resulting Companies to RIL's shareholders they would then cease to be subsidiaries of RIL. The CG Committee formulated the Scheme's rationale of the demerger as one of substantial benefits that would accrue to the Resulting Companies on account of focused attention.

35. On August 5, 2005 the Board of Directors of RIL met and the CG Committee presented its recommendations. Some outside professionals from the fields of law, accounting and finance also rendered their opinions and provided inputs. The minutes of the meeting show that one of the Directors of RIL particularly stated and emphasised that the gas supply agreement should specifically state that price and terms and conditions shall be subject to Central Government's approval. It is also recorded that all those present, including Cyril Shroff, who had prepared the MoU, was in charge of preparing the Scheme

and was advising ADA with respect to gas based energy business, agreed with that view. The Board then resolved, *inter-alia*, that pursuant to proposals of certain professional organizations and the solicitor firm M/s Amarchand Mangaldas and Suresh A. Shroff and Co., and recommendations of the CG Committee, to segregate by a process of demerger the undertakings relating to Coal based Energy, Gas based Energy, Financial Services and Telecommunications. They also further resolved that, pursuant to provisions of Section 391-394 of the Companies Act, 1956, a Scheme of Arrangement be filed by which each of the undertakings would be transferred to four different Resulting Companies, including the transfer of the Gas based Energy Undertaking to Global Fuel Management Services Limited, which through various transmutations of its name became Reliance Natural Resources Limited, the main protagonist in these proceedings.

36. A Company Application for reorganisation of RIL was filed in September 2005 in the High Court and based on its directions, meetings of the shareholders and the stakeholders under the aegis of a retired High Court Judge were conducted on

October 21, 2005. The Scheme as presented was approved near unanimously by the shareholders and the stakeholders. Subsequently, the High Court sanctioned the Scheme on December 09, 2005. The MoU and the terms in it relating to gas supply do not find any mention in any of the petitions as well as the sanctioned Scheme.

37. Beginning on June 30, 2005 representatives of both the groups started negotiating the terms of gas supply agreements. Voluminous correspondence (Exh. F) ensued, mostly in the form of emails. Neither prior to the filing of the Scheme nor thereafter could the two groups arrive at any agreement. It is clear from the correspondence, that even until end of February, 2006 there was no controversy that was raised regarding the requirement of governmental approvals. The draft NTPC-GSPAs of May, 2005 containing the requirement of governmental approvals had been handed over to the ADA Group and it was agreed by an ADA Representative that it would form the basis for negotiation of gas supply agreements.

38. On January 12, 2006 a meeting of the Board of Directors of RNRL was called for, in which, a Gas Supply Master

Agreement and a model Gas Sale and Purchase Agreement, approved by the Board of RIL, were placed for consideration of the Board of RNRL. Two Directors, both nominees of the MDA Group, voted to accept the said gas supply agreements, and one Director, the sole nominee of the ADA Group, strongly protested. The said nominee of ADA Group also wrote a letter protesting the same, and, *inter-alia*, alleged that he had been given the gas supply agreements the previous night, had no time to properly read through them, no one in the ADA Group got a chance to vet them and further that the gas supply agreements were illegal because they should have been executed by RNRL only after ADA Group was fully in charge of RNRL.

39. On January 27, 2006, RNRL was listed on the stock exchanges that RIL was listed on and the shares of RNRL were given to the shareholders of RIL as provided for in the Scheme. In particular, each shareholder of RIL was given one share of RNRL for each of the shares he/she/it held with RIL, except certain specified shareholders of RIL as provided for in the Scheme. On February 7, 2006 RNRL was handed over to the ADA Group for focused leadership of ADA after reconstitution of the

Board of RNRL as per the wishes of ADA and ADA Group. Thereafter on February 28, 2006 a letter was written by RNRL to RIL alleging various malafide actions by RIL with respect to gas supply agreements, amongst other things.

40. In April, 2006, RIL applied to MoPNG for approval of the the well-head price of USD 2.34/mmBtu for the natural gas to be supplied to RNRL on the grounds that it was the same as the agreed price for supply of gas to NTPC. The MoPNG rejected it on July 27, 2006 and the same was communicated by RIL to RNRL. In the meanwhile, RNRL had also written to MoPNG asking for the approval of the same, though in the letter RNRL stated that the GoI's rights with respect to price formula/basis are only with respect to the valuation that GoI might wish to place on natural gas to determine its share of profit petroleum.

41. In the meanwhile RNRL was also writing to a number of governmental, statutory and regulatory bodies regarding the status of its gas supply agreements with RIL. In its statements made with respect to issuance of Global Depository Receipts, in Luxembourg, RNRL specifically stated that gas supply agreements including price formula/basis would be subject to

governmental approvals and if approved it would then be able to sell it to end customers at market prices.

42. On August 1, 2006 the MoPNG constituted a Committee to "Formulate Transparent Guidelines for Approving Gas Price Formula/Basis" for giving Government Approval under the PSC for the same. On August 17, 2006, the said Pricing Committee issued letters to various stakeholders, seeking their comments and thereupon submitted its report in November 2006.

43. On November 8, 2006, RNRL filed Company Application under Section 392 of the Companies Act, 1956 seeking directions from the High Court to order RIL to change the gas supply agreements in a certain specific manner. According to RNRL, the gas supply agreements were not bankable in international financial markets, did not demerge the business of supply of gas to gas based energy producing companies within the ADA Group and thereby the very purpose for which RNRL had been set up was negated. Further, RNRL also claimed that unless the said changes were made, the Scheme would be unworkable and hence the reliefs as prayed for. RIL countered that the

Company Application of 2006 was not maintainable, as the clauses that were being sought to be changed were not unconscionable, and the jurisdiction under Section 392 was only to ensure that the Scheme as presented to the shareholders and stakeholders was implemented and not to substitute better terms or to frame a better Scheme. According to RIL, Clause 19 of the Scheme provided that suitable arrangements with respect to gas supply were to be made and the gas supply agreements put in place by it were suitable because they protected the interests of both RIL and RNRL. Further, RIL also took the affirmative defense that under the PSC it was obligated to obtain approvals of the government. The MoU was not pleaded specifically by RNRL, though in the pleadings it raised issues about what had been promised to it which could be linked to the MoU. The correspondence between the two groups after the MoU, regarding the gas supply agreements were placed on record and analysed.

44. In May 2007, RIL submitted a price formula/basis to the MoPNG for its approval so that all gas from KG-D6 could be sold at a price derived from that formula. Around the same time,

RNRL also made a representation to the Ministry of Chemicals and Fertilizers that the Government should put in place a Utilisation Policy which RNRL stated was a right of the GoI under the PSC and also take its share of profit petroleum in kind and distribute the same to power and fertilizer sectors at a reasonable price.

45. Be that as it may, in August 2007 an Empowered Group of Ministers, consisting of Senior Cabinet Ministers, was constituted by the GoI, which met in a series of meetings (numbering six in all) between August 27, 2007 and January 8, 2009. The substantive decisions taken were: (i) acceptance of the price formula/basis submitted by RIL, based on, *inter-alia*, an evaluation by the Prime Ministers Economic Advisory Council that the price band that would be derived pursuant to the price formula/basis was comparable to prices at which non-APM regime natural gas prices were prevailing. The formula was modified to set an upper limit to the crude oil at USD 60 and set the biddable factor to zero so that the alleged non-transparency aspect could be mitigated; (ii) set in place an Utilisation Policy that specified the sectoral allocations and priority list of the

sectors; (iii) that all users should be in a position to consume gas right away or within a short period of time and that there was to be no reservation of gas; and (iv) the policy was to be effective for five years.

46. While the EGOM meetings were being held the litigation between RIL and NTPC, and RIL and RNRL were in various stages before the High Court. It appears that while exercising its sovereign right to frame policy of national importance, EGOM was also sensitive to the issue of decisions to be made by the concerned courts, and hence noted that the decisions of EGOM would be without prejudice to the rights of the litigants as decided by the Courts.

47. A final order and judgment was passed, on 15.10.2007, by the Learned Company Judge. The judgment held: the Application under Section 392 to be maintainable, that the Company Court was not competent to dictate the specific changes sought, that the GSMA was in breach of the Scheme, that the MoU was binding on both parties, and that "suitable arrangements" in Clause 19 of the Scheme had to be read in light of the MoU and that it was necessary for the Scheme. The

Learned Company Judge also held that such gas supply contracts would be subject to Government's approval, pursuant to NELP and PSC and it was further held that Government should normally approve such contracts unless clearly in breach of public policy and public interest. The Learned Company Judge then ordered the parties to renegotiate.

48. Both sides filed appeals before the Division Bench against the said judgment. As a number of interim orders were passed at the stage of the proceedings before the Learned Single Judge and then later on before the Division Bench, the GoI intervened in the proceedings as it had been realized that it had a vital stake because the dispute involved issues that could affect national development, national interest and also GoI's revenues.

49. The Division Bench disposed off the appeals of RIL and RNRL by its order and judgment dated 15.06.2009. The decision at the level of the Division Bench turned, it seems, on the fact that a portion of the MoU was jointly tendered by RIL and RNRL and apperception of the Division Bench that under the PSC, RIL is entitled to a physical share of natural gas, as a part of cost gas and profit gas. Further, the Division Bench seemingly agreed with

the conclusions of the Learned Company Judge and then departed from it. Substantively it was held that a fixed quantum of 28 MMSCMD plus 12 MMSCMD in the event that NTPC contract did not fructify stood allocated and to be supplied for use in any of REL's power projects, and that the allocations made were a class apart in themselves. The price of supply was to be in accordance with the PSC – but as there was no clause in the PSC prohibiting RIL from selling it at a price lower than that arising from the price formula/approved by the Government, natural gas up to the first 40 MMSCMD at a well head price of USD 2.34/mmBtu of natural gas stands allocated to RNRL, as RIL would still make profits at that price point. Further, the Division Bench also ordered the parties to renegotiate with respect to issues regarding identity, definition of affiliate and limitation of liability to make the gas supply agreements bankable.

50. There is considerable confusion as to what the Division Bench ordered with respect to Utilisation Policy and its applicability with respect to the Option Volumes of natural gas provided for in the MoU. The three parties to this case have urged three different interpretations regarding the same.

51. Aggrieved by the said Judgment and Order of the Division Bench all the parties have approached this Court in appeal by way of special leave. The Union of India which was allowed to intervene before the Division Bench, being aggrieved by certain findings, has also preferred an appeal against the Judgment and Order of the Division Bench. After initially raising objections, the Learned Senior Counsel appearing for RNRL, Shri. Ram Jethmalani withdrew his objections to leave being granted. Further, in as much as on the face of the record it would appear that the PSC, to which the UoI is a party, has been interpreted without the GoI having had an opportunity to be properly impleaded and present its case and the potentially serious public interest implications that arise therefrom, leave has been granted to the UoI.

52. Now we shall proceed to summarise the contentions of the parties made during the oral hearings spanning 27 days and in the many thousands of pages of written documents. A number of authorities were also cited by each of the counsel in support of their arguments. We make it clear that we shall advert only to

those submissions and citations which are necessary for disposal of these appeals.

PART III

SUMMARY OF THE SUBMISSIONS OF THE PARTIES:

53. Though the first party to file a special leave petition in these proceedings was RIL, and it is Shri Harish Salve, the learned senior counsel for RIL who led the arguments, because of the fact that it was RNRL's petition and the main attack was initiated by RNRL in the courts below, we consider it appropriate and convenient to note their submissions first. While there is a welter of facts and arguments it would also be quite clear that there has been a set of consistent themes flowing right through this case. In addition, at the earlier stages of proceedings the public interest and public law elements were not properly before the courts. Though late, with the entry of Union of India as a full fledged party to the case, the issue of public interest and welfare has also come to be crystallized.

CONTENTIONS OF RNRL:

54. The line of argument that RNRL has taken in the course of these proceedings can be gleaned from the Six Protested Points they have raised about the underlying gas supply agreements. They are about Price, Quantity, Tenure, Identity of Buyer, Definition of Affiliate and Limitation of Liability. We note each one of them below as substantively argued by Shri. Mukul Rohtagi, learned senior counsel appearing on behalf of RNRL.

1. *Price*: The natural gas that is to be supplied to it, not including the Option Volumes, should be at a fixed price of USD 2.34/mmBtu well head cost plus marketing margins and transportation charges at the delivery point for a total of USD 3.18/mmBtu. Contemporaneously, while various commitments were being made by RIL between 2002 to 2005 to the gas based energy producing division while it was a part of RIL, a bid was offered on the international tender floated by NTPC at the said price. In as much as that was the only contemporaneous arms length and a market

determined price, it is contended that the same price should apply to RNRL as it is the derivative of and the successor in interest to that gas based energy producing division.

2. *Quantity*: The quantum that RNRL should receive 28 MMSCMD plus, in the event that NTPC's contract does not go through, an additional 12 MMSCMD. It is argued that the size of the gas based energy producing plant, at Dadri, of 7500 MW of generating capacity is the first determinant of the requirement of 28 MMSCMD. The other 12 MMSCMD is based on the required supplies for RPPL and other gas based energy producing plants it had proposed to set up. According to RNRL these were commitments that RIL had made prior to the demerger and even prior to the MoU and hence ought to honour them.

3. *Tenure*: The tenure should be a firm 17 years, as that was the term that had been promised to NTPC and that the provision regarding the same should be as stated in the draft agreements with NTPC.

4. *Identity of Buyer*: In as much as the gas supply agreements mandate that it nominate an affiliate from within the ADA Group that is engaged in gas based energy production as a buyer, and the gas is directly supplied to it and payments made to RIL are also from that quarter, the very purpose for which RNRL has been set up, to supply gas to gas based energy producing companies and thus promoting the setting up of such companies, would be negated. It is contended by RNRL that a fair reading of the Scheme would reveal the same.

