Centre For Public Interest Litigation vs Union Of India & Anr on 16 September, 2003

Equivalent citations: AIR 2003 SUPREME COURT 3277, 2003 (7) SCC 532, 2003 AIR SCW 4671, (2004) 13 ALLINDCAS 881 (SC), 2003 (5) SLT 601, 2003 (3) UPLBEC 2708, 2003 (4) COM LJ 1 SC, 2003 (7) SCALE 491, 2003 (8) ACE 473, (2003) 4 COMLJ 1, 2003 (10) SRJ 519, 2003 (4) LRI 60, (2004) 1 ALLMR 65 (SC), (2003) 10 INDLD 144, (2003) 117 COMCAS 123, (2003) 3 UPLBEC 2708, (2004) 1 BANKCAS 173, (2003) 6 SUPREME 634, (2003) 7 SCALE 491

Bench: S. Rajendra Babu, G.P.Mathur

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           CASE NO.:
Writ Petition (civil)  171 of 2003

PETITIONER:
Centre for Public Interest Litigation

RESPONDENT:
Union of India & Anr.

DATE OF JUDGMENT: 16/09/2003

BENCH:
S. RAJENDRA BABU & G.P.MATHUR

JUDGMENT:
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J U D G M E N T (WITH WRIT PETITION (CIVIL) NO. 286 OF 2003) RAJENDRA BABU, J. :

In these two writ petitions filed in public interest the petitioners are calling in question the decision of the Government to sell majority of shares in Hindustan Petroleum Corporation Limited (HPCL) and Bharat Petroleum Corporation Limited (BPCL) to private parties without Parliamentary approval or sanction as being contrary to and violative of the provisions of the ESSO (Acquisition of Undertaking in India) Act, 1974, the Burma Shell (Acquisition of Undertaking in India) Act, 1976 and Caltex (Acquisition of Shares of Caltex Oil Refining India Limited and all the Undertakings in India for Caltex India Limited) Act, 1977.

The petitioners contended that in the Preamble to these enactments it is provided that oil distribution business be vested in the State so that the distribution subserves the common general good; that, further, the enactments mandate that the assets and the oil distribution business must vest in the State or in Government companies; that, they are not opposed to the policy of disinvestment but they are only challenging the manner in which the policy of disinvestment is being given effect to in respect of HPCL and BPCL; that, unless the enactments are repealed or amended appropriately, the Government should be restrained from proceeding with the disinvestment resulting in HPCL and BPCL ceasing to be Government companies. It is further submitted that disinvestment in HPCL and BPCL could result in the State losing control over their assets and oil distribution business and, therefore, it is contrary to the object of the enactments.

It is the submission of the learned counsel for the petitioners that acquisition of HPCL and BPCL has taken place in pursuance of Article 39(b) of the Constitution; that, Article 39(b) subserves the object of building a welfare State and an egalitarian social order; that, therefore, these enactments have been passed with the object of giving effect to Article 39(b) of the Constitution and the provisions of the enactment provide for vesting of these undertakings in the State or in a Government company; that, it is not open to the Government to disinvest the same without first changing the law in this regard either by repealing the enactments or by making appropriate changes by way of amendments in the enactments. The learned counsel further relied upon a decision of Superior Court of Justice of Ontario between Brian Payne vs. James Wilson and Her Majesty the Queen in Right of Ontario dated April 19, 2002. In that decision the Superior Court of Justice of Ontario declared that any sale of the common shares of Hydro One Inc. held in the name of Her Majesty in right of Ontario, whether pursuant to an initial public offering of common shares or by way of a secondary offering, or otherwise, contravenes sub-section 48(1) of the Electricity Act, 1998. In that enactment Section 48(1) provides that the Lieutenant Governor in Council may cause two corporations to be incorporated under the Business Corporations Act and shares in those corporations may be acquired and held in the name of Her Majesty in right of Ontario by a member of the Executive Council designated by the Lieutenant Governor in Council. That order was appealed to the Court of Appeal of Ontario. During pendency of the appeal the Electricity Act, 1998 was amended by replacing Section 48(1) thereof which expressly authorises the Minister of Environment and Energy to dispose or otherwise deal with the shares of the Hydro One Inc. and on that basis, disposed of the appeal. It was further noticed in that decision that the reasons given by the Superior Court of Justice cannot be read as a general pronouncement on the rights of the Crown to deal with its assets; that, the learned Judge purported to analyse a specific provision in a specific Act; that, he did so in the context of the entirety of the Electricity Act, 1998, the specific circumstances surrounding its enactment and the comments of the Minister responsible for that specific Act.

