

Centre For Public Interest Litigation & ... vs Union Of India & Ors on 19 October, 2000

Author: S.S.M.Quadri

Bench: S.S.M.Quadri

CASE NO.:
Appeal (civil) 2485 of 1999.

PETITIONER:
CENTRE FOR PUBLIC INTEREST LITIGATION & ANR.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 19/10/2000

BENCH:
S.N.Hegde, S.S.M.Quadri

JUDGMENT:

SANTOSH HEGDE, J.

L.....I.....T.....T.....T.....T.....T.....T.....T..J Being aggrieved by the judgment of the High Court of Delhi dated 25th January, 1999 made in C.W.P.No.3020/97, the writ petitioners therein have preferred this appeal by leave of this Court. Respondent No.1, Government of India (GOI), took a policy decision in the year 1992 to offer some of its discovered oil fields for development on a joint venture basis. Its decision in this regard was that medium sized oil fields will be offered for development under the joint venture with the participation of the Oil and Natural Gas Commission (ONGC)/the Oil India Limited (OIL) while the small sized oil-fields will be offered for development without the participation of the ONGC/OIL. This policy decision was taken on the ground that the country was facing foreign exchange crisis and there was lack of resources to fully develop these oil-fields. The GOI was also of the opinion that the domestic crude production was declining and there was a need to augment its production. With the said policy in mind, the GOI invited bids for 12 medium sized oil fields and 31 small sized oil fields. In response to the invitation of the GOI in regard to the two medium sized oil-fields, namely, Panna and Mukta, as many as 8 consortia offered their bids and after preliminary technical evaluation of those bids, discussions were held with the bidders and based on such discussions, the GOI shortlisted respondent Nos. 4 and 5 and another consortium of Hyundai Heavy Industries, Essar Oil Limited, Dan Offshore and Albion International. Sometime in October 1993, these two consortia were called for further negotiations by the Negotiating Committee to finalise the contract and after such negotiations and evaluation of the bids

on the recommendations of the said Committee, the bid of respondent Nos. 4 and 5 was accepted in February 1994 and a Letter of Award (LOA) was issued to the said consortium. As per this award, the oil-fields - Panna and Mukta - were agreed to be given to the said consortium with a participating interest of 30% each to respondent Nos.4 and 5 in association with the ONGC which was given a share of 40%. The said contract provided that the GOI had the first option to purchase up to 100% of the production of oil from these fields at an international market price to be determined in accordance with the provisions of the contract. It further provided that the international price shall be determined with reference to one or more freely traded international market prices which bear resemblance to the produce crude in terms of standard parameters such as gravity, sulphur content, yield etc. which are critical to the market value of the crude. The contract price to be paid to the contractor had to be the price of Brent (DTD) crude with a discount of \$ 0.10 cents per barrel. Brent is said to be a similar sweet crude which is freely traded in the international market. The actual contract termed as Profit Sharing Contract (PSC) was signed by the GOI and the consortium of respondent Nos. 3, 4 and 5 in regard to Panna and Mukta oil-fields on 22.12.1994. The appellants herein challenged the awarding of this contract before the High Court of Delhi on 26th July, 1997 seeking the following reliefs :-

(a) direct a thorough criminal investigation into this deal by an appropriate agency to be supervised by a senior independent person such as a retired Judge of a High Court or the Supreme Court; and (b) direct the Respondents No.1 and 2 to take further follow up action by way of criminal prosecution and departmental proceedings against officials who have played a corrupt or improper role in the award of the contract for the Panna Mukta oil fields; and (c) order the cancellation of the contract for the Panna Mukta oil fields to the joint venture led by RIL Enron.