5. *Definition of an Affiliate*: According to RNRL the definition of an affiliate should not require 51% ownership, but rather the definition as contained in either the PSC or the NTPC draft agreements. It is argued that by restricting its nominees to only those companies in which RNRL owns at least 51%, the freedom of RNRL to set up gas based energy producing companies is automatically restricted and in as much such a restriction was not placed on NTPC it should be accordingly changed. Further, RNRL also contends that

the definition of affiliate as provided for in the PSC could also be appropriate.

6. *Limitation of Liability*: The promise made to RNRL was that gas would be supplied to it from any of the gas fields given to RIL by GoI, and consequently it should be possible to draft a liability clause that becomes operative in the event that there is no gas available at any of the gas fields or for reasons beyond the control of RIL.

55. The three themes that RNRL presses are and they relate to Government Approvals, binding nature of the MoU and maintainability in seeking the reliefs claimed as above.

1. Government Approvals**:** In its claimed reliefs, RNRL seeks the deletion of Section 13.9 of the GSMA and Clauses (d) and (e) of Schedule 3.2 of the GSPA, which substantively deal with the issue of approval of the price formula/basis and also of applicability of governmental utilization policy or any other powers of the GoI to curtail production or otherwise prevent RIL from supplying natural gas. The first contention of RNRL, as

pressed by both Shri. Jethmalani and Shri. Rohtagi, is that under the PSC what is shared between RIL and UoI are physical quantities of natural gas, and that is what a PSC means – sharing of production. For this proposition reliance is placed on *CIT* v *Enron Oil and Gas India Ltd*.[9] Further, it is also argued that because the Contractor expends monies on exploration, development and production and is allowed to recover its costs first, it should be deemed that the title to natural gas to the extent of cost and profit petroleum pass to the Contractor at the Delivery Point when natural gas is first brought on-shore. To this effect they rely upon the provisions of Article 27.2 of the PSC. Consequently, they also argue that the approval of price formula/basis in Article 21.6.3 of the PSC is only to facilitate GoI in placing a value on natural gas so that its share to physical quantity of natural gas under the Profit Petroleum component can be calculated. They also argue that if GoI is allowed to determine price and also frame a utilization policy, then the absolute freedom to market, as promised in NELP and in Article 21.3 of the PSC would become otiose.

9 (2008) 305 ITR 75

Alternately, it is also argued by Shri. Jethmalani and Shri. Mukul Rohtagi that, even if one were to assume that the title does not pass through to the Contractor and that the GoI did have such rights, when the binding commitments were made by RIL to RNRL, there was no utilization policy in place, consequently RIL was free to find its own buyers under the marketing freedom promised by NELP, the only policy in place. Moreover, it is argued, the GoI knew about supply of natural gas to RNRL in as much as it was specifically mentioned in the IDP approved by the MC of the PSC. Arguing that the State has to act justly, fairly and reasonably even in contractual field, they have relied upon *Kumari Shrilekha Vidyarthi* v *State of U.P.*,[10] *Mahabir Auto Stores* v *Indian Oil Corpn.*,[11] *LIC of India* v *Consumer Education & Research Center*.[12] Further, they also argue that EGOM decisions cannot be held to be applicable in a manner that would affect its pre-existing contractual rights with RIL as executive action cannot interfere with contractual rights. To this effect they rely upon *Rai Sahab Ram Jawaya Kapur & Ors.* v *State of Punjab*,[13] *State of Madhya Pradesh* v *Thakur Bharat*

10 (1991) 1 SCC 212
11 (1990) 3 SCC 752
12 (1995) 5 SCC 482
13 1995(2) SCR 2.

Singh,[14] and *Poonam Verma* v *DDA*.[15] Even if one were to consider EGOM decisions as policy, it cannot have retrospective effect and to this effect they placed reliance on *Union of India & Ors.* v *Asian Food Industries*,[16] and *Kusumam Hotels (P) Ltd*. v *Kerala SEB*.[17] Moreover, in as much as in the EGOM minutes it is clearly recorded that their decisions are without prejudice to the rights of RNRL in the court cases, RNRL's rights were beyond the pale of EGOM's decision. For interpretation of the expression "without prejudice" they relied upon *NTPC Ltd*. v *Reshmi Constructions, Builders & Contractors*.[18] Finally, arguing that Article 297 of the Constitution does not give sovereign rights to GoI with respect to dealings with its own citizens to change contractual rights and that sovereignty is restricted to the sphere within the international context, Shri. Jethmalani relied upon *Madhav Rao Jivaji Rao Scindia* v *Union of India*.[19]

2. *Binding Nature of MoU***:** It is the contention of RNRL that the MoU is binding upon all and hence, the main commercial terms

14 1967 (2) SCR 454
15 (2007) 13 SCC 154
16 (2006) 13 SCC 542
17 (2008) 13 SCC 213
18 (2004) 2 SCC 663
19 (1971) 1 SCC 85

provided in its gas supply section should be faithfully followed, as they relate to the Six Protested Points. Shri. Jethmalani argues that at the time of the execution of the MoU, MDA was not just the Chairman and M.D., but also armed with all the powers of the Board. Consequently, he was the controlling mind of the Company. To this effect he pressed the Doctrine of Identification to state that MDA's actions should be deemed to be the actions of the Company, and the Board. He relied upon *Lennards Carrying Co*. v *Asiatic Petroleum Co. Ltd*.[20], *Boulting and Anr*. v *Association of Cinematography, Television and Allied Technicians*[21], *R. Vs. McDonnell* [22], *Tesco Super Markets* v *Nattrass*[23], *Meridian Global* v *Securities Commission*[24], *J.K. Industries Ltd*. v *Chief Inspector of Factories & Boilers*[25], *Indian Bank* v *Godhara Nagrik Coop. Credit Society Ltd*.[26], *H.L. Bolton (Engineering) Co. Ltd*. v *T.J. Graham & Sons*[27], *Union of India* v *United India Insurance Co. Ltd*.[28], *Assistant Commissioner, Assessment-II, Bangalore & Ors*. v *M/s. Velliappa Textiles Ltd. &*

20 2924-25 AllER 280
21 (1963) 2 QB 606
22 (1966) 1 ALLER 193
23 (1971) UKHL 1; (1972) AC 153
24 (1995) 3 ALL ER 918
25 (1966) 6 SCC 665
26 (2008) 12 SCC 541
27 (1956) 3 ALL ER 624
28 (1997) 8 SCC 683

Ors.[29] It was argued that the terms of gas supply, which are in the nature of day to day agreements entered into by the Management and hence need not have been placed before the shareholders for approval and that the powers of a Director to enter into contracts are very wide and reliance is placed on *LIC v. Escorts Ltd*[30] and *Mohta Alloy & Steel Works* v *Mohta Finance & Leasing Co. Ltd*.[31]

3. *Maintainability*: It was also argued by the Learned Senior Counsel for RNRL that the power of the Company Court is of the widest amplitude and that in fact it is the duty of the court to ensure that the Scheme is fully implemented and the only limitation on the powers of the court is that it cannot change the character, purpose or basic structure of the Scheme. He relied on *S.K. Gupta* v *K.P. Jain*[32]

CONTENTIONS OF RIL:

29 AIR 2004 SC 86
30 (1989) 1 SCC 264
31 (1997) 89 Comp. Cases 227
32 (1979) 3 SCC 54

56. RIL's position with regard to the Six Protested Points was argued by Shri. Harish Salve as follows:

The basic contention of RIL is that under the PSC the GoI has the right to approve the price formula/basis on which sales can be effectuated, pursuant to Art. 21.6 et. seq. Additionally, it says that ordering it to supply at USD 2.34 mmBtu well head price even if the valuation placed by GoI is much higher is misconceived, because it cannot recover its interest costs and its investments are recouped over a long time frame, its rate of return which is very, very modest will be threatened and that it would amount to RIL subsidizing RNRL, which was never contemplated in the Scheme. The Scheme cannot be changed to the detriment of shareholders of RIL.

It was submitted that RIL can commit to supply only that amount of gas as have been certified to be proven reserves. In early 2006, the total amount of natural gas in gas field that would be required to commit 28 MMSCMD and the Option Volumes had not yet been certified; and it was not known

whether P1 reserves were available beyond the 12 MMSCMD needed for NTPC.

RIL contends that the kind of certitude that is being demanded by RNRL could have been given by it only if certified and proven reserves were known. Further Shri Salve submitted that as and when new reserves became known, new GSPA's would then be executed with a nominee of RNRL. In fact it is RIL's contention that if certified reserves were known and firm commitments had been made, given that the project in Dadri, in 2006, was nowhere near completion, RNRL would have had to suffer the very onerous "take or pay" clauses in the Industry. Shri Salve also argued that in any event it cannot commit supplies beyond the validity of the Mining Lease which expires in 2025.

It was argued by Shri. Salve that the protest of RNRL about limitation of liability was in fact frivolous and that the clause is being protested by only selectively reading it. The phrase "short fall" in the clause in the GSMA, RIL says, refers to non-

availability of natural gas and not a voluntary shutting of gas supply by RIL.

RIL contents that the Scheme itself postulates supply of gas only to power plants of REL and RPPL. However, the fact that GSMA has included a definition of affiliate so that it can take on the higher responsibility of supplying gas even to power generating units started by entities other than REL and RPPL provided RNRL owned at least 51% of that company demonstrates the good intentions of RIL. It further contends that in fact the GSMA is more flexible than the Scheme or for that matter the MoU and hence, on that count RNRL has no right to contend that the definition of affiliate should be wider than what was provided in the GSMA.

It was submitted that the GSMA and GSPA fully comply with the requirements of Clause 19 of the Scheme, which requires that arrangements be entered into with RNRL for supply of gas to the power plants of REL and RPPL. Under the GSMA, RNRL would have the right to nominate affiliates to whom gas is required to be supplied under different GSPAs. The GSPA's are to be entered

into with companies who are engaged in generation of electricity like the REL. RIL also further contends that the Scheme does not contemplate RNRL purchasing the gas and selling the same to its affiliates at a profit. RIL says that the buyers under the Scheme were to be companies which actually own and operate power plants and moreover under the PSC the title can only pass to the end consumer at the delivery point. It was stated that the scheme envisaged that RNRL take delivery of gas at the delivery point on behalf of the buyers and arrange for its transportation to the ultimate consumption point and for this purpose charge a marketing margin which must be nominal and the transportation charges incurred. The submission was that the very names Gas based Energy Undertaking suggests that the value arises, not from trading of gas, but from generating energy from gas. Shri Salve explained that the procedure that RIL put in place, whereby the GSMA is with RNRL and the GSPA with its nominee company that is actually starting a gas based electricity generating plant, would make it bankable for both the power generating company as well as RIL. It was his contention that in the event that RIL did not get paid and with "take or pay" penalty not being there, then it would at least have a company

with some actual assets against which it can proceed to collect.

57. With regard to the issue of bankability of the GSMA and GSPA, it was submitted that RNRL has not shown one single document or produced any evidence suggesting that they are not bankable in the international financial spheres. It was submitted that contrary to RNRL's assertions that they are not bankable, RNRL has in fact raised substantial funds, both domestically and abroad. RIL also contends that even though such huge sums of money have been raised, not a brick has been laid so far to begin the construction of the Dadri power plant in Uttar Pradesh. It was also stated that by entering into GSPA's with the nominee companies that would be setting up gas based power plants, it would actually make the agreements bankable because it is the nominee companies which need to raise monies to establish the power plants.

58. Shri Salve argued that as a matter of both law and logic, within the context of the scope of this litigation, the rights of RNRL vis-a-vis RIL cannot transcend the rights possessed by RIL and actually demerged by RIL. The rights of the UoI with respect to approval of the price formula – and thereby affecting

the price - and to frame a government utilization policy effectively delimits RIL's own rights as to what it can do with the natural gas. It is mandatory that RIL strictly remain within those boundaries. The width and nature of GoI's control can be discerned from its continuing and constant role in overseeing activities in all aspects and phases of the Petroleum Operations. Further, Shri. Salve says that what RIL gets is not a physical share but only a share of the value, that the title only passes to the end user and purchaser at the Delivery Point and not to RIL when natural gas is extracted and that RIL can really only act as an agent of UoI.

59. According to Shri. Salve, what was approved by the shareholders and formed the basis for sanction of the Scheme, has in fact been propounded by the Board. The minutes of the Board meetings and the discussions recorded clearly show that the Board sought the opinion of the CG Committee and outside professionals in deciding whether to go with the reorganization or not, and also the nature of the Scheme that was to be put together. It is clear from the record that the Board acted independently and collectively. What it did not include in the

Scheme therefore cannot now be said to be a part of the Scheme itself. With respect to gas supply agreements, the Board had clearly recognized that they were not permissible without governmental approvals, and in fact the personnel of ADA Group knew this and so did the lawyer who put the scheme together, drafted the MoU and was advising ADA.

60. Shri. Salve argued that the MoU was a confidential document from the private domain of the promoters and was executed in the context of settlement of family disputes. In as much as the MoU was never placed before the Board or the shareholders, it cannot be deemed to have been approved by them. According to Shri. Salve, Sections 193, 194 and 195 of the Companies Act, 1956 raise the presumption that the record of the proceedings of the meetings of the Board are accurate The minutes of the Board were never challenged and were never put in issue in any proceeding.

61. With respect to the Doctrine of Identification, Shri Salve argues that it has no relevance in the context of the facts of these cases. The resolutions of the Board vesting vast powers upon MDA themselves speak of the fact that the powers which

the Board was required to retain, by the Companies Act, 1956 and the Articles of Association, it did so. Under Section 293 of the Companies Act, the Board cannot sell off or otherwise dispose off an undertaking without the consent of the shareholders. Consequently, the Board cannot relieve itself of the powers with respect to matters that only it can take a decision on. The record clearly indicates that Directors acted independently and that the Board applied its collective mind after obtaining the necessary inputs and recommendations of the CG Committee and other professionals and accordingly had the Scheme prepared and recommended to the shareholders. Consequently it is not MDA who acted but the Board itself. Hence, the Doctrine of Identification which arises in cases involving torts and criminal liability has no application here.