In the counter-affidavits filed on behalf of the contesting respondents, it is urged that the policy of disinvestment followed by the Government of India has been upheld by this Court in BALCO Employees' Union vs. Union of India, 2002 (2) SCC 333; that the decision to disinvestment and the implementation thereof is purely an administrative decision relating to the economic policy of the State; that, it is the

> prerogative of each elected Government to follow its own policy; that, the contention of the petitioners that prior approval of Parliament for disinvesting Government's holding in HPCL and BPCL is not necessary since in the Acquisition Act setting up these companies there are no restrictions on the disinvestment of these companies; that, the said companies are registered under the Companies Act, 1956; that, the sale of shares thereof do not require Parliamentary approval; that, the Memorandum and Articles of Association of the said companies also do not contain any such restriction on transfer of shares; that, the Acts in question have worked themselves out after acquisition; that, the provisions of the Companies Act, 1956 and Securities and Exchange Board of India's guidelines govern the companies in question under which there are no restrictions on disinvesting Government share holding in these companies; that, there is no other statutory bar to such sale of shares; that, indeed, the Disinvestment Commission examined the issues relating to disinvestment of IBP Co. Ltd. and found that there was no necessity of Parliamentary approval for its disinvestment; that, in fact, shares in HPCL and BPCL were sold during the period 1991-92 to 1993- 94 through executive decisions; that, similarly, another public sector undertaking, Maruti Udyog Limited where acquisition was through an Act of Parliament, was disinvested through executive decisions over the last two decades; that, even in those cases, Parliamentary approval was not required and the present case does not stand on a different footing as the legal regime is similar; that, in the enactments in question there are no express or implied provisions restraining transfer of shares of HPCL or BPCL; that, oil is an important sector of the economy and can grow only with increasing efficiency and that the key to efficiency is competition and disinvestment is an important instrument to achieve competition; that, after dismantling of the Administered Prices Mechanism with effect from 1.4.2002, the Government's main responsibility in the petroleum sector is laying down the broad policy framework with the objectives of ensuring oil security in the country and protecting the interests of consumers; that, under the ensuing market scenario in the oil sector, there is a need for an independent statutory regulatory mechanism to ensure competition, encourage investment and protect consumers' interest in the oil sector;

that, steps have been taken to introduce in Parliament a Bill for establishing a statutory regulatory authority; that, two private parties viz., M/s Reliance Industries Limited and Essar Oil Limited, have already been granted authorisations to market transportation fuels and the Government has already deregulated Exploration and Production, Refining and Pipelines; that, there is now widespread private sector participation in Exploration and Production, Refining and Pipelines; that, petroleum sector and consumers are expected to benefit as a result of such increased competition; that, in this global economic scenario and the need for greater private participation and private finance initiative, disinvestment by Government of its share holding in State owned companies is an instrument of economic policy accepted globally. It is also brought to our notice by him that assets of the HPCL and BPCL were acquired by the Central Government through Acts of Parliament but in course of time of more than quarter of a century the assets have changed their nature and today they bear hardly any resemblance to the assets which were acquired under the statures; that most of the present assets of the two companies have been acquired after acquisition by means of investment by the Government and those assets which were initially acquired under statute have also been transformed into substantially different assets; that, data placed before the Court will clearly indicate that the assets of HPCL and BPCL today have only a remote semblance to the assets that had been acquired in 1974 and 1976 and a large proportion of the assets of the two companies have been added after acquisition; that, even the assets that were taken over are no longer the same as capital has been spent on them over the past several years; that, all these assets now belong to HPCL and BPCL which are incorporated under the Companies Act, 1956; that, at the highest, the petitioner's contention can be that the assets taken over cannot be privatised but there clearly cannot be any requirement of Parliamentary approval or sanction for disposal of assets added post-acquisition; that, assets acquired by HPCL and BPCL either by acquisition through legislation or through purchase have all now indistinguishably merged and form the assets of the companies, disposal of which will be governed only by the provisions of the Companies Act, 1956 and there is no need for any Parliamentary approval or sanction. In this context, he relied upon the decisions of this Court in Western Coalfields Limited vs. Municipal Council, Birsinghpur Pali & Anr., 1999 (3) SCC 290, and Municipal Commissioner of Dum Dum Municipality & Ors. vs. Indian Tourism Development Corporation & Ors., 1995 (5) SCC 251, to indicate the nature of holding by a Government company of the assets held by it.