The main ground of attack before the High Court was that the contract in question was awarded arbitrarily for collateral consideration and is actuated by malafides. It was contended before the High Court that the oil fields which were developed by a public sector company, namely, the ONGC at an expenditure of Rs.800 crores and which had the reserve oil capacity worth more than Rs.20,000/-crores was given on a 25 years lease to a private joint venture for a paltry sum of Rs.12 crores. It was also alleged that the quantum of oil and gas reserves which was originally estimated at 54.25 MMT was subsequently brought down to 14 MMT in order to justify the award of this contract. It was also contended before the High Court that the GOI agreed for a fixed royalty and cess payment from the consortium which would mean that the GOI has tied its income from the royalty and cess from these oil-fields to a fixed rate for a period of 25 years which was opposed to all known standards of business prudence. They also contended that the price at which the GOI agreed to purchase the oil from the JV was far in excess of the market price and over and above that excess market price, the GOI also agreed to pay a further sum of \$ 4 per barrel of oil as a premium on an ostensible ground of the quality and locational advantage of the oil so purchased .

The appellants who were the petitioners before the High Court strongly relied on the observations made by the Comptroller and Auditor General of India (CAG) who in its report submitted to the Parliament, had raised many objections in regard to this contract. They also relied upon a recommendation made by the Superintendent of Police, Anti Corruption Unit of CBI, Bombay, who

had recommended the filing of a First Information Report pointing out various irregularities committed in the awarding of this contract. According to the appellants, this recommendation of the Superintendent of Police, CBI, Bombay, was scuttled by some higher officers of the CBI with a view to favour the persons involved in awarding of this contract. It was also alleged in the said petition that some of the senior officers of the ONGC who actively participated in the negotiations which culminated in awarding of this contract in favour of respondent Nos. 4 and 5 had joined the services of respondent No.4 or 5 which fact, according to the petitioners, clearly indicated that these officers during their tenure with ONGC had colluded with respondent Nos. 4 and 5. It was further alleged that the contract in question lacked transparency in the invitation of the bids as well as in the evaluation of bids which has led to the grant of a very valuable contract on unconscionable terms, leading to plundering of national resources. The appellants also relied on a statement purported to have been made by the Private Secretary to the then Minister of Petroleum, who had averred in the said statement to the investigating agency, to the effect that large sums of monies were paid to the said Minister. The petition was opposed by all the respondents on almost similar grounds contending that the contract in question was awarded after a careful consideration of all the commercial/ technical aspects of the contract bearing in mind the policy of the GOI in this regard and the contract in question was to the best advantage of the GOI and the ONGC. The respondents have asserted that there has been no collateral consideration or mala fides involved in awarding of the contract; and that each of the terms of the contract was carefully considered keeping in mind the interest of the GOI and the ONGC. It was further argued that the figures mentioned in the writ petition are wholly imaginary and exaggerated both in regard to the oil reserves as also in regard to potential returns from the oil fields and as a matter of fact the estimated take of the GOI and the ONGC in this contract is to an extent of 80 to 82 per cent of the total net revenue or technical profits from the contract. The respondents also denied the fact that under the contract the GOI had agreed to purchase the crude oil from the joint venture consortium at a highly inflated price of \$ 24 per barrel which included a premium of \$ 4 per barrel. According to the respondents, this figure was deliberately inflated by the petitioners, and there was no such agreement to pay \$4 per barrel as premium. On the contrary, the price fixed under the contract for purchase of the crude oil by the GOI was the international market price prevailing on the date of such purchase minus a rebate of \$ 0.10 cents per barrel on such price which meant that the price paid by the GOI was less than the international price prevailing. The respondents also questioned the correctness of the petitioners claim that the quantity of oil reserves in these wells were to an extent of 54.4 MMT and also contended that at no point of time the reserve oil figure was deflated, as alleged in the petition. They also contended that re-employment of the officials named in the petition had no effect on the contract. In regard to the statement of Mr. Safaya, they contended that the alleged statement of the Private Secretary to the Minister was false and, at any rate, the same was subsequently withdrawn before the court and the said bribery case is the subject-matter of a pending criminal trial. The CBI has also denied the allegation made against it. The High Court as per its judgment dated 25th January, 1999 rejected the preliminary objection of the respondents in regard to the maintainability of the petition and proceeded to deal with the petition on its merits. It came to the conclusion that the questions raised by the appellants/petitioners in their petition involved matters of economic policy in respect of which the GOI had greater latitude and flexibility and the courts would be slow to interfere in such matters. Dealing with the allegation pertaining to abnormality in fixing of royalty and cess amounts payable by the joint venture, the High Court came to the conclusion that the