62. MoU is an antecedent document that should not have been considered by the Courts below. Even if considered, the MoU itself contemplated that the actions necessary to start the process of reorganization had conditions precedent which included approvals by the Board and the shareholders. Further,

the MoU itself also shows that governmental approvals were always known to be necessary.

63. *RNRL's Application Not-Maintainable***:** According to Shri. Salve and Learned Senior Counsel Shri. R. F. Nariman, the powers of the Company Court under Section 392 cannot be greater than the powers under Section 391 of the Companies Act, 1956. The width of the powers of the Company Court are that of an umpire, ensuring that the rules of the game are fair, and then allowing the parties to *inter-se* decide the appropriate terms of commercial exchange. The Court pursuant to Section 391, for instance, cannot compel the parties to substitute a Scheme approved by the members of the classes required to approve the Scheme with what the Court feels is a better one. Shri. Nariman relied upon *Miheer H. Mafatlal* v *Mafatlal Industries*.[33] Consequently, under Section 392 the Court cannot impose its own wisdom, and change the basic fabric of the Scheme itself. Reliance was placed on *S.K. Gupta* (supra). Further, Shri Nariman also argued that in search of modification, it is impermissible to substitute a portion of the Scheme with a

33 (1997) 1 SCC 579.

new Scheme. Reliance was placed on *Meghal Homes (P) Ltd*. V *Shree Niwas Girni K.K. Samiti & Ors*.[34] According to RIL there is nothing unconscionable in the six clauses that have been protested and hence also the application by RNRL was not maintainable.

64. *Scope of Clause 19 of the Scheme*: Shri. Rohinton Nariman argues that what was provided for in Clause 19 with respect to the gas supply was a "suitable arrangement," which means an uncrystallized arrangement to be negotiated. This, according to Shri Nariman is to be contrasted with the crystallized agreements and rights to use Reliance brand logo etc. which are also found in Clause 19 and this difference must be interpreted to be intentional. Further, according to Shri. Nariman the "suitable arrangements" with respect to gas supply were to be between the Demerged Company owned by two million shareholders and the Gas Based Resulting Company, whereas the MoU on the other hand is between three shareholders out of two million shareholders and consequently it cannot now be said that the gas supply provisions of MoU

34 (2007) 7 SCC 753

constitutes the phrase 'suitable arrangement'. Shri Nariman also argued that what is contemplated in Sections 391-394 of the Companies Act, 1956 is an arrangement between the company and a class of shareholders. The present Scheme treats all equity shareholders as a class. The MoU was between three shareholders and has nothing to do with the entire class of shareholders who approved this Scheme. Further, Shri Nariman also argued that if the MoU were known to the Board, then the fact that the terms and conditions of the gas supply contained therein were kept out, indicates that the act of omission was deliberate and hence foreign to the Scheme.

CONTENTIONS OF THE UNION OF INDIA:

65. According to Learned Solicitor General, Shri. Gopal Subramaniam, there are two kinds of Production Sharing Contracts, one in which physical produce is shared and the other in which revenue is shared. He relied on a book "International Petroleum Fiscal Systems and Production Sharing Contracts" by Daniel Johnston.

66. The Learned Solicitor General, presenting a synoptic view of the history of oil production contracts, from early concessions to modern day arrangements, says that the PSC's evolved to give the State greater control over all aspects of petroleum operations. This includes the right to determine the expenses to be incurred, the rates of production, the equipment to be used and also which markets to sell to or not to sell to. Further, the Learned Solicitor General submits that PSC's have many aspects which are negotiated and the specific set of rights given, in terms of recoupment of costs, the extent and delineation of such costs determines the particular bargain struck. Hence, an assumption or conclusion that because a contract is titled "Production Sharing Contract", physical quantities of the produce are to be shared would be erroneous. The specific terms of the contract ought to be determinative, rather than a general assumption.

67. According to the Learned Solicitor General the concept of Permanent Sovereignty over natural resources is a widely accepted one in international law and UN General Assembly Resolution 1803 of 1962 specifically recognizes the same.

Further, it was also argued that, in fact, forms of PSC developed as a result of such a resolution. Under the new contractual systems in the petroleum industry, as opposed to the historical concessions given by Persia for instance, the ownership of the resource vests and continues to vest with the sovereign until it is disposed off. It was pointed that Article 297 of the Constitution declares that minerals and other resources underlying the ocean vest in the Union of India. Learned Solicitor General specifically stated in his oral arguments that the PSC was placed on the floor of the Parliament.

68. It was argued that the EGOM decisions, regarding the utilization of natural gas and the price formula/basis, have never been challenged independently and that the present litigation is an attempt, in a seeming internecine war, to waylay GoI policies in a Company Petition. Learned Additional Solicitor General Shri. Mohan Parasaran points to Articles 77(3) and 73 of the Constitution and argues that the powers of EGOM are not merely traceable to the PSC but also to the powers flowing from such Constitutional provisions and its policy decisions have the force of law.

69. Arguing that distribution of national property and state largesse has to adhere to the dictates of Article 14 of the Constitution, Shri. Mohan Parasaran says that if the GoI had effectuated the distribution of natural gas in the manner in which it is being claimed to have been allocated by the MoU, in secret and without it being offered to others, it would be liable to be struck down by the courts. To this effect he relies on *R.D. Shetty* v. International *Airports Authority of India*[35] and *F.C.I*. v *Kamdhenu Cattle Feed Industries*.[36] Further, Shri. Parasaran also argued that the State is enjoined to distribute the material resources in a manner that promotes common good. In this regard he assails the demands of RNRL for a reservation of gas that places vast amounts of it in the hands of one entity as being detrimental to common good. He relied on *State of Tamil Nadu* v. *L. Abu Kavur Bai* [37] and *Salar Jung Sugar Mills Ltd*. v *State of Mysore*.[38] Shri. Mohan Parasaran also stated that natural gas is to be used for national development and placed reliance on *Association of Natural Gas* & Ors. v. *Union of India & Ors.* [39]

35 (1979) 3 SCC 489
36 AIR 1993 SC 1601.
37 1984 (1) SCC 515
38 1972 (1) SCC 23.
39 2004 (4) SCC 489

70. Learned Additional Solicitor General Shri. Vivek Tankha explained that natural gas is a very scarce resource in India and that many units which could use it have been stranded on account of its non-availability. In fact, he pointed out that, a Chief Minister and others have also written to GoI with regard to non-availability of natural gas from KG-D6 on account of the claimed reservation of natural gas by RNRL. Additionally, he submitted that the market for natural gas in India is undeveloped. Shri. Tankha pointed out that the network of pipelines that can transport natural gas in India is very small in comparison to developed Nations. This, he pointed out, means that many regions of the country cannot get access, and reservation of such huge amounts of gas by one entity would mean that other regions would not be able to access such gas after pipeline is developed there. He also stated that while some new discoveries have been made, some of the older fields are likely to run out of natural gas. In light of such factors, Shri Tankha argued that, it is very important for GoI to be able to monitor and frame policy for utilization of natural gas. It was emphatically stated by him, and also by Shri. Mohan Parasaran,

that any marketing freedom under the PSC can be only pursuant to a gas utilization policy put in place by the GoI.

71. Shri Mohan Parasaran analysed Articles 27.1, 27.2, in conjunction with Article 21.1 and posited that title to PSC can pass to an end user only upon sale, and such sales have to be in accordance with a utilization policy. With respect to what is shared between the contractor and the GoI, he argues that it is revenue. To this effect he also drew our attention to the fact that the PSC considered by this Court in *CIT v Enron Oil & Gas India Ltd.* (supra) – is different from the PSC in hand, and hence that case is not applicable.

72. Shri. Mohan Parasaran interpreted Article 21.6 to mean that arms length prices and the price formula therein as being applicable with respect to all gas produced and sold from KG-D6.

PART IV

WHOSE GAS IS IT ANYWAY? WHETHER A CONTRACTOR BECOMES THE OWNER OF THE GAS?

73. Shorn of all the details and lengthy submissions and contentions we shall now proceed to consider the relevant and

substantive issues that are required to be dealt with. It may be necessary to have a bird's eye-view about the importance of the natural gas and the evolution of the PSCs. We also set forth a broad and a brief overview of the political economy of natural gas industry and the evolution of the various arrangements between sovereign nations and oil companies.

74. Natural Gas is a mixture of hydrocarbons, but mostly methane and is a primary source of energy. It is formed by the conjuncture of a random set of factors – biological, physical, chemical & geological – intersecting precisely to trap the formed gas in underground cisterns (See: *Association of Natural Gas*). The known reservoirs across the globe are randomly distributed. Those regions that have many large reservoirs are considered to have been favored by the cosmic dice. The difficulties of exploration and mining, and the location specificity of reservoirs have a direct bearing on identification of those reservoirs, extraction from them and subsequently distribution of natural gas. Its gaseous nature makes it expensive and difficult to store and transport. Between continents it is shipped in the form of LNG; and overland it is transported by pressurized pipelines. It

is used as a fuel and a feed stock in: (i) production of fertilisers, (ii) generation of power, (iii) transportation, (iv) households, and (v) production of various products such as petro-chemicals, textiles, sponge iron etc. Its low carbon content, relative to other fossil fuels, implies that its use may help in combating global warming problems. Availability at an attractive price point could potentially induce entities in those sectors to switch to using natural gas. However, because it is also an exhaustible and non-renewable resource, there is an imperative need to conserve it. Such conservation can be achieved by restricting the amount available and also by modulating the price. Because the differences in relative abilities to pay varies between different sectors, in conditions of extreme scarcity, it is likely that certain sectors could out-bid others and corner the entire available quantities in unregulated markets; and that could lead to a shortage of supply to vulnerable sectors like fertilisers, power, transportation and households. Availability of natural gas to each of those sectors raises thorny questions of equality and quality of life issues[40].

40 Handbook of Natural Gas Technology and Business, ed. Parag Diwan and Ashutosh Karnatak, Pentagon Energy Press (2009).

75. The size, scale, scope and nature of a market for natural gas is a function of the total supplies, the level of demand and relative abilities to pay by different user segments, the length and density of network of pipelines, the number of producers, distributors and retailers etc. One of the critical features of a properly developed market for natural gas would be the network of large capacity pipelines that can carry it to different regions, and then a further local network to distribute it to end users[41]. Further, where that large capacity pipeline goes to, determines which regions get natural gas. In a large country, if many regions are left without access, then inter-regional conflicts could develop, especially if competition for primary energy sources intensifies.

76. All of these factors play a role in classifying a market as developed or undeveloped. The market for natural gas in United States is considered to be the most developed, with historically large supplies being available, hundreds of producers, many lakhs of miles of pipeline and dense local networks. Consequently spot markets have developed, in which prices are

41 Ibid.

determined and are sensitive to various factors, including factors such as prices of alternative fuels and peak demand. In other jurisdictions with such features being less developed, prices have been set through formulae linked to prices of alternate fuels, including crude. Historically natural gas industry has been highly regulated and it is only over past three decades that there has been a greater dependence on market forces to effectuate market coordination. Different jurisdictions have chosen different paths, with variations regarding which of the various stages of the value chain from production to end user access are regulated. The mechanisms for such regulation also vary from direct state commands to setting of rules and allowing private players to operate with relative freedom within those set of rules. The choices made seem to depend on various historical events, and factors and already established institutions and rules. [42], [43]

77. We have referred to a number of journals, articles and books in this regard, too numerous to all be cited[44], and one

42 Ibid.

43 Robert J. Michaels, "Natural Gas Markets and Regulation", in the Concise Encylcopedia of Economics, 2nd Ed.

44 A small sample: Stephen Breyer: Regulation and its Reform, Harvard University Press (1982); Paul Stephen Dempsey: Deregulation and Reregulation – Policy, Politics and Economics in Handbook of Regulation and Administrative Law ed. David H. Rosenbloom & Richard D. Schwartz, New York (1994); Colin Scott: The Juridification of Relations in the UK Utility Sector in Commercial Regulation & Judicial Review ed. Julia Black, Peter Muchlinski & Paul Walker, Hart (1998); Cosmo Graham: Regulating Public Utilities – A Constitutional Approach; UNCTAD: Competition in Energy Markets

thing stands out: there are no completely unregulated free markets for natural gas anywhere in the world. By framing an overarching analytical framework, it can be observed that every jurisdiction grapples with three sets of issues relating to ensuring: (1) adequate supplies to meet overall energy and industrial needs; (2) equitable access across all sectors, especially those which have implications for quality of life; and (3) equitable pricing, even if market forces are allowed to play a much larger role. Three more issues are emerging with respect to ensuring: (4) energy security of the nation; (5) energy defense links; and (6) inter-generational equities. Under conditions of scarcity, these latter factors may indicate a greater need for emphasis on conservation as opposed to current consumption. It would appear that markets, with their emphasis on current consumption and short run profits may lead to faster depletion, and consequently necessitate far greater and indeed a primary role for the State in coordination and making choices between different objectives and value premises. While markets and private initiatives have an important role in garnering financial

TD/B/COM.2/CLP/60 GE. 07-50741 (2007); Gas Regulation: in 35 jurisdictions, Global Competition Review (2006); and Handbook of Natural Gas Technology & Business, supra note 40. Also see Integrated Energy Policy – Report of the Expert Committee, Planning Commission of India, GoI (2006).

resources, developing and bringing new technologies to practical use, expanding the infrastructure, and increasing supplies by identification of and extraction from new sources, if unmonitored and completely unregulated markets are also capable of causing great inequities, in access, overpricing and sometimes even under pricing (if externalities, such as environmental costs, are not taken into account) the resources.