In addition, Shri Harish Salve contended that as per Section 7 of the Act, the Central Government may vest the assets acquired by it in any Government company which becomes a complete owner of the acquired assets and the Central Government has no further interest in the assets so transferred to the companies. The company holding the acquired assets is like any other company incorporated under the Companies Act; that such companies do not hold or administer these properties for and on behalf of the Central Government; that there is no express or implied prohibition in Section 7 of the Act on the transfer by the Central Government of its shares in these companies; that, the only reason why the assets were acquired by the Government by legislation was that part of the assets included the marketing part of a foreign company; that the parliamentary debates specifically show that the understanding was that for the transfer of the shares and assets in an Indian company did not require the enactment of a law. That part of the assets belonging to the two oil companies were obtained by negotiated purchase, rather than through acquisition; that in the case of Burmah Shell, the assets belonging to the Indian subsidiary were bought through a commercial transaction; that, it cannot be gainsaid that the companies are free to sell off their assets without any change in the law; that thus if the companies desire to sell off at this distance of time the old machinery inherited by them (and the value of which is a small fraction of its current net worth), there is no legal embargo even if it amounts to the company no longer holding any of the assets vested in after nationalisation; that if the contention of the petitioners is accepted, the Central Government cannot sell its shares even in such a company ; that, the definition of a Government Company can be amended under the Companies Act generally and unrelated to purposes nationalisation laws or can amalgamate these companies with another company which may ultimately impact the Central Government's shareholding;that thus, there is nothing in law to prevent the Central Government to amend the articles to provide that even if it continues to hold 51%, it will not interfere in the management with the private strategic partner who holds less shares; that the Government can attain the same object in a manner more favourable to the Government – viz. by selling off its shares to reduce its holding;

that, the submission that the policy underlying a statute has to be determined from a reading of the preamble; and that reference to the preamble of a statute can be had only when the words of a statute are ambiguous and placed reliance on Smt. Sita Devi (Dead) by LRs. v. State of Bihar & Ors. 1995 Supp (1) SCC 670, para 2; that, the legislative policy as spelt out in the preamble which is to ensure that the assets are so managed and the undertaking is so run to ensure that its business remains vested in the State so that it can be run for the public good; that even by transfer of a company other than Government company the assets can be distributed in a manner that would subserve the common good and "the common good" is a matter of economic policy; that with the passage of time, the needs of the economy may dictate changes – a change cannot be condemned on the ground that it would be deterimental to common good. In this context, it is submitted that the nationalisation was a part of a larger policy to bring in the oil sector under Government control; that, the control of the oil sector was not attained by a legislation but by administrative policy; that the prices of oil products were also controlled by executive orders. These have been all modified by the Government in exercise of executive power; that in view of these changes, the continuance of Government ownership of shares in these companies is no longer considered to be necessary; that the perception now is that the "common good" will best be subserved by the privatisation of these undertakings; that this perception is a matter of economic policy not amenable to judicial review.

We start our discussion of the matter from a constitutional angle. When the government decides to set up a new company, the investment for setting it up is shown as a 'new instrument of service' and exhibited separately in the demand for grants for the concerned Ministry while presenting the Annual Budget. Under Article 113(2) of the Constitution, estimates are presented to Parliament in the form of demand for grants. This fulfills the technical requirement of parliamentary approval when a new company is set up. The President, in exercise of his powers conferred under Article 113(2) of the Constitution has framed the General Financial Rules, in which under Rule 71, it is provided that no expenditure shall be incurred during a financial year on a new service not contemplated in the Annual Budget for the year except after obtaining the supplementary grant or an advance from the Contingency Fund. Setting up a new public sector company is defined as a 'new instrument of service' for which approval of Parliament is required for expenditure from the Consolidated Fund of India. If this is the background in which a new company is set up, can such a company be dismantled without some kind of parliamentary mandate? In this background we will now consider the case on hand.