liability to pay royalty is upon the oil produced and sold, irrespective of the price payable by the GOI which could vary depending on the international market. On this foundation, it came to the conclusion that there was no basic fallacy in the methodology adopted by the GOI as to the payment of royalty and cess. It also held that in regard to the evaluation of bids, more than one view was possible, hence it could not come to the conclusion that the view taken by the GOI was actuated by mala fides. In regard to the price payable by the GOI for the crude oil to be purchased from the joint venture, the High Court came to the conclusion that the price payable was actually less than the international price for oil of similar proof and the High Court concluded that the Governments take in the contract would not be less than 80% of the total value of the contract. In regard to the complaint made against the CBI, the High Court refrained from expressing any opinion. On this basis, the High Court came to the conclusion that the allegations of the petitioners before it that the contract in question was unconscionable as to call for an independent probe, were not established and, accordingly, dismissed the petition. Lengthy arguments have been advanced before us by Mr. Shanti Bhushan, learned senior counsel appearing for the appellants, and learned Additional Solicitor General Mr. Kirit Rawal, Mr. Ashok Desai, Mr. Atul Setalvad, Mr. B. Sen and Mr. K.N. Bhat, learned senior advocates, on behalf of the respondents. To avoid repetition, we will refer to the gist of their arguments during the course of our judgment. Mr. Shanti Bhushan initiated his attack on the impugned contract by contending that the GOI had earlier instructed the Ministry of Petroleum to make a study of comparative economics of operating the oil wells on a stand alone basis by the ONGC or the OIL vis-a-vis offering these wells on a joint venture basis. He contended that the Ministry of Petroleum, however without any such comparative economics, in August, 1992, invited bids for development of the discovered oil/gas fields including the oil fields of Panna and Mukta on a joint venture basis without first considering the feasibility of operating them on stand alone basis by the ONGC/OIL. The appellants contend that these oil fields which were with the ONGC on a long term lease and on which the ONGC had already spent more than Rs.800 crores from 1976 to 1993; and from which the ONGC had been producing oil and selling it to the Government of India at an administered price of \$ 8 per barrel need not have been given on joint venture basis; and if a comparative study were to be made, it would have been crystal clear that the development of these wells on a stand alone basis would have been much more profitable to the GOI than by giving these wells on a joint venture.

On behalf of the first respondent in regard to this contention of the appellants, it is stated that even though in the notes submitted to the GOI, no comparative economics was indicated, as a matter of fact such a comparative study was taken up and it is only based on the result of such studies that the two oil fields i.e. Panna and Mukta were recommended to the GOI to be offered for development on a joint venture basis. They also contended that as per this study it was noticed that the two oil fields Panna and Mukta were not fully developed and the ONGC inspite of spending huge sums of money on development of these wells, was not able to exploit these oil wells to the maximum possible extent and in the wake of the then prevailing financial crunch and the foreign exchange crisis and the imminent need of the country for extra oil production, it was considered that offering these wells on a joint venture basis was more beneficial and less burdensome in the interest of the country. It was also pointed out that at that point of time the World Bank had offered financial assistance provided a time-bound programme was chalked out by the GOI for development of these wells. For all these reasons the GOI contended that it was thought economically prudent to go for joint venture