78. It would be a gross understatement to say that India's identified reserves and availability of natural gas for domestic consumption are very small. The total proven and identified reserves of natural gas in India are said to be about 1074 BCM[45]. That may appear to be very large. It is not. United States consumes around 22-23 Trillion Cubic Feet[46] of natural gas every year – yes every year. According to MoPNG documents the total global reserves are around 6534 TCF[47], and our access to those global reserves are very limited, because of relatively underdeveloped shipping infrastructure for transport of LNG and the difficulties in laying international and undersea pipelines for

45 MoPNG Basic Statistics (2008-2009).
46 Energy Information Administration, Dept. of Energy, U.S. Government.
47 MoPNG Basic Statistics (2008-2009) citing BP Statistical Review of World Energy, June 2008 & OPEC Annual Statistical Bulletin.

its transport from better endowed regions such as the Middle East. While some new discoveries, such as the one in KG Basin, have raised hopes of the supply constraints easing somewhat, we should always remember given India's extremely low – in fact de-humanized – per-capita consumption levels of energy, such easing of constraints only implies an easing with respect to the pressure of immediate and effective demand, and not with respect to potential demand that could arise with economic growth and certainly not in relation to the kind of levels of consumption that would enable our people to live with a modicum of dignity. As the Planning Commission has stated, India's energy challenge is of a fundamental order with immediate resonance in respects of our constitutional goals, internal and external security. India's energy security cannot be taken for granted – that would be disastrous, ethically impermissible and a fraud on the Constitution. Planning Commission also warns that the hubris of having large coal reserves is unwarranted; according to it, much of that coal is un-extractable and clean coal technologies are only possibilities and not certainties. [48]

48 Integrated Energy Policy: Report of the Expert Committee, supra note 44

79. If, as many scholars state, oil production has peaked or will peak in the future[49], India will increasingly have to compete for primary sources of energy and this may lead to geo-political instability on a global scale and even within national boundaries. Identification of our own domestic sources, determination of whether they can be extracted from and augmentation of such sources with new forms of energy production, and balancing of needs between current consumption and future consumption, reserves for defense purposes etc., are all absolutely essential tasks which have to be performed by the GoI[50].

80. The network of pipelines for transport of natural gas is very small in length in India, of a few thousand kilometers only, and the density is also very low[51]. Except for a few states, and that too a few small regions in those states, access to natural gas in the rest of the country is non-existent. It is not a wonder that at least one Chief Minister wrote to the GoI in the

49 Adam R. Brandt: Testing Hubbert (2006); Aleklett, Hook, Jakobsson, Lardelli, Snowden & Soderberger: The Peak of the Oil Age, Energy Policy Vol. 38 (2010). There are of course many more articles in the public domain regarding this. There are of course industry experts who do not agree.

50 Integrated Energy Report, supra note 44.

51 See Basic Statistics on Indian Petroleum & Natural Gas, 2008-2009, MoPNG GoI.

middle of the last decade protesting about non-availability of new natural gas discovered off the sea shore of that state's coast for various units located in that state which had already been started and lying stranded on account of lack of domestic supplies of natural gas.

81. Historically, oil production had been undertaken by major oil producing companies in the private sector[52]. Their relationship with sovereign owners of such petroleum resources has changed over one hundred years of struggle of the sovereigns. These struggles reveal nine zones of problems or great mischiefs that can occur: (1) of oil companies not producing even after discovery and not relinquishing the area of exploration; (2) of oil companies forming into pools and trusts to reduce production levels and keep the market prices at a high level;[53] (3) of oil companies financing armed revolutions and interfering in political aspects; (4)of oil companies claiming ownership rights over the areas in which oil could be produced from; (5) of oil companies claiming permanent rights to extract

52 Ernest E. Smith & John Dzienkowski, "A Fifty Year Perspective on World Petroleum Arrangements" 24 TEX. INT'L L. J. 13 (1989). This is a broad survey of the history of this industry post nationalization of Mexican Oil Industry and the citations therein are very valuable resources.

53 In United States legislature and courts combated with development of anti-trust jurisprudence. See Ernest E. Smith & John Dzienkowski, ibid. Also see Oswald Whitman Knauth: The Policy of United States Towards Industrial Monopoly, Bibliolife (2010).

petroleum resources in-situ and taking the physical quantities away for marketing elsewhere; (6) of under development of facilities for refining the petroleum and the Nation not having access to channels to market and distribute the resources;[54] (7) of deception by oil companies via low posted prices, and thereby reducing the royalty payments to the sovereign owners and reaping higher rewards in downstream activities that were also controlled by the oil companies; (8) sovereign owners not having any rights to determine what levels of production can take place and without rights in management of petroleum operations; and (9) joint off take agreements between oil companies and downstream divisions amongst them that controlled production, at an international level, keeping posted prices low so that even if sovereigns tried to take over the industry, they could be beaten down with production from elsewhere.[55]

82. In response to such great mischiefs, different types of arrangements have emerged between sovereign nations and oil producing companies. The philosophical and operational

54 The great mischiefs 3 to 6 led to nationalization of the oil industry in Mexico, in 1938. They also led to the first modern declaration that all natural resources belong to the people as a nation and to be used for national development and substantively informed the progress in international law , led by former colonies, that the people in those lands are the rightful owners and should benefits from the use of such resources.

55 Ernest E. Smith & John Dzienkowski, supra note 52.

differences are with respect to: (1) the lengths of time over which exploration could take place and the requirement that after the initial period, if requisite exploration is not undertaken or does not result in a commercially exploitable discovery, the return of the contract area; (2) nature, extent and mode of participation in management of the petroleum operations; (3) participation in price setting and price modulation functions, through both administered price mechanisms and also through varying the quantity available in the market; (4) setting up of a financial system between the oil produces and the sovereign involving various parameters such as the tax regime, royalty structures, and sharing of production – the last one being in terms of physical quantities or in terms of realized value after sales; and (5) assertion of sovereign ownership rights of both in-situ and also of extracted resources. These parameters obviously vary across various regimes and jurisdictions. These aspects enter into the complex conspectus of factors with respect to negotiations of particular arrangements. Factors such as levels of competition for exploration activities on a global scale at the time of such negotiations, the certitudes of fiscal systems proposed, assessments of the hydro-carbon potential (which in turn

depends upon historical discoveries already made and extracted from) etc., would play a role in the particular bargain as Learned Solicitor General Shri. Gopal Subramaniam stressed.

83. Scholars and experts divide the modern agreements between sovereign nations and oil companies into specific types of agreements. However, as experts point out, there is often a considerable overlap. As Prof. Ernest E. Smith and John S. Dzienkowski point out:

> *"....there are four basic arrangements between host countries and multinational oil companies…. (1) the concession; (2)the production sharing agreement; (3) the participation agreement, and (4) the service contract. Although each of these four arrangements can be used to accomplish the same purpose, they are conceptually different from each other. They provide for different levels of control by the company, different compensation arrangements, and different levels of state oil company involvement. It is important to note, however, that some existing agreements have borrowed clauses and concepts from two or more of the types of arrangements. Thus precise categorization of a particular country's arrangements is not always possible."*[56]

56 Ernest E. Smith & John Dzienkowski, supra note 52

84. The principal themes in production sharing contracts would appear to be that the sovereignty over the petroleum produced continues to be with the nation, and the contractor bears varying levels of and forms of risk with respect to exploration activities and what is allowed to be recovered as costs (called Contract Costs) and to what extent in each year (called Cost Petroleum). According to Daniel Johnston, who was cited by Learned Solicitor General, Gopal Subramaniam:

> *"contractual arrangements are divided into service contracts and production contracts. The difference between them depends on whether or not the contractor receives compensation in cash or in kind (crude). This is a rather modest distinction and, as a result, systems on both branches are commonly referred to as PSC's or sometimes production sharing agreements (PSA's)"*

85. One authentic source has been the United Nations. In a document titled "Alternative Arrangements for Petroleum Development: A Guide for Government Policy-makers and Negotiators"[57] published by the United Nations Centre on Transnational Corporations it has been stated:

57 UN Document No. ST/CTC/43, Sales No. E.82.II.A.22

> *"almost all forms of agreements between Governments of host countries and foreign oil companies increasingly reflect the Government's objectives of greater participation, greater control over operations and a greater share."*[58]
>
> *"Sharing of net revenue generated by petroleum exploitation has been a constant source of conflict between Governments and oil companies….. A certain proportion of the gross revenue must be set aside to repay capital costs of exploitation and field development to meet current operating costs…. The remainder of sales revenue is then available to provide a return to the oil company and to provide income to the State. The Government, in its role as sovereign and, in most cases, as owner of the petroleum resource, expects to retain the bulk of such rent and to restrict profits of oil companies to that which is required to attract the companies investment"*[59]
>
> *"Even more variety appears in the provisions that determine how net revenue is shared if production is undertaken. Inspite of the variety, most payments can be classified in one of two types: payments based on profitability and payments based on production."*[60]

The present PSC is required to be interpreted and understood with this background in mind.

58 Ibid page 5, para 15.
59 Ibid page 14, para 48
60 Ibid page 16 para 57

86. We now turn to an analysis of the constitutional and statutory matrix in which the question "whose gas is it anyway?" needs to be addressed.

87. The natural gas, under dispute in these proceedings, is being mined from deep beneath the sea bed, off the eastern shore of India. Thus, it is a resource that falls squarely within the purview of Article 297 of the Constitution of India and is explicitly noted so in the PSC. Article 297 of the Constitution declares that "All lands, minerals and other things of value underlying the ocean *within the territorial waters or the continental shelf or the exclusive economic zone shall vest in the Union, to be held for the purposes of the Union*". This Article of the Constitution is unique as it is the only such provision in the Constitution that addresses a particular inclusive set of potential resources in a particular class of geographic zones. It goes on to say that the limits of those geographic zones "*shall be such as may be specified, from time to time, by or under any law made by Parliament*." We need to appreciate the purport and meaning of Article 297 of our Constitution as increasingly these resources in the geographic zones specified by it are going to be tapped,

because of technological developments enhancing the capacities of the nation.

88. While the word "vest" could normally partake of at least a portion of the full bundle of rights associated with ownership, the phrase "shall vest" as used in Article 297 of the Constitution implies a deliberate, and not an incidental, act by a body at the various constitutional moments that have informed our Constitution. That body is the people as a nation. It is now a well established principle of jurisprudence that the true owners of "natural wealth and resources" are the people as a nation. U.N. General Assembly Resolution 1803 (XVII) of December 1962 states that the "*right of the people and nations* to *permanent sovereignty over their natural wealth and resources must be exercised in the interest* of *their national development and the well-being of the people* of the *State concerned*." (emphasis supplied) Consequently, we have to hold that it is the people of India, the true owners, who have vested, the inclusive set of potential resources in a particular class of geographic zones, in the Union, and that it is an act of trust and of faith, with a specific set of instructions.

89. Those instructions are inscribed, nay genetically encoded and hardwired, in the commands "to be held" "for the purposes of the Union." The core and pure purport of the word "hold" is to conserve, to preserve and to keep in place and it only secondarily means 'use' or 'disposal'. The fact that the phrase "be held" is used in Article 297 of the Constitution, whereas in Article 298 of the Constitution, in its immediate neighborhood, the word "hold" is used in conjunction with abilities to "acquire" and "dispose" is significant and a clear indication of the intent of the supreme drafter of the Constitution – the people. The use of a series of words in a Constitutional setting clearly implies that they are being used precisely, so that overlapping meanings are to be set aside and the purer and the core meanings be delineated. The phrase "be held" when viewed along with the phrase "shall vest", which vesting was done by the people as a nation, can only mean that it was used as a lock to conserve, to preserve and to keep in place. And the key to that lock is also there in the same Article of the Constitution: "purposes of the Union" which can only mean the integrity, unity and development of the nation.

90. Within the context of international law, there has emerged a body of thought under the broad rubric of Human Rights, that the people as the true owners of natural wealth and resources, ought to exercise a "permanent sovereignty" i.e., the power to make laws, over such resources to ensure national development and well being of the people. The responsible use of such natural resources for the well-being of the people of a nation has been seen as an important aspect of maintenance of international peace and a part of their right to "self determination"[61]. Further, these rights of the people as Nations have been secured by many struggles for self-determination over millennia. Those rights encompass the freedom of self-determination through a democratic order within the boundaries of the nation-state and the imperative of such self-determination in inter-se and yet interdependent zones of co-existence between nation-states.

91. In *Association of Natural Gas* (supra), a Constitution Bench speaking through Balakrishnan, J.(as he then was) said:

> *"…. The people of the entire country has a stake in the natural gas and its benefit has to*

61 . See UN General Assembly Resolution 523 (vi) of January, 1952, 626 (vii) of December, 1952, 1314 (xiii) of December, 1958, 1515 (xv) of December, 1960 – all specifically referred in Resolution 1803 on Permanent Sovereignty

be shared by the whole country. There should be just and reasonable use of natural gas for national development."

92. Article 38 of the Constitution, a Directive Principle of State Policy, states that: "(1) State shall strive to promote the welfare of the people by securing and promoting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." And further it is stated that the "State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." Thus, we can see that Article 38, though not enforceable in any court, but nevertheless fundamental in governance, codifies a part what the Preamble sets forth as the goal of the nation i.e. national development as both a process and a situation in which conditions of complete justice prevail. These conditions are essential for maintenance of social order in which our people can live with dignity and fraternity. National Development has been

conceived as welfare of the people; a concept of welfare that subsumes within itself the benefits of the conditions of justice.

93. The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other. In the quest for national development and unity of the nation, it was felt that the "ownership and control of the material resources of the community" if distributed in a manner that does not result in common good, it would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the Constitutional matrix just enunciated, and in the sweep of the quest for national

development and unity, is another provision. In as much as inequalities between people and regions of the nation are inimical to those goals, Article 39(c) posits that the "operation of the economic system" when left unattended and unregulated, leads to "concentration of wealth and means of production to the common detriment" and commands the State to ensure that the same does not occur.

94. The concept of equality, a necessary condition for achievement of justice, is inherent in the concept of national development that we have adopted as a nation. India was never meant to be a mere land in which the desires and the actions of the rich and the mighty take precedence over the needs of the people. The ambit and sweep of our egalitarian ideal inheres within itself the necessity of inter-generational equity. Our Constitutional jurisprudence recognizes this and makes sustainable development and protection of the environment a pre-condition for the use of nature. The concept of people as a nation does not include just the living; it includes those who are unborn and waiting to be instantiated. Conservation of resources, especially scarce ones, is both a matter of efficient use to

alleviate the suffering of the living and also of ensuring that such use does not lead to diminishment of the prospects of their use by future generations.