The pleadings filed and the arguments raised before this Court indicate that the question for consideration before us is whether or not there is any express or implied limitation on the Government to privatise HPCL and BPCL. It is no doubt true that the two companies are Government companies and being instrumentalities of the State, they can enter into contracts among other things, but question is whether this power is circumscribed by any statute either expressly or by necessary implication. It is also clear that there is no provision in the Act expressly stating that the Government shall, at all times, hold not less than 51% of the paid-up capital of each corresponding new company, as has been stated in the Banking Companies (Acquisition & Transfer of Undertakings) Act. Nor is there any provision as in the Coal Mines Nationalisation Act, 1973 to the effect that "no person, other than the Central Government or a Government company or a corporation owned, managed, or controlled by the Central Government shall carry on coal mining operation, in India, in any form".

For the purpose of understanding the provisions we will set out the relevant provisions of one of the enactments. We make it clear that the three enactments stated above in this case are identical. Preamble to the ESSO (Acquisition of Undertaking in India) Act, 1974 (hereinafter referred to as 'the Act) reads as follows :-

> "An Act to provide for the acquisition and transfer of the right, title and interest of ESSO Eastern Inc. in relation to its undertakings in India with a view to ensuring co-ordinate distribution and utilisation of petroleum products distributed and marketed in India by Esso Eastern Inc. and for matters connected therewith or incidental thereto.
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> WHEREAS Esso Eastern Inc., a foreign company, is carrying on, in India the business of distribution and marketing petroleum products manufactured by Esso Standard Refining Company of India Limited and Lube India Limited, and has, for that purpose, established places of business at Bombay and other places in India;
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> AND WHEREAS it is expedient in the public interest that the undertakings, in India, of Esso Eastern Inc. should be acquired in order to ensure that the ownership and control of the petroleum products distributed and marketed in India by the said company are vested in the State and thereby so distributed as best to subserve the common good;"

Section 2(d) of the Act defines a 'Government company' to mean "a company as defined in section 617 of the Companies Act, 1956." Section 617 of the Companies Act, 1956 provides that a Government company means "any company in which not less than 51% of the paid-up share capital is held by the Central Government or by any State Government or Governments partly by the Central Government or partly by one or more State Governments and includes a company which is subsidiary of the Government company". Thus, holding of only 51% or more of the shares in a company either by the Central Government or State Government makes a company a Government company. Chapter II of the Act provides for acquisition of the undertakings in India of Esso companies. Section 3 provides for transfer and vesting in the Central Government of the undertakings of Esso in India. Section 4 provides for general effect of vesting. Section 5 provides for the Central Government to be lessee or tenant under certain circumstances. Section 6 deals with removal of doubts. For the present purpose, Section 7 of the Act is important and it reads as follows :-

> "Section 7(1). Notwithstanding anything contained in sections 3, 4 and 5, the Central Government may, if it is satisfied that a Government company is willing to comply, or has complied, with such terms and conditions as that Government may think fit to impose, direct, by notification, that the right, title and interest and the liabilities of Esso in relation to any undertaking in India shall, instead of continuing to vest in the Central Government, vest in the Government company either on the date of the

> notification or on such earlier or later date (not being a date earlier than the appointed day) as may be specified in the notification.
>
> (2) where the right, title and interest and the liabilities or Esso in relation to its undertakings in India vest in a Government company under sub-section (1), the government company shall, on and from the date of such vesting, be deemed to have become the owner, tenant or lessee, as the case may be, in relation to such undertakings, and all the rights and liabilities of the Central Government in relation to such undertakings shall, on and from the date of such vesting, be deemed to have become the rights and liabilities, respectively, of the Government company.
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> (3) the provisions of sub-section (2) of section 5 shall apply to a lease or tenancy, which vests in the Government company, as they apply to a lease or tenancy vested in the Central Government and reference therein to the "Central Government" shall be construed as a reference to the Government company."