development of the oil fields. They also contended that though, as a matter of fact, the particulars of the result of the comparative economics prepared by the Ministry and the ONGC were not submitted to the GOI, these materials were considered by the concerned Ministry along with the Cabinet Sub-Committee on Economic Affairs and on their approval and with the knowledge and consent of the Cabinet, a decision was taken to give the oil wells for development on a joint venture basis. The High Court after considering the material available on record came to the conclusion that non-placing of the report on comparative economics before the GOI is only an irregularity and in the absence of any prejudice to public interest being pointed out, the prayer of the appellants before it for directing a probe was not justified. We have carefully considered the arguments and the material that was placed before us, and we note that so far as the allegation of failure to make a comparative economic study is concerned, from the material on record we find that the said allegation is not factually correct because it is seen that, as a matter of fact, such a comparative study was made by the Ministry and when the particulars thereof were sought for by the CAG, the same were also placed before the CAG, and the CAG has also accepted this fact but commented in its report that the study conducted by the Ministry has not taken into consideration the ONGCs current cost of development of the well platforms vis-à-vis the cost of similar facilities to be provided by the joint venture contractors. Be that as it may, the fact remains that a comparative study was conducted; but the same was not placed before the GOI when the latter accepted the proposal of the Ministry to give these wells on a joint venture basis. The question, therefore, for our consideration is: does the non-placing of the materials pertaining to the comparative economics vitiate the contract impugned in this appeal. As noted above, the GOI in its counter has stated that though the result of the comparative economics conducted was not submitted to the Cabinet, the same was discussed with the Cabinet Sub-Committee on Economic Affairs and on their approval and with knowledge and consent of the Cabinet, a decision was taken to give the oil wells for development on a joint venture basis. This submission when taken in the background of the fact that at the relevant point of time the ONGC was not in a position to exploit the oil wells in question to the best advantage of the oil needs of the country and there was overall financial crunch and foreign exchange crisis, and there was also a possibility of the GOI losing the financial assistance from the World Bank, the GOIs decision to accept the suggestion of the Ministry to offer these oil wells on a joint venture basis cannot be faulted. The material available on record and the circumstances prevailing at the time of the decision of the GOI show that though the materials of the comparative study were not placed before the GOI, the recommending authority had based its recommendations on such study which was accepted by the GOI. Therefore, by the mere absence of placing the materials constituting the comparative economic study, while in effect it was actually taken note of, we are unable to accept the argument of the appellant that there has been non-application of mind by the GOI while awarding the contract. That apart, whether the oil wells should be developed on a stand alone basis by the ONGC or not, is a matter of policy with which we are not inclined to interfere solely on the ground that there is no reference to such study in the decision of the GOI. Therefore, the allegation of non-application of mind must fail.

It was next contended by the appellants that the GOI has bartered away the two oil wells already developed by the ONGC containing large deposits of oil to the joint venture for a meagre sum of Rs.12 crores paid to the GOI as signature bonus. According to the appellants, the oil reserve in the said two oil wells was in the range of 54.4 MMT which, on the basis of the then prevailing market

price, would be of the value of Rs.17,000 crores. The appellant also contends that with a view to benefit respondent Nos.4 and 5, the oil reserves were under-estimated at 14 MMT with the connivance of Mr. RB Mehrotra, Member (Exploration) and Mr. Khosla, Chairman & Managing Director, ONGC at the relevant time. In support of this contention, the appellants also rely on the observations of the CAG who, in his report at para 2.11, has observed that The reserve estimates on the basis of which the Government should have proceeded in the matter, kept varying at different stages . . . In the absence of a reasonable assessment of reserves, it would be difficult for the Government to anchor negotiations properly for obtaining higher Government take in the form of past cost compensation, signature and production bonuses to ONGC and increased share in profit petroleum. The GOI and the ONGC in their statements as well as in their submissions had given their own explanation in regard to the varying figures found in the records. They contended that the figure of 51.4 MMT originally noted was not an estimate of oil reserve only but was the total estimate of reserve of oil and gas found in these wells out of which the ONGC had estimated oil reserve at 34.4 MMT only; the balance being gas reserve. It is also contended that in the year 1990 the ONGC undertook a 3D seismic survey which revealed that the actual oil available for commercially viable extraction from these wells was to the extent of 14 MMT only. They contend that this figure, as obtained from the 3D seismic survey, was not conveyed to any of the bidders. On the contrary, the intending bidders were asked to conduct their own survey for the purpose of offering their bids. They also contend that 34.4 MMT of reserve oil was not actually the quantity of economically recoverable oil but was the estimate of a possible reserve of oil in these wells. Even according to the ONGC, before the 3D seismic survey, the planned recovery estimate was only 24.9 MMT out of 34.4 MMT estimated reserve. From the material on record, it is seen that the bidders made their own survey of these wells and so far as respondent Nos.4 and 5 are concerned, they estimated the economically recoverable oil from these wells at 20 MMT while the other joint venture consortium which was short-listed along with the consortium of respondent Nos.3 to 5, had estimated it at 12 MMT, and the respective bids of the parties were evaluated on the basis of their self-evaluation of the reserve oil in the wells concerned. Therefore, we think it is possible that out of 34.4 MMT of the oil estimated originally as being the reserve, as a matter of fact, the recoverable oil could be only 20 MMT or near about that quantity, as evaluated by respondent Nos.4 and 5 because we could reasonably draw an inference that it may not be possible to economically exploit all the oil that may be existing in an identified oil well. At any rate, it would be hazardous for the courts to venture on a guesswork as compared to the technical assessment that is made, correctness of which is not disproved by cogent materials. Therefore, we are unable to accept the contention of the appellants that, as a matter of fact, the recoverable oil reserve in Panna-Mukta oil fields was either 54.4 MMT or even 31.4 MMT. That apart, it is very important to note that the GOI has made provisions in the contract itself to increase its take in the event of there being an increase in the quantity of recoverable oil by providing for progressive fiscal regime in the contract. As a matter of fact, this aspect of the contract was also taken note of by the CAG in Para 2.12 of the report. In view of this safeguard coupled with the fact that the economically recoverable oil from these wells is in the region of 20 MMT, we do not think that the contract in question is so unreasonable as to suspect the bona fides of the same on this ground. At this stage, we will have to take note of the argument of the appellants that Mr. Mehrotra and Mr. Khosla, who were at the relevant point of time holding important posts in the ONGC, had subsequently joined the services of respondent Nos.4 and 5 which, according to the appellants, shows that that these two officers could have played an