95. The statutory matrix dealing with natural gas and other petroleum resources also clearly indicates the importance of such permanence of sovereignty. The Territorial Waters Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, the Oilfields (Regulation & Development) Act, 1948 and the Petroleum and Natural Gas Rules, 1959, all emphasise the importance and duty of the GoI to conserve and develop mineral oils, including natural gas.

96. As we have noted above, Article 297 of the Constitution is a special provision which leads us to conclude that the powers granted to the Union to hold the resources for purposes of the Union casts special obligations over and above what are normally affixed with respect of all other resources that the Union may be permitted to act upon pursuant to Article 298. We hold that under Article 297 of the Constitution, the Union of India can indeed enter into contracts for the identification, development and extraction of resources in the geographic zones

specified therein. However, such activities can only be premised on the key therein to unlock those resources: for the purposes of the Union.

97. Much of the jurisprudence regarding restrictions of powers of the State in using natural resources has arisen from the concept of "public trust." Prof. Joseph Sax has said:

> *"[t]he idea of a public trusteeship rests upon three related principles. First that certain interests….. have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry, without regard to economic status. And finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from public uses to restricted private benefits…."*[62]

98. The concept of public trust actually finds its genesis with respect to the ocean and waters, and some have even traced this concept to the Ch'in Dynasty in China (249-207 BC) and the Roman Justinian Institutes. This has been extended substantially, and the broader notion now is that the State really

62 Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action (1971).

is acting only in a fiduciary capacity. "The message is simple: the sovereign rights of the nation-states over certain environmental resources are not proprietary, but fiduciary."[63]

99. In light of the public trust elements so intrinsic to resources under the sea-bed, and the special nature of Article 297, the implications of natural gas for India's energy security, and the imperatives of national development – including the concepts of egalitarianism and promotion of inter-regional parity, we hold that the Union of India cannot enter into a contract that permits extraction of resources in a manner that would abrogate its permanent sovereignty over such resources. It is not just a matter of mere textual provisions in a contract or a statute. It is a matter of Constitutional necessity. We hold that with respect to the natural resources extracted and exploited from the geographic zones specified in Article 297 the Union may not: (1) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same; (2) allow a situation to develop wherein the various users in different

63 Peter H. Sand Sovereignty Bounded: Public Trusteeship for Common Pool Resources. Also seeTurnipseed, Roady, Sagarin & Crowder: The Silver Anniversary of the United States Exclusive Economic Zone – Twenty Five Years of Ocean Use and Abuse, and the Possibility of a Blue Wtare Public Trust Doctrine., Energy Law Quarterly Vol. 36:1 (2009).

sectors could potentially be deprived of access to such resources; (3) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements; (4) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions; (5) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilization policy; and (6) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government.

100. Any contract including a PSC which does not take into its ambit stated principles may itself become vulnerable and fall foul of Article 14 of the Constitution.

101. Based on the above discussion, we now turn our attention to the specific PSC under consideration in this case.

From a broad consideration of the provisions therein, as discussed below, we cannot on the face of it deem that the PSC is in contravention of the Constitutional values enunciated above. The subsequent policy decisions of GoI in no manner derogate from covenants of the PSC.

102. The PSC itself specifically recognizes that the interests of India are of paramount importance. Recital 6 of the PSC states that the "Government desires that the petroleum resources…… be discovered and exploited with utmost expedition in the overall interests of India and in accordance with Good International Petroleum Industry Practices". Further, the PSC also places an affirmative obligation on the Contractor, in Article 8.3(k) to "be always mindful of the rights and interests of India in the conduct of Petroleum Operations". Article 32.2 specifically states that nothing in the PSC shall "entitle the Contractor to exercise the rights, privileges and powers conferred upon it in a manner which will contravene the laws of India." We fail to appreciate, given such a clear linkage between the PSC and the constitutional imperatives, Shri Jethmalani's argument that GoI's policy initiatives violate the terms of the PSC and sanctity of contracts.

103. *Does a Production Sharing Contract only mean a sharing of physical quantity of natural gas as contended by RNRL? What does this PSC provide?*

As discussed earlier, it is clear that a wide variety of instruments have come to be called Production Sharing Contracts and there is no specific concordance between that title and what is actually shared pursuant to a PSC. In light of that discussion and the general acceptance that revenues are also shared in the context of Production Sharing Contracts, the insistence of RNRL that only production i.e., physical volume of gas can be shared under any production sharing contract may have to be held to be unsustainable.

104. One of the bigger sources of confusion has been the manner in which the word Petroleum has been used in the specific PSC under consideration. The word Petroleum, referring to crude oil or natural gas as the case may be, is used in two senses in different parts of the PSC: as a physical product and also in terms of the monetized value. However, when the word Petroleum has been used in conjunction with the words Cost and

Profit, the definitions in this PSC clearly indicate that reference is to the monetized value of the physical product i.e., the units of the physical quantity multiplied by the sale price at which the physical quantity is sold at. Article 1.28 of the PSC defines "Cost Petroleum" to mean "the portion of total value of the Crude Oil, Condensate and Natural Gas produced and saved from the Contract Area which the Contractor is entitled to take in a particular period, for the recovery of Contract Costs as provided in Article 15". Article 1.77 of the PSC defines "Profit Petroleum" to mean "the total value of Crude Oil, Condensate and Natural Gas produced and saved from the Contract Area in a particular period, as reduced by Cost Petroleum and calculated as provided in Article 16." Reading Articles 2.2, 8, 15 and 16 of the PSC together, it would have to be concluded that under this PSC the contractor is only entitled to cost petroleum and share of Profit Petroleum in terms of realized value from sale of Petroleum i.e. natural gas in this case, and not to a share in physical quantities of Petroleum.

105. As pointed out by the Learned Additional Solicitor General, Shri. Mohan Parasaran, in some previous PSC's the

word volume had been used instead of value, but that has been specifically changed. The change in the wording is of great significance. PSC's and such instruments are model contracts that are developed and written to reflect particular policy decisions and we have been informed by the counsel of UoI that it was laid on the floor of the Parliament. This implies that the Government is of the view, that the entire range of activities being contemplated by the Policy and the PSC itself to be of such importance that they also be noticed and commented upon, and if necessary acted upon, by the Parliament as a whole. Consequently, we are of the opinion and hold that such Contracts be very carefully examined and interpreted so as to not disturb the most obvious meanings ascribable. The two words in question here are "volume" and "value," which need to be appreciated.

106. The word "volume" when used in scientific contexts would normally mean physical dimensions on three coordinate axes; in business and industrial parlance it is also used to reflect the total quantity of some physical produce. The word "value", on the other hand, implicates the meaning of both intrinsic capacity

to provide some utility, and also the value derived in the context of exchange in the market place. The word "value" and the phrase "total value" when used in the context of commerce would normally only reflect the monetized sum that is derived by multiplying the number of units of a physical product with the sale price. This distinction is clearly stated in P. Ramanatha Aiyar's "Advanced Law Lexicon" (3rd Ed. 2005) as follows:

> "*Volume***:** *"…Term often confused with turnover, although in some instances they may be used to mean the same thing. Strictly, volume is the number of units traded, whereas turnover refers to the value of the units traded. On the commodities market, however, volume refers to the quantity of soft commodities traded, and turnover refers to the tonnage of metals traded over a particular period of time."…. Number of units traded (as opposed to turnover, which is the value of the units traded, although the terms are sometimes interchanged). (International Accounting)*
>
> Whereas, Value is said to be *: "The expression "VALUE" in relation to any goods shall be deemed to be the wholesale cash price for which such goods of the like kind and quality are sold or are capable of being sold for delivery at the place of manufacture and at the time of their removal therefrom……"*

Also, according to Black's Law Dictionary, Value is said to be:

> "1. The significance, desirability or utility of something. (as a noun).

> 2. The monetary worth or price of something; the amount of goods, services or money that something will command in an exchange. 2. The significance, desirability, or utility of something. 3. Sufficient contractual consideration. (*Black, 7th Edn. 1999*)"

107. In as much as the words "volume" and "value" have different connotations and meanings, though occasionally they may have some overlap, the fact that one was replaced by the other implies that the meaning ascribable in the context of this PSC should eliminate the overlap. Consequently it can only be understood that the word "value" is being used, in the PSC, to mean the monetized value of the physical quantity that is a resultant of multiplying the quantity of Petroleum (crude oil or natural gas) produced, saved and sold in the market (as discussed below) at a "price." The words produced and saved are first used in the phrase "Petroleum Operations" defined in Art. 1.74 of the PSC, wherein it is stated that Petroleum Operations mean, as "the context may require, Exploration Operations, Development Operations or Production Operations or any combination of two or more of such operations, including construction, operation and maintenance of all necessary

facilities….. environmental protection, transportation, storage, sale or disposition of Petroleum to the Delivery Point…. And all other incidental operations or activities as may be necessary." Further Article 21.6.1 specifically states that the Contractor "…. shall endeavour to sell all Natural Gas produced and saved…" This indicates that the entire set of all Petroleum Operations are to end in a sale at the Delivery Point; so it has to be concluded that the phrase "produced and saved" in the PSC encompasses the activity of sale of natural gas. Consequently, the phrases "Total Value", "Cost Petroleum" and "Profit Petroleum" can only be interpreted as having been used to denote the monetary value realized after the sale of natural gas at the delivery point.

108. The change in the wording clearly implies that under the PSC by making the "value" of the natural gas produced, saved and sold as what is to be shared, the intention of the Government was to ensure that the "volume" i.e., the physical quantities remain outside the purview of what is to be shared between the Contractor and the Government. Consequently, under this PSC, RIL has no rights whatsoever to take physical quantities/volume of natural gas as a part of Profit Petroleum or

Cost Petroleum, in as much as the contractor's right to take anything under the PSC can only be from the total value i.e., total revenue received from sale of natural gas.

109. The decision in *Commissioner of Income Tax, Dehradun (supra),* relied upon by the Learned Senior Counsels for RNRL is inapposite in the instant matter, for the reason that the PSC that was under consideration in that particular case, Cost Petroleum (Article 1.24 therein) and Profit Petroleum (Art. 1.69 therein) were defined in terms of volume and not value. The observation of this Court in that decision that in Production Sharing Contracts what is shared is physical oil was based on that specific PSC. We have verified that contract also which was placed before us and we do find the difference as submitted by Shri Mohan Parasaran.

110. *Under the PSC does the title get transferred to Contractor on account of it expending monies on exploration, development and production?*

According to the Learned Senior Counsel for RNRL, in as much as Article 27.2 of the PSC specifies that title "to Petroleum to which the Contractor is entitled under this Contract and title to

Petroleum sold by the Companies shall pass to the relevant buyer party at the Delivery Point…..” it indicates that the title automatically passes to the Contractor on account of the Contractor having expended monies for exploration, development and production activities. This is only a partial reading of the PSC. Article 27.1 states that the “Government is the sole owner of Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract except as regards that part of Crude Oil, Condensate, or Gas the title whereof has passed to the Contractor or any other person in accordance with the provisions of this Contract.” These clauses do not state that the title passes through the contractor as an offset. Offset cannot be read into these clauses by implications. All Petroleum Operations are directed towards selling of Petroleum i.e. natural gas in this case at the Delivery Point as discussed earlier.

111. The title pursuant to Article 27.1 of the PSC can pass from the sovereign owner, the people of India, at the Delivery Point upon a sale, and not as a matter of offset against any incurred expenditure by RIL. The rights of RIL under the PSC are

to recover its costs first, from sale of Petroleum, and that too only up to a maximum of 90% of each year's total value realised from sale. In as much as the contractor under such a PSC takes the risk that exploration costs cannot be recovered unless petroleum is discovered in commercially exploitable form, this is a continuation of the risk. For instance, the reservoir could stop producing or its production could start to decline precipitously. If the total volume of natural gas that is produced over the life of the reservoir is very little or not sufficient and the market prices are low, the Contractor would risk not recovering its investments. Sale of Petroleum, is an integral part of Petroleum Operations and hence selling of Petroleum is an obligation of the Contractor. The question of an automatic offset of incurred expenditures to effectuate an automatic transfer of title is not contemplated in this PSC at all. The transfer of title can be only to entities within a class of buyers specified by a utilization policy as discussed below.

112. It should be noted, that in as much as title passes only upon sale at the Delivery Point, the true owner, the people of India acting through the Union of India have a sovereign right,

that is tempered by public law, in determining the manner in which that sale is effectuated. Public resources cannot be distributed or disposed off in an arbitrary manner.

113. *Does the GoI have the right to frame a Utilisation Policy under this PSC?*

RNRL has repeatedly argued that in as much as NELP promised the freedom to market to the contractors and that is what is provided in Article 21.3 of the PSC, and no other utilization policy was put in place, RIL had the right to commit to sell natural gas at its sole discretion. They argue that in this case RIL chose to commit to RNRL, via the MoU and the Scheme. Therefore, according to RNRL's counsel, the GoI should not have any right to interfere in this contractual commitment.

114. We disagree. The sale at the Delivery Point takes place when the people of India are still the owners of the natural gas and consequently they have the responsibility of ensuring that they exercise their permanent sovereignty, through their elected government, in order to achieve a broad set of goals that constitute national development. While revenue generation is one part of those objectives, that cannot be the only objective of

India. Timely utilization, by users spread across many sectors and across regions as the network of pipelines spreads and conservation are all necessary objectives to be kept in mind. The fundamental rationale of the PSC is "the overall interests of India" and the obligation of the Contractor is to always be mindful of the rights and interests of India.

115. Article 21.1 of the PSC makes it very clear that the sales of Natural Gas have to be in accordance with a Government Utilisation Policy and to the Indian Domestic Market.

> "Subject to Article 21.2[64], the Indian domestic market shall have the first call on the utilization of Natural Gas discovered and produced from the Contract Area. Accordingly any proposal by the Contractor relating to Discovery and production of Natural Gas from the Contract Area shall be made in the context of the Government's policy for the utilization of Natural Gas and shall take into account the objectives of the Government to develop its resources in the most efficient manner and to promote conservation measures."