Section 7 provides that subject to the conditions that may be imposed by the Government, right, title and interest and liabilities of Esso in relation to any undertaking in India can be vested in a Government company and sub-section (2) thereof enables such Government company to become the owner from such date.

In order to interpret the enactments in question it is necessary to look to the Preamble to the Act. The Preamble to the Act clearly stated that acquisition is done "in order to ensure that the ownership and control of petroleum products, distributed and marketed in India by the said company are vested in the State and thereby so distributed as best to subserve the common good." (emphasis supplied). Preamble, though does not control the statute, is an admissible aid to construction thereof. The Act sets out that the assets of the undertaking shall vest in the Government as provided under Section 3 of the Act. However, Section 7 of the Act enables the Government to transfer the undertaking to a Government company as defined under Section 617 of the Companies Act, 1956. If the Act intended that the undertaking so vested in the Government company can be transferred, wholly or partly, to any company other than a Government company, there certainly would have been an indication to that effect in the Act itself. The question, therefore, is whether absence of specific provision as contained in the Banking Companies (Acquisition & Transfer of Undertakings) Act or in the Coal Mines Nationalisation Act, 1973 that the share holding shall always be held by Government, will give a different complexion to these provisions. When the provisions of the Act provide for vesting of the property of the undertaking in the Government or a Government company, it cannot mean that it enables the same being held by any other person, particularly in the context that the object of the Act is that the ownership and control of the petroleum products is distributed and marketed in India by the State or Government company and that thereby so distributed as best to subserve the common good. The argument that there is no specific provision in the Act as contained in the Banking Companies (Acquisition & Transfer of Undertakings) Act or in the Coal Mines Nationalisation Act, 1973 does not carry the matter any further because the idea embedded in those provisions are implicit in the provisions of this enactment, as explained earlier. If disinvestment takes place and the company ceases to be a

Government company as defined under Section 617 of the Companies Act, to say that it is still a Government company as contemplated under Section 7 of the Act will be a fallacy. What is contemplated under Section 7 of the Act is only a Government company and no other. In relation to a Government company Sections 224 to 233 are substituted and the audit of the company takes place under the supervision and control of the Comptroller & Auditor General of India who shall give effect to Section 224 (1-B)(1-C). The Auditors shall submit a report to the Comptroller & Auditor General of India and even when audit takes place, subject to his instructions, Comptroller & Auditor General of India may also conduct supplementary audit and a test audit. Under Section 19(1) of Comptroller & Auditor General's (Duties, Powers and Conduct of Service) Act, 1971 audit of companies is to be conducted by him in terms of the Companies Act. Annual Reports on the working of affairs of the company is laid before Parliament under Section 619(1)(b) of the Companies Act. Such control will be lost if a company ceases to be a Government company.

Argument of Sri Harish Salve that a simple amendment of Section 617 of the Companies Act unrelated to the acquisition can alter the position in law is only perceived but not attained and hence does not require any examination. He contended that to facilitate disinvestment of the shares the public sector enterprises are allowed to list the shares on Stock Exchanges, irrespective of the percentage of shares disinvested by the Government and, therefore, submitted that there is no need for the Government to obtain Parliamentary approval. Sales of shares of these companies, though uninhibited, cannot be to such an extent so that the substratum of the character of the Government companies is allowed to be lost and converted into an ordinary company without being approved by the General Body of shareholders and, in this case, the Government. Government, in turn, is subject to the statutory limitations, to which we have adverted to now. Hence, the argument begs the question which is put in issue before us.

Again accretions to the Government company's assets subsequent to acquisition of the undertaking is an irrelevant factor in the context of the question we are considering. Here what is required to be seen is, not which asset can be transferred or not, but whether the undertaking can change its character from a Government company to ordinary company without Parliamentary clearance in the light of the statute of acquisition.

The debate as to whether a privatization law is necessary has been going on all over the world. This aspect has been discussed by Pierre Guislain in his book entitled 'The Privatization Challenge' published by the World Bank. The views of the learned Author are reproduced hereunder:

> "Whether a country needs to enact a privatization law or can do without one depends on several factors: the political situation and legal traditions of the country, the scope of its privatization program, and the nature of the enterprises to be privatized. Two different issues have to be addressed: does legislation need to be enacted to authorize or facilitate privatization, and if so, should the new provisions take the form of amendments to the pertinent laws or be grouped together in a specific privatization law?