important role in reduction of the figures mentioned by the ONGC. It is true that in the year 1992, Mr. Mehrotra was the Member (Exploration) and Mr. Khosla was the Managing Director of the ONGC. Among these two officers, Mr. Khosla retired as an M.D. in the month of September, 1992 and Mr. Mehrotra retired as Member (Exploration) on 31.12.1993, while the contract in question was approved by the GOI on 23.2.1994 and a Letter of Award was issued to the consortium on 16.3.1994 by which time these two officers had left the services of the ONGC, and it is to be noted that they had no part to play in the approval of the award of contract to the consortium which was done by the GOI on the recommendations of a Committee of Secretaries. Therefore, it is difficult to accept the argument that these two officials connived to reduce the oil reserves so as to help their future employers.

We will now consider the argument of the appellants that the GOI had deliberately agreed to peg down its income from the royalty and cess payable to it to a fixed rate for a period of 25 years which, according to the appellant, is opposed to all known standards of business prudence. They contend that by such freezing of royalty and cess, the GOI has denied itself the benefit it would have obtained if the royalties were to be fixed at an ad valorem rate, correlated with the increase in future international oil prices. The appellants contend that by freezing of royalty and cess, the take of the GOI in the contract would increasingly become a small portion of the total earnings when international oil prices increase in future. By this, according to the appellants, the GOI has conceded a large benefit in favour of the contractors in the long run. The CAG has also taken note of this freezing of royalty and cess in its final report wherein it has observed that the Ministry had not informed the GOI before agreeing to freeze the rate of royalty and cess in the contract. It had also observed that the royalty ought to have been at an ad valorem basis. The GOI has contended that the freezing of royalty and cess is not a concession given to the joint venture and the same was to provide for fiscal stability so that the economics of the project is not adversely affected. It was contended that the decision to freeze the royalty and cess during the period of contract was taken to enable the investors to work out their economics of the project without undue uncertainty arising from the future behaviour of the Government with regard to such levies. The other respondents have sought to rely on similar international practice in regard to the fixed levy of royalty and cess in similar contracts. They argued that if royalty and cess were not to be on an assured basis during the period of contract, it was most likely that the bidding parties would not have come forward with attractive bids, as has been done in the present case under other heads. They also contend that there is always a possibility that if an open-ended royalty and cess were to be insisted upon, the bidding parties might not have accepted the figures which are now agreed to be paid as royalty and cess. As could be seen from the arguments addressed on behalf of the appellant, neither the appellant nor the CAG has taken any exception in regard to the quantum of royalty and cess as fixed in praesenti. But the argument seems to be that it should not have been a fixed figure for the entire period of the contract rather it should have been at an ad valorem rate. This argument proceeds on the footing that if international prices of oil were to be increased in future, there would be no corresponding increase in royalty and cess, hence, the GOI would stand to lose, but then this argument does not take within its sweep the repercussions consequent to a reduction in the international oil prices, however rare it might be, if it were to happen, the corresponding share of the GOI under this head would also get reduced. Then again, one should not be oblivious of the fact that the Profit Sharing Contract in the present case is not anchored on the basis of a single head of payment as we could see