116. Article 21.1 clearly contemplates that the pool of eligible buyers of natural gas extends to the whole of Indian

64 Article 21.2 gives the right to the Contractor to use a small part of the Natural Gas produced from the Contract Area for purposes of Petroleum Operations such as reinjection for pressure maintenance in Oil Fields, gas lifting and captive power generation required for Petroleum Operations i.e. for technical purposes of extraction and saving of natural gas.

domestic market. It does not speak of RIL having a right to unilaterally decide who to sell to. Clearly, under the provisions of Article 21.1 in the PSC, the Board Room of RIL or its internal divisions do not constitute the Indian domestic market. That phrase contemplates the entire class of eligible buyers in India.

117. Further, the said Article 21.1 proceeds to state that all proposals of the Contractor for production, which includes the activity of selling, shall take into account Government's utilization policy. We note that it does not say that the Contractor take into account a government utilization policy only if there is one. It mandates that the extraction and sale can only be in the context of a utilization policy. Without a utilization policy that satisfies the conditions of Article 297 of our Constitution, not even a cubic centimeter of that natural gas can be sold, let alone the many millions of cubic metres of natural gas that RNRL claims vested in it as a matter of contractual right.

118. Consequently, we hold that under the PSC, unless the Government actually sets out a policy regarding utilization of the natural gas produced, it cannot be committed or sold to anyone.

The freedom to market can only be exercised subject to the utilization policy of the GoI.

119. *Of what purport the approval by the MC of the PSC of the Initial Development Plan?*

RNRL also contends that because the Initial Development Plan was approved by the MC of the PSC, and that plan had specifically stated that natural gas produced from KG-D6 would be used in their prospective power plant at Dadri, that the GoI knew about the allocation for Dadri and therefore should be presumed to have agreed to the same. That argument is attractive but does not bear the scrutiny. First and foremost, the IDP was only a proposal as to who could be the potential users. Secondly, the proposal also specified that there could be other users, especially those who have already started units that needed natural gas and were stranded. The MoU and the extent of natural gas that RNRL is demanding, completely denies the rights of those users to a fair access.

120. Over and above that, under the PSC the right to effectuate a utilization policy only vests with the GoI. Indeed, it

cannot be any other way. The MC of the PSC is not the GoI to be able to effectuate decisions which would have the ramifications of policy, especially over a scarce resource with the kind of implications across the constitutional spectrum that we have delineated in this decision so far. In the instant case, what RNRL had demanded, as of the first time that it filed the Company Application was for 28 MMSCMD (and in the event that NTPC contract did not go through then 40 MMSCMD) and the Option Volumes of 40% of all the gas to be ever produced by RIL under any contract with the GoI. The notion that two nominees of the GoI can effectuate policy decisions of such a nature, in the context of their role as members of the Management Committee to effectuate the working of a PSC, is simply untenable and impermissible.

121. The IDP itself was proposed way back in the year 2004 and the production started only in 2009. The fact that there was no Government Utilisation Policy in place has a direct connection to that lengthy gap. Over such a time frame, many new developments, including the increase of supply of gas, newer sources, depletion of older sources, availability of gas from

other sources etc., could have as well taken place. There would have been no way for the GoI to know who would be the potential users, what are the needs of the nation, inequities between regions, how the network of pipeline would develop – those and many other such factors play a role in determining the policy. In such circumstances, one cannot imagine how the GoI could have framed a Utilisation Policy with respect to inter-sectoral needs, the requirements arising from strategic considerations or some other necessary factor that would be needed to be taken into consideration so many years ahead of actual production.

122. *The Silence and the Noise of Various Government Officials:*

The Learned Senior Counsel for RNRL also argued, very vehemently, that the GoI had remained silent for a very long time, and even though it knew that RIL was making commitments to its internal divisions, said and did nothing. From this, they attempted to draw the implication that the GoI had agreed to RIL making such commitments to its own internal divisions. They went even further. They claimed that in the

atmosphere of such a silence, RIL and the gas based energy producing division within RIL could make and indeed have made such allocations and that such a silence implies that rights have vested in them. That is an unsustainable argument. It is not uncommon for government agents to remain silent, even though the instruments under which private parties get rights to exploit natural resources provide otherwise and impose restrictions that are being flouted. This happens many a times, and for obvious reasons. That cannot become the basis for evisceration of policy making rights of the GoI. And in this case, it involves a scarce resource in such massive quantity, that is almost 50% of what had been available throughout the country for use by all the other users in the previous decade, that silence by officials of GoI cannot and ought not to be given any weight at all.

123. It was also argued by the learned senior counsel for RNRL that various utterances by senior officials and replies by some Ministers in the Parliament indicate that the Government knew that the PSC provided the kinds of rights to RIL that RNRL claims in order to sustain its demands. The short answer to that, in the context of this case is: it does not matter. At best, they

may suggest that the Ministers concerned may need better advisors from the permanent machinery.

124. The courts cannot be solely guided by the replies given by Ministers in the Parliament, in response to queries by Members, to appreciate and interpret the covenants in the PSC. When the covenants evidently carry a plain meaning which could be gathered from what the instrument itself has said, such responses cannot be used to interpret the terms of a contract. The answers, at the most, may reflect the opinion of an individual minister and they would have no bearing on the interpretations to be placed by the courts. At any rate, the courts are not bound by the answers so given to interpret the instruments. The decision in *Emperor* v *Sibnath Banerjee & Ors*.[65], relied upon by Shri Jethmalani is not an authority for the proposition that the courts are bound by such statements made in the House in response to queries by members. The decision merely holds that such answers were "admissible under Sections 17, 18 and 20 of the Indian Evidence Act."

65 .AIR 1943 FC 75

125. *Is the Price Formula/Basis For Valuation to determine government Share or For Sale of All Natural Gas?*

It was argued on behalf of RNRL that the provisions of Article 21.6 titled "Valuation" can be read to mean that the right of the GoI to approve a "price formula/basis" is only to enable it to place a value on natural gas to be able to determine its own physical share of the natural gas, and that consequently, RIL was free to sell it at whatever price it may to sell it at, so long as the price is an "arms length price." RNRL also claims that the price fixed with respect to commitments to supply natural gas at USD 2.34/mmBtu well head price should apply, because that was the only contemporaneous arms length price that was available for a determination of what price RNRL should be paying.

126. This is yet another strained interpretation that defies credulity. In a lengthy letter to Minister of Fertilisers and Chemicals written by a Senior executive of RNRL in June 2007, it was stated that a number of factors enter into price determination, including spot, length of supply, quantity, delivery point, price floor, and that even end use must be taken into account. Obviously this set of factors is not all inclusive. In a

seller's market i.e., where natural gas is in acute shortage, the options given to a buyer can have a huge bearing on the price. The parameters between NTPC terms and RNRL are of a significantly different order. First, the onerous "take or pay" clause is a part of the NTPC contract but not the gas supply agreements with RNRL, as repeatedly pointed out by Shri Salve. Secondly, NTPC did not get the option to get quantities of natural gas that were promised to some one else, in the event that contract failed. Nor did NTPC get the right to receive 40% of all future gas supplies that were likely to be produced from any gas fields of RIL. Nor was the price for NTPC fixed in the confines of a Board room. Moreover, when the MoU was executed, a few years later the prices of natural gas all over the world had risen considerably. If an international tender were floated at that point of time, it would defy logic for RIL to bid at such a low price level.

127. The terms of Article 21.6 et. seq. are clear. The first one is a command that all the natural gas produced from KG-D6 is to be sold at "arms length sales price", per Article 21.6.1. There is a reason for such a requirement. Historically, oil

companies and sovereigns have bickered over the posted prices and joint off take agreements through which the real value realized is hidden from the sovereign. The requirements of arms length prices and arms length sales are to ensure that the sovereign receives a fair share of the revenues. However, it may not be possible to determine true arms length prices in all situations, because a market may not have developed properly.

128. A spot market for natural gas for instance, which is possible when a large quantity of natural gas is available in a region, and distributed through a dense network of pipelines, would be the best source for determination of arms length sales prices because numerous transactions take place and records are kept of the prices. Where such arms length prices are not available or a sizable class of comparable transactions in the recent past is also not available such as the one provided in Article 21.6.2 (c), other methods have been chosen, including formulas that link prices to basket of fuel oils or even to crude oil as provided for in Article 21.6.3. All three Articles i.e., 21.6.1, 21.6.3 and 21.6.2(c) have to be read together. Article 21.6.2 (b) provides for a situation in which natural gas is sold to nominees

of GoI, in which case the GoI would know the actual price. RNRL is taking a clause that is provided to protect the GoI, in the event that GoI is unable to determine whether it can assure to itself that the Contractor has sold or is selling at the stated price and conflating it to a right of RIL.

129. With regard to refusal of GoI to approve the proposed sale price on parity with the NTPC bids, it is noted that RNRL has not separately challenged it. The rejection was precisely on the ground that it is not a competitive arms length price between two unrelated parties, and was justified. At any rate as there is no provision for sharing physical quantities, the question of Government fixing the price for its share of gas does not arise.

EGOM Decisions:

130. The Empowered Group of Ministers framed a utilization policy and also approved the price formula/basis submitted by RIL. It was constituted pursuant to Business Rules framed under Article 77(3) and its decisions are treated as the decisions of the Cabinet itself. It is a policy decision of the Government and has force of law since the field is not occupied

by any legislation made by the Parliament. It is needless to state that under Article 73 of the Constitution the powers of the Union executive do extend to matters upon which the Parliament is competent to legislate and are not confined to matters over which the legislation has been passed already. There is no need to dilate further on this issue since there is no independent challenge questioning the validity of EGOM decisions. The collateral attack leveled against EGOM decision cannot be entertained notwithstanding the serious allegations of mala fides made against some Ministries during the course of hearing of this matter. The Government did not surrender its rights under PSC to fix the price by way of approval. Nor do the decisions of EGOM run counter to any of the covenants of PSC. The contention that no policy decision could have been taken by the Government retrospectively effecting the contractual rights needs no further consideration for the simple reason that the decision of EGOM does not run counter to the contract. The decisions cited in this regard are not required to be gone into.

PART V

WHOSE COMPANY IS IT ANYWAY?

131. We would have thought that the answer to this question was settled in the early stages of evolution of corporate form of organization. However, where an atmosphere of privilege and of secrecy is allowed to be all pervasive, trust and capacity for fiduciary action would consequently decline and this question would have to be asked again. Whether it be social life or the hurly burly of action in economic sphere, neither law nor force can sustain a path of growth and development, if the capacity to trust is consistently undercut by surreptitious activities.

132. Be that as it may, we now turn to some of the issues that come up for our consideration with respect to matters internal to RIL. They are not dispositive as to the main elements of these proceedings, in as much as both Shri. Harish Salve and Shri. Mukul Rohtagi had submitted that the issue of governmental approvals was the key to the entire dispute. We have already expressed our view about that set of questions. Nevertheless, certain aspects of law and questions remain, on account of the decisions of the courts below. We turn to those issues.

133. *Of What Purport the "Gas Supply Arrangements" in Clause 19 of the Scheme From the Perspective of Section 391?:*

It has been a widely accepted principle that companies can only transfer such rights, powers, duties and property as are capable of being lawfully transferred by a party to a scheme; and this determination has to be made as if the Companies Act, 1956 itself did not exist. Way back in 1958, Sachs J., had enunciated that principle. Specifically he held, and it is worth quoting him *in-extenso*:

> *"… It is not necessary in a scheme to exclude specifically from its operation things incapable of such transfer, as general words in the scheme and any order in furtherance thereof must be taken to operate in a manner not repugnant to the general law…… If, however, on a proper construction of the terms of a scheme, some part of it happens, by inadvertence, expressly to order an act which, had there been no scheme, the parties could not, either in relation to the interests of third parties or otherwise, bind themselves to do, then that part of the scheme would, in my view, have to be treated as a nullity in so far as it purports so to order. To my mind, this latter principle equally applies where a scheme expressly prohibits an act which the parties could not, under general law…. bind themselves to refrain from doing."*[66]

66 In the Estate of Skinner, (1958) 1 W.L.R. 1043.

134. In this case, no definitive agreement for gas supply was placed before the shareholders and indeed such an agreement was not even promised or stated to be possible. No sensible person, exercising judgment from within the sphere of "commercial wisdom", could have arrived at the conclusion that the State in India could abrogate its responsibilities to frame policies for utilization and pricing in the context of production and distribution of an extremely scarce and a vital natural resource and that in the context of such policies supply of gas between RIL and RNRL could not have been interrupted or abrogated. Consequently, if Clause 19 of the Scheme were to be read as the imposition of the burden upon RIL to supply natural gas, irrespective of governmental policies with respect to utilization and pricing of natural gas, then it would have to be struck down as a nullity.

135. Clause 19 of the Scheme makes a very important distinction between agreements - which are more concrete - and arrangements - which are amorphous and not certain. The Scheme implicitly contemplated a situation in which the arrangements for supply of gas may not occur or function to the

full extent as desired. Governmental approvals and governmental policies are set in the context of national welfare and constitutional imperatives, and they cannot be said to be within the control of any particular person or company. Does that mean then that the Scheme with respect to the Gas Based Energy Business, which is now RNRL, has become unworkable? We hold that it has not become unworkable, but only that one part of the Scheme, which was in any case in the nature of a contingent and a highly uncertain event, has not come to pass for now on account of events and powers beyond the capacity of those who proposed the Scheme. Given the acute scarcity of natural gas in India, and given the constitutional imperatives on the GoI, no shareholder who was not naïve would, could or should have relied on the certitude of natural gas supply from RIL to RNRL. Clause 19 of the Scheme provides that "suitable arrangements" would have to be made with respect to gas supply as opposed to the more definitive "suitable agreements" with regard to "right to use the Reliance logo" in the same clause. The word arrangement as used in this context clearly only indicates a potential that may or may not be realized and that is the only way it could have been interpreted. The word 'arrangements' as used in Clause 19

contemplates a complex set of mechanisms and would involve many broad aspects, with a multitude of smaller parts, that may or may not work, especially because of changed circumstances. Hence, the phrase "suitable arrangements" has to be treated as being amorphous, requiring flexibility, involving uncertainty and even the potential that the results sought may not be achieved or realized.