> Some countries have opted to enact privatization laws even when privatization could have been implemented without amending the existing legislation. This may have the advantage of mobilizing explicit political support and commitment in favour of privatization from the very start. It may confer a stronger, clearer mandate on the government and agencies in charge of implementing privatization and make them more accountable. A privatization law also provides an opportunity to introduce changes in legislation that, although not required for commencing the process, may substantially facilitate it. On the other hand, a privatization law involves risks, including potentially long delays in getting parliament approval, the sometimes excessively restrictive scope of legislative provisions, and a tendency on the part of some parliaments to interfere too much in the implementation of privatization transactions. Furthermore, special legislation may not be needed for the transfer of the subsidiaries, participations, or assets of State Owned Enterprises or public holding companies."

[pp.296-297] The learned Author has further enunciated that if legislation is to be brought for privatization, the same should reflect the broad political lines of the privatization strategy and programme and that it should also endow the Government or privatization agency with the required implementation powers, and it should avoid restrictions that may unduly tie the hands of the executing agencies and slow down the process. The legislation must allow adequate flexibility, in the choice of the privatization technique best suited to each, while providing basic safeguards guaranteeing the integrity and efficiency of the process. Success of the programme hinges on, among other things, a basic consensus among Parliament, Government, and head of state on the scope and broad lines of the programme; a clear mandate given to the executing agencies along with the powers necessary for fulfilling that mandate; and unambiguous, flexible, and competitive privatization procedures applied in a transparent manner by officials accountable for their actions.

Apart from United Kingdom, there have been privatization programmes in France and Italy in Europe. Similarly massive programme has been carried out in Argentina, Mexico and Brazil. In these countries, Privatization Acts have been enacted and numerous routes are adopted to achieve privatization, some of which are illustrated below:

> 1. A public offering of shares combined with a listing on the stock exchange has brought share ownership to many millions of people and have been the mechanism through which the Government's desire to widen share ownership has been brought to fruition.
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> 2. A trade sale to another private sector company or to a consortium and such a transaction is inherently more private than a share offering and some of the privatizations executed in this manner have faced some criticism for being insufficiently open to public examination and debate.
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> 3. A 'management buy-out' where the public sector entity's management team combine together to raise finance and, in conjunction with the financier, purchase the

business through a newly formed vehicle company.

4. A private placing of shares in a business with a group of investors.

5. Making State assets available under concession so that the assets may then be worked out by the concessionary.

6. Special features of making provision for a golden share that is a special share in the privatized entity which is retained by the Government and which typically entrenches certain provisions within the company's articles of association in such a way as to prevent specified changes occurring without the consent of the Government.

Such processes are adopted in certain businesses which are important in defence and strategic grounds and so should be insulated from the possibility of take over or, more generally, that businesses which are new to the private sector should not be blown off course by an unsolicited take over offer made early in their newly private lives. This special share can be a double-edged sword and it may give protection to the Government in certain sensitive circumstances but leave the Government with the risk of incurring the wrath of shareholders who would be denied the right to accept what might be a very attractive offer for their shares.

[Vide C.Graham and T. Prosser Golden Shares : Industrial Policy by Stealth]

7. There were certain other categories where debt equity swaps were followed.

We have an overview of the position world over on whether there is any need for law regarding privatisation or what routes are to be adopted for achieving the same. Irrespective of those considerations, we base our decision on the statutes with which we are concerned.

In the case of BALCO (supra) executive action to disinvest was not challenged probably due to the fact that there was no statutory backing of the nature with which we are concerned in the present case. In the case of Maruti Udyog limited (supra), though acquired under an enactment, there was no challenge to the same to disinvest merely by executive action. Thus, these cases stand on a different footing.

There is no challenge before this Court as to the policy of disinvestment. The only question raised before us whether the method adopted by the Government in exercising its executive powers to disinvest HPCL and BPCL without repealing or amending the law is permissible or not. We find that on the language of the Act such a course is not permissible at all.

In the result, we allow these petitions restraining the Central Government from proceeding with disinvestment resulting in HPCL and BPCL ceasing to be Government companies without appropriately amending the statutes concerned suitably.