136. RNRL has argued vehemently that it will become a shell company if it does not get natural gas from RIL and trade with it, as it claims that was its main purpose and also claims that would be a fair construction of the purport of the Scheme. A Scheme must be understood and interpreted exactly in terms of how a shareholder and a stakeholder who voted for it and received shares after the demerger would have understood it.

137. In the Explanatory Statement to the Scheme, while one of the purposes of RNRL as stated in its Memorandum of Association is said to be dealing in the business of supply of gas, it is only a part of the total business of buying, selling and distributing a wide spectrum of fuels, with Natural Gas being just one of them; moreover, when we turn to the second objective of

the Memorandum of Association, it is clear that an equally important purpose of RNRL is to "carry on, manage, supervise and control the business of transmitting, manufacturing, supplying, generating, distributing and dealing in electricity and all forms of energy and power generated by any source, whether nuclear, steam, hydro, or tidal, water, wind, solar, hydrocarbon fuel, natural gas or any other form kind or description." Consequently we fail to see how RNRL can claim that it was set up only to obtain natural gas from RIL and then to trade with it within the ADA Group, or that any one who reads the Scheme can understand it in that manner.

138. The arguments made by RNRL that it has not been able to set up the mega gas based power plant at Dadri because it did not get bankable agreements from RIL are unpersuasive. First and foremost, it would seem extremely unlikely that bankers do not understand that there are always supply risks associated with natural gas in a country like India, whether that be on account of GoI's policies or otherwise. It is also observed that others have started gas based energy generation plants and they have faced equally serious uncertainties, if not more.

Furthermore, we have not been given one single document that shows denial of financing on account of lack of definitive natural gas supplies. Additionally, we were also informed that significant amounts of monies have been raised, and accepted as a fact by RNRL's counsel, both here in India and abroad and yet admittedly not even a brick has been laid at Dadri for the power project for which natural gas was first sought and RNRL claims its rights begin from.

139. RNRL also filed an information document for the issuance of its GDR's at Luxembourg in which it specifically claimed that the risks that it would face include the fact that Governmental Approvals for gas supply arrangements with RIL may not come through. These are business risks associated with scarcity of natural gas and the necessity of national policy. These risks are attendant upon every entity that wants to rapidly expand. We see no reason to conflate that general condition which affects everyone in the Indian economy, to an issue of workability of the Scheme itself.

140. *Can the MoU be binding on the company?:*

It is absolutely clear that the MoU was executed in the private domain, with the help and aid of a lawyer and then marked confidential. Further, the individuals, from all indications have only executed it in their individual capacity and it was not purported to be in exercise of their positions in RIL or any other company of the Reliance Group. It is also very clear that the MoU itself recognizes that the reorganization that the promoters sought would have to be routed through the Board. The promoters also had the right to apply for a Scheme of Rearrangement under Section 391 of the Companies Act, 1956, in which case the mode of shareholder approvals and the classes formed would have been entirely different. As Shri. Rohinton Nariman points out, the MoU is an agreement between three promoters, and the Scheme is between two million shareholders, all of the same equity class and hence the MoU cannot now be imported into the Scheme. Otherwise the promoters who under the Scheme were the same as any one else would now become special, thereby negating the very concept of class of members with similar interests voting on a proposal for reorganization.

141. The minutes of the meetings of the Board of RIL dealing with various issues concerning the reorganization do not reveal anywhere whether the Board as a collective body ever took note of and approved the MoU. This is not a mere technicality. There is a certain legal sanctity associated with it, in the first place, in the form of presumptions that flow from Sections 193, 194 and 195 of the Companies Act, 1956 that they are an accurate record of the proceedings. The collective decision making, at a conjoint sitting allows for exchange of ideas. The idea of the Board working as a collective is also about the process of sharing of views and arriving at collective decisions to protect and enhance the interests of all the shareholders. And in the very first meeting, albeit on the same day that the MoU was announced, the various Directors of RIL after thanking KDA, quite effectively severed any umbilical cord that the eventual Scheme might have had with the MoU, when they asserted that any reorganization can only be premised on protection of the value of all the shareholders. There is not even a whisper of protection of a broader class of shareholders in the MoU. This is not some mere technicality; but a fundamental philosophical and attitudinal approach with regard to arrival at the decision to reorganize the

businesses. The duty to protect the interests of the shareholders is cast upon the Board, and the Board has to act in a fiduciary capacity vis-à-vis the shareholders. This duty has been a part of broader understanding of company law from the days of Settlement Companies[67] that were the precursors of joint stock companies. What RNRL is demanding, by implications that follow the insertion of the gas supply section of the MoU in Clause 19 of the Scheme, is that the Board of RIL only acted at the behest of the promoters and were mere rubber stamps of the decisions of the promoters. Acceptance of such demands would destroy the fabric of company law itself and the foundations of trust, faith and honest dealing with the shareholders. The actions of the Board of RIL clearly indicate that it did not conceive its role in that manner.

142. It is quite obvious, from the MoU itself, that the promoters family had a number of personal issues to settle, amongst which the issue relating to businesses and ownership over them was but one. It is also equally obvious that what has been revealed is but a portion of the total document. If such a

67 See part 1.103 – 1.104 of Palmer's Company Law, page 1011, 25th Edn. Vol.1.

document were to be filed as a proposal for arrangement, it would have to be thrown out at the very inception. The differences in details of the proposals for demerger as contained in the MoU, when contrasted with that of the Scheme, are staggering. Where no reasons for reorganization are adduced in the MoU, apart from a statement that having settled all the other family and other business related issues the best way forward would be a reorganization, it is the Scheme as framed and approved by the Board which provides the justifications. The Scheme specifies that each of the businesses carry different sets of risks and prospects, and that they could attract different sets of investors, that a focused management is needed to enhance the prospects of each business, etc. Finally, it is the Board which recommended the Scheme to the shareholders saying that it would benefit them.

143. The fact that the Board asked that an analysis of the pros and cons of such a reorganization be undertaken by the CG Committee of Independent Directors, along with the command that they propose a scheme of reorganization if any, with the help of professionals to study the various businesses and the

implications with respect to statutory and legal issues, is *prima facie* evidence of independence and application of the mind. Further, from the record it can be gleaned that the CG Committee with the help of professionals framed an outline of a Scheme, executed by representatives of both the MDA and the ADA Group and on that count too, it would have to be held that the Scheme was something more and fundamentally different from the MoU.

144. Clinchingly, with respect to the most contentious aspect - governmental approvals - which RNRL claims were not necessary, the minutes reveal that the Board actually commanded that it be made sure that any gas supply agreements, including terms of price, tenure etc., be subject to such approvals. Moreover, if MoU is considered, it actually runs counter to the entire claim of RNRL that it formed the basis of the Scheme regarding gas supply also in as much as the Board approved a Scheme in which the only provision with respect to gas supply was for a plan to set some uncrystallised "suitable arrangements" in place. If the Board had agreed to the commercial terms of agreement, as contained in the gas supply

section of the MoU, then it would have been mandatory upon them to reveal the same to the shareholders of RIL, because of the sheer scale of monetary value of the gas supply contracts. RNRL itself claims that the potential monetary value of such gas supply arrangements could run into many thousands of crores of rupees, and we fail to see how prospective agreements involving such huge value, in which commercial terms are claimed to have been settled, cannot be revealed to the shareholders in the context of a scheme of arrangement. No rationale or justification can support such a proposition.

145. The Companies (Amendment) Act, 1965, based on the recommendations of Daphtary-Sastri Committee specifically provided that the applicants for a scheme shall "disclose by affidavit all material facts". (See: Section 391(2) of the Companies Act, 1956). In as much as the terms and conditions of gas supply, as specified in the MoU, were not specifically informed to all the shareholders and stakeholders, including in this case the GoI (as a party to the PSC), we simply fail to see how the MoU can be read into the Scheme itself. It doesn't matter whether one calls MoU the guiding light or a tool for

interpretation or a foundation – the sheer fact that the terms of gas supply contained in the MoU were withheld from the shareholders implies that it cannot now be imported into the Scheme. The argument that contracts are entered into all the time, and are treated as day to day affairs for the management and the Board, fails at the point of division of a company. Where, in regular times a shareholder or a stakeholder can demand and obtain information and have time to try and monitor such contracts and the actions of the management, the act of hiving off an undertaking is a much more crucial point, when the shareholders have to be even more careful about the transfer of value. The whole purpose of Section 293 which prohibits the Board from hiving off an undertaking without shareholders approvals, is to prevent such transfers being effectuated on a permanent basis without the knowledge of the shareholders. The very essence of the requirement that all material facts be disclosed would have been decimated. Consequently, we hold that the Scheme as propounded by the Board, placed before and approved by shareholders and stakeholders and sanctioned by the court is completely different from the MoU. The MoU may have been the starting point. The end point is significantly,

substantially and materially different from it and it cannot now be brought back in the guise of interpretation.

146. *Does the MoU support the contentions of RNRL with respect to governmental approvals?*

The provisions of Paragraph xii (a) and (b) of the Gas Supply section of the MoU, makes it abundantly clear that the two brothers who executed the MoU understood that the gas allocation set forth in it would require governmental approvals. The said paragraphs state as follows:

> "Xii(a): In relation to applicable governmental and statutory approvals, without in any manner mitigating RIL's responsibility to jointly work towards obtaining such approvals, RIL will, if so required by the Anil Ambani Group, give an irrevocable Power of Attorney to the Anil Ambani Group/REL to apply for and obtain such governmental and regulatory approvals as are necessary on its behalf.
>
> (b) The definitive agreements will reflect that the Mukesh Ambani Group will act in utmost good faith and will make best endeavours to work for and obtain such approvals. If there is any action taken in bad faith for not obtaining/scuttling the obtaining of such approvals, Kokilaben reserves her ability to intervene again

> and the Anil Ambani Group would also have a claim for damages." (emphasis supplied)

147. In the course of the proceedings before us, Shri. Harish Salve repeatedly challenged that RNRL had singularly failed to explain this provision which so clearly demonstrates that ADA was aware that governmental approvals would be necessary for the kind of gas supply agreements that had been contemplated in the MoU. At first, we heard an argument by RNRL that the said paragraphs do not relate to gas supply as such, but general governmental and statutory approvals with respect to reorganization. When pointed out that general approvals were provided for separately in the section of the MoU dealing with "Manner of Business Segregation", we next heard the arguments from RNRL's counsel that these relate to laying of pipes and make other arrangements for transport of natural gas from Kakinada. Finally, in the written submissions given to us after the hearings ended, this is what the counsel for RNRL submitted on page 43 of their written submissions:

> "8.<u>GOVERNMENT/STATUTORY APPROVAL CLAUSES IN THE MOU:</u>

> i) Contrary to what is falsely contended by RIL, MOU did not provide that the commercial terms of supply of gas would require Government/statutory approval.
>
> ii) MOU merely referred to applicable regulatory and other approvals as RIL would require to engage in and carry on the gas exploration and production business."

These defenses of RNRL absolutely hold no water. The entire gas supply section of the MoU deals primarily with the issue of quantum and by reference to NTPC terms, price and tenure, as has been repeatedly contended by RNRL itself. To now turn around and claim that the governmental approvals mentioned in that section refer to RIL's business of oil production and exploration is untenable. This is further evidenced by at least two other factors. The first one relates to RNRL's total failure to rebut the inferences drawn by Shri Harish Salve from the fact that ADA Group and RNRL's executives had accepted that NTPC draft agreements from May, 2005 were to be the basis for gas supply agreements and those draft NTPC agreements specifically provided for governmental approvals. The second factor, equally striking, is that in the letter dated February 28, 2006 in which RNRL strongly protested the GSMA & GSPA,

RNRL did not protest the terms that governmental approvals were required. In the annexure to the said letter, in which differences between the MoU and the gas supply agreements were listed in a tabular form, in item 16 the protest was that with respect to governmental agreements it was not provided that the MDA Group would act in "utmost good faith" and "make best endeavours". Many more of such acts of omission and commission which would demonstrate unequivocally that RNRL and ADA Group always knew that governmental approvals were necessary could be adduced. We do not consider it to be necessary to go into all those details. We conclude that ADA Group and subsequently RNRL was always aware that under the PSC the GoI had a right to frame policy and approve price formula/basis applicable to the sale of all gas produced from KG-D6.

DOCTRINE OF IDENTIFICATION:

148. Shri. Jethmalani went to some lengths in arguing that the Doctrine of Identification has immediate and crucial relevance in this case. As explained by him, there are certain individuals, who are the controlling mind of the Company and that once they

have agreed to something, it should be deemed that the Company also agreed to the same, including the Board. Reliance was placed upon the decisions referred to in the summary of submissions. In the instant matter his argument was that, in as much as MDA had agreed to the gas supply agreements as provided for in the MoU, it should be deemed that the Board and the Company also agreed to the same. Consequently his argument is that the MoU is binding on RIL.

149. We disagree. Doctrine of Identification as developed by the courts is typically applicable in criminal and tortious liability cases. Even assuming that it is applicable in matters such as this case, nothing really turns upon it in the factual matrix of this case. It is a fact that the Board in mid 2004 had vested a substantial portions of its powers on MDA but retained the powers that only it could exercise. The crucial fact is that ADA had agreed that the agreements entered into with MDA as a part of the MoU be mediated through the Board in the form of a reorganization, and the Board thereafter acted independently. This is amply evidenced by the Board insisting that governmental approvals were necessary for gas supply agreements, which

RNRL claims were not a part of the MoU. If that be the case, for the sake of argument, then it only strengthens the finding that the Board acted independently and provided that "suitable arrangements" needed to be put in place with respect to gas supply. Moreover, it is absolutely clear that the personnel from both ADA and MDA Group participated in the discussions leading up to the Board resolution approving the Scheme as presented to the shareholders and the stakeholders. The same Scheme was also approved by over 99% of the shareholders, which would mean that ADA himself also approved the Scheme as presented. Further, given the finding above by us that ADA and ADA Group members knew that government approvals were necessary and these are a part of general business risks that the ADA Group undertook, we fail to see what is left to impute to any one. Further, ADA was a member of the Ambani family and a powerful shareholder who would have obviously had deep connections in the Company's management. To claim that he did not know what was going on with respect to how the Scheme was going to be framed and have the changes made in accordance to what he wanted, if acceptable to others, is simply unacceptable. Further, the active participation of the lawyer - who had framed the MoU

and was advising ADA on gas based energy production business -in the relevant Board meetings in which gas supply agreements were discussed and it was recorded that he concurs with the view of Board members that the same are necessary, implies that ADA was aware of the same.

150. Over and above all of that, the matter turns upon Governmental approvals. How can anyone be held liable and then that liability be extended to the company, on a matter such as securing governmental approvals and that too with matters that involve major policy decisions? What exactly are RNRL, its board, ADA Group and ADA asking that MDA and RIL should have done? For the view we have taken in the matter it may not be necessary to refer any of the decisions upon which both the parties relied upon in support of their submissions.

MAINTAINABILITY:

151. The learned Senior Counsel for RNRL have contended that the powers of the Court, under Section 392 of the Companies Act, are of the of the widest amplitude, much wider than the powers under Section 391, because they can extend even to suo moto ordering the winding up of the Company.

Consequently, they argue that the courts must exercise such powers to fully implement the Scheme to effectuate the scheme one way or the other. They relied upon *S.K. Gupta* (supra).

152. Shri. Nariman argued that Section 392 of the Companies Act, 1956 appears to have been enacted to bring the provisions of Section 391 on par with the provisions of Section 394. To this effect he pointed out to the differences between Section 394, which he stated was a complete code because it included powers of supervision in the post-sanction scenario, and Section 391 which does not have similar provisions. Mr. Nariman, relying on the decision of this court in *Miheer H. Mafatlal* (supra) submitted that the company court's jurisdiction is peripheral and supervisory and not appellate, and further that the power to enforce a compromise or an arrangement by way of modification does not extend to substantive modifications to the scheme itself as approved by the shareholders. The power of modification, pursuant to Section 392, cannot be greater than the power to sanction the scheme. In this regard he also argued that the ratio of *S.K. Gupta* (supra) should be construed to be that courts have the power to modify terms of the scheme to remove

impediments and the like to make the scheme function properly so long as the basic fabric of the scheme is not affected. According to Shri Nariman, the judgment of this Court in Meghal Homes (P) Ltd. (supra) sets out the correct position in which it was stated in para 54 that:

> "… Section 392 of the Act… only gives power to the Court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement… it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in terms of Section 391 of the Act."

153. However wide the powers of the courts may be, they cannot be so wide as to order supply of gas in contravention of government policies, the constitutional obligations that the GoI must bear in mind when formulating such policies and in contravention of broader public interest. The Division Bench erred by holding that certain quantum of natural gas stood allocated to RNRL. The error is on account of both a misinterpretation of the PSC and also public law. Apart from that, both the Learned Single Judge and the Division Bench below have erroneously held that the MoU's gas supply section be read

into the Scheme thereby effectively substituting the phrase "suitable arrangements" in Clause 19 to mean the gas supply provisions of the MoU. We hold that those conclusions were erroneous. We disagree with the propositions of Learned Counsel for RNRL that the ratio in *S.K. Gupta* (supra) would support such a result.

154. The ratio of *S.K. Gupta* (supra) is that under Section 392 the Courts have the duty of continuous supervision to make the Scheme workable by removing the hitches, obstacles or impediments as necessary to ensure the proper functioning of the Scheme. Further, while the Court does state that the powers of the court are of the widest amplitude, including the power to modify a provision of the scheme, it also does hold that the same can only be exercised so as to ensue the proper working of the Scheme and further, that such powers may not be exercised in a manner that would alter the "basic fabric" of the scheme. The removal of obstacles, impediments or hitches cannot be held to mean wholesale changes in the scheme itself and go beyond the confines of what the shareholders, the stakeholders and the

courts that sanctioned the scheme would have understood the provisions of the scheme to mean.

155. It is true that in paragraph 26 of the said decision it was stated that if "something can be omitted or something can be added to a scheme of compromise by the Court, on its own motion or on the application of a person interested in the affairs of the company" then there ought not to be any justification for restricting the meaning of the word of modification and whittle down the powers of the court. However, the next paragraph holds the key to the judgment that the "basic fabric" of the scheme ought not to be changed. The limit on the powers of the Court to modify by way of even additions or omissions as contemplated is that the "basic fabric" of the Scheme cannot be changed; and according to the said decision, even before a court could embark upon a mission of suggesting modifications it has to first determine what "modifications are necessary to make the compromise or arrangement workable." Any such determination first has to arrive at a conclusion that the Scheme has become unworkable in its entirety or in a portion thereof. Arrangements, by their very nature are complex processes involving many elements that may or may not work. In fact in *S.K. Gupta*

(supra) this court recognized that to be the very reason why the legislature in India has given such a power to the courts; and such power can be exercised only to order those minimal modifications that would bring the aspect that is not working into a functional zone, with the proviso that at any rate such a modification cannot lead to a change of the "basic fabric" of the Scheme.

156. What does the expression "basic fabric" mean? "Fabric" can imply both the end result, and also equally importantly, the processes, procedures and steps that were taken to weave the "fabric" of the Scheme. During the course of weaving of the "fabric", decisions could be taken to leave out certain aspects as unacceptable to the Board or the shareholders and stakeholders or the Court. Further, those processes necessarily involve certain steps in obtaining shareholders permissions. Such processes are the very essence of the fabric and not just some technicalities that are to be consigned to history and ignored in making modifications. Whatever changes are made can only be minor ones which would not tamper with the essence of the scheme.

157. In this Scheme, the shareholders & stakeholders of RIL would have broadly understood from the Scheme two things: (1) that the Gas based Energy Resulting Company was to engage in the business of supply of many different kinds of fuels, in which supply of natural gas to its affiliate companies is one; and (2) that the Gas based Energy Resulting Company will engage in the business of promoting energy generation business, from using any and all fuels, including natural gas, both from RIL and also from other sources. Nowhere did the Scheme state that the only fuel that the Gas based Energy Resulting Company would deal with would be natural gas from RIL. To change that meaning would be to begin the process of tearing apart the "basic fabric" of the Scheme.

158. "Basic fabric" of a scheme also implicates the essentiality of common interests between the class of members who have voted together, thinking that they all have the same level of information and the same understanding of the entire class of members as to what the Scheme entails. That understanding would certainly not have comprehended the claims that RNRL is putting forward in these proceedings: (i) that the intent was to actually share the benefits of the production and

exploration activities, including the benefit of internal use of natural gas; (ii) that because the same was not possible on account of statutory and contractual problems, the gas supply agreement was a way out; (iii) that the gas be supplied in accordance with the commercial terms regarding quantity, price and tenure in the MoU which were never revealed to them; (iv) that the burden of gas supply would involve the transgression of the boundaries of the PSC from which the value flows to RIL; and (v) that the burden would extend to RIL subsidizing RNRL if it were required to pay a much higher value to GoI than what it receives from RNRL. In contrast to the foregoing, all that the class of members who approved the scheme and the court which sanctioned it would have understood was that normal commercial agreements of supply, that would protect the interests of both parties and also including the clauses of governmental agreements, would be put in place. Such a conclusion would also follow from the main tenet of the Scheme that the two groups were to function independently of each other.

159. If the question regarding what would make the Scheme work had been framed properly by the courts below and they had appreciated the role of the courts better then this case

would not have taken the twists and turns that it has. The first question would have been whether the Scheme itself has become unworkable? RNRL's arguments that the gas supply is integral to the whole Scheme are simply an unsustainable proposition. Gas supply is but a part of the Scheme as a whole. The fact remains that RIL can supply gas to RNRL provided appropriate governmental approvals, pursuant to constitutionally permissible utilization policies, are in place; and moreover, the commitment to supply gas in the Scheme was to established gas based energy generating power plants. That possibility still remains. We fail to see where even that aspect of the Scheme has failed to work. We were given to understand that in fact one of the gas based power generating power plants associated with RNRL and ADA Group is in fact being supplied natural gas, all in accordance with the utilization policies set in place by the GoI. If that be the case, then the conclusion that even this small part of the Scheme is not working is completely unwarranted and would not even merit a second look at.

160. The Learned Counsel for RNRL objected to reliance of RIL on the ratio of *Miheer H. Mafatlal* (supra), on the ground that it only pertains to the situation at the time of sanction of the

scheme and that the ratio of *Megal Homes* (supra) cannot be relied upon as *S.K. Gupta* (supra) a three judge decision, suggests otherwise. In light of the discussion above we do not see how, in the context of this case, the ratio of *S.K. Gupta* (supra) is different from that of *Meghal Homes* (supra): they both speak of the same thing, that the basic fabric of the scheme cannot be changed. Which aspect of that basic fabric the courts may deal with could vary, but certainly the processes that protect the shareholders, their rights to know what is being transferred and the sanctity of the class of members who have voted together cannot be derogated from.

161. In the instant case by importing the gas supply section into the Scheme, in the guise of interpreting it, the phrase "suitable arrangements" was transformed into "suitable arrangements as agreed upon by the promoters in the gas supply section of the MoU". Such a modification necessarily tears apart the basic fabric and cannot be permitted.

162. For the view that we have taken it is not necessary to go into the protested points regarding the Identity of the Buyer, Definition of Affiliate and Limitation of Liability.

CONCLUSIONS:

163. In the result, we hold that:

(i) both the learned Single Judge and the Division Bench committed a serious error in exercising jurisdiction in the manner they did under Section 392 of the Companies Act, 1956, for such interference has resulted in the provisions of a document (MoU) which was not before the shareholders supersede the Scheme of Arrangement. Such a document could not have been read into and incorporated in the Scheme propounded by the Board, approved by the shareholders and sanctioned by the Company Court;

(ii) the courts below having rightly directed the parties to negotiate, and further having rightly refused to grant the prayers in the Company Application, however, fell into error directing the MoU to be binding and the basis for further negotiations between the parties. MoU is a private pact between the members of Ambani family which is not binding on RIL;

(iii) the EGOM decisions, regarding the utilization of the natural gas and the price formula/basis etc. do not suffer from any legal or constitutional infirmities. They shall apply to all supplies of natural gas under the PSC. The parties are bound by the governmental policy and approvals regarding price, quantity and tenure for supply of gas;

(iv) under the PSC in issue the Contractor (RIL) does not become the owner of natural gas, and there is nothing like specified physical quantities of natural gas to be shared by the GoI and the Contractor;

(v) we, accordingly, direct the parties to renegotiate as to the suitable arrangements for supply of gas de-*hors* the MoU. Such renegotiations shall be within the framework of governmental policy and approvals regarding price, quantity and tenure for supply of gas. The renegotiations shall commence within eight weeks from today at the initiative of RIL and shall be completed within a period of six weeks from the day of commencement of negotiations.

Accordingly, the judgments of the learned Single Judge and the Division Bench of the Bombay High Court are set aside and we dispose of all the appeals without any order as to costs. Intervention Applications do not require any adjudication. They are also accordingly disposed of.

164. Before we part with the case, we consider it appropriate to observe and remind the GoI that it is high time it frames a comprehensive policy/suitable legislation with regard to energy security of India and supply of natural gas under production sharing contracts.

165. What remains for us is to place our appreciation on record of the invaluable assistance rendered by Sarvashri Ram Jethmalani, Harish N. Salve, Mukul Rohatgi, R.F. Nariman and Ravi Shankar Prasad, all learned senior counsel appearing on behalf of the parties. We also acknowledge a very dispassionate assistance rendered by learned Solicitor General and his team of Additional Solicitors General.

.....J.
(B. SUDERSHAN REDDY)

NEW DELHI,

MAY 07, 2010.

ANNEXURE

GLOSSARY OF TERMS

ADA	:	Anil D. Ambani
APM	:	Administered Price Mechanism
BCF	:	Billion Cubic Feet
BCM	:	Billion Cubic Meters
CG	:	Corporate Governance
CNG	:	Compressed Natural Gas
DGH	:	Directorate General of Hydrocarbons
EGOM	:	Empowered Group of Ministers
GoI	:	Government of India
GSMA	:	Gas Sales & Master Agreement
GSPA	:	Gas Sale & Purchase Agreement
GUP	:	Gas Utilization Policy
IDP	:	Initial Development Plan
KDA	:	Smt. Kokilaben Dhirubhai Ambani
KG-DWN-98/3	:	KG-D6
LNG	:	Liquefied Natural Gas
MC	:	Management Committee
MDA	:	Mukesh D. Ambani
mmBtu	:	Million British Thermal Units

MMSCMD	:	Million Standard Cubic Meters Per Day
MoPNG	:	Ministry of Petroleum and Natural Gas
MoU	:	Memorandum of Understanding
NELP	:	New Exploration Licensing Policy
NTPC	:	National Thermal Power Corporation
P1 Reserves	:	Proven Reserves
P2 Reserves	:	Probable Reserves
P3 Reserves	:	Possible Reserves
PNG	:	Petroleum and Natural Gas
PSC	:	Production Sharing Contract
PSU	:	Public Sector Undertaking
REL	:	Reliance Energy Limited
RIL	:	Reliance Industries Limited
RNRL	:	Reliance Natural Resources Limited
RPPL	:	Reliance Patalganga Power Limited
Scheme	:	Scheme of Arrangement
SCF	:	Standard Cubic Feet
TCF	:	Trillion Cubic Feet
TBtu	:	Trillion British Thermal Units
UoI	:	Union of India
USD	:	United State Dollar