it is an offer of a basket containing payments under various heads. The offering party and the accepting party in such cases, will assess the total value of the basket and decide on the acceptance or otherwise of the offer. In such a case, it is not possible to evaluate the profit from a contract by assessing the value under each head of receipt individually. That can be done only by taking into account all the heads of receipt cumulatively. Therefore, it is difficult to accept the argument of the appellants that by pegging the rate of royalty and cess to a fixed sum, the GOI has arbitrarily bartered away a major portion of its take in the contract. At any rate, when two options were available before the GOI to have a fixed royalty and cess or a varying rate based on an ad valorem rate of oil, and if after taking into consideration the entire value of the contract, the GOI has opted to go in for a fixed royalty rate, we cannot conclude that such a decision was arrived at either arbitrarily or unreasonably. We think it is not safe to come to the conclusion that freezing of royalty and cess during the period of contract was done in the instant case with the sole intention of granting undue benefits to the joint venture. In regard to the observations of the CAG that the Ministry did not inform the Government in advance as to the decision to fix the royalty and cess on a frozen basis, it was pointed out to us by the respondents that in January, 1994 itself the Government was informed of the decision of the Committee of Secretaries that the bidders will be asked to pay the royalty and cess at the current rate because of the prevailing international practice. For these reasons, we are of the opinion that the appellants' objection as to the fixed royalty and cess payable to the GOI under the contract cannot be sustained.

The next challenge of the appellants is to the agreed price under the contract at which the GOI has agreed to purchase the oil exploited by the JVs under the contract. The appellants contend that before awarding the contract, the ONGC was selling oil from Panna Mukta to the GOI at the rate of Rs.1,741/- per ton (\$ 8 per barrel). They contend that after the signing of the contract the GOI is buying the oil from the JVs at the cost of \$24 per barrel (i.e. \$ 20 being the international price plus \$ 4 as premium). It was also contended that the share of the GOI in the crude oil produced was fixed on a fraudulent formula beneficial to respondents 4 and 5. They also contend that as per the calculations of the appellants, the share of the GOI in the crude oil produced under the contract will be merely 5 to 10 per cent; whereas normally in similar contracts, the take of the Government should have been 80% to 90%. The appellants also assail the alleged additional cost of \$ 4 as premium per barrel which, according to them, is being paid to the JVs because of the fact that the oil produced from Panna and Mukta costs less by way of transportation charges and the crude is of superior quality. This agreement to pay a premium of \$ 4 on the above count, according to the appellants, is an atrocious deal which alone would cause a loss to the GOI to the tune of Rs.3,000 crores. They contend that there is no logic of paying \$ 4 per barrel for the oil produced from Panna and Mukta oil fields on the ground of superior quality of oil or on the ground of locational advantage. In reply, on behalf of the GOI, it was contended that sharing of the profit petroleum between the Government and the contractor was a biddable item and the same was fixed with reference to the take of the GOI in the entire contract. They contend that this was the best offer that the GOI got from amongst the final bidders. They further contend that the bid for profit petroleum was invited by two alternatives, namely, on slabs of investment multiple (IM) or on the post tax rate of return achieved by the companies. According to this, the profit petroleum share of the GOI ranges from 5 to 50 per cent depending on the level of IM reached. It also contends that this share of profit petroleum with the Government is over and above the payment of statutory duties and other takes

like royalty, signature and production bonuses, tax etc. It was also contended that this element of sharing profit petroleum is a new element and there was no such earlier arrangement with the ONGC to have a profit petroleum sharing. They also deny that the Government is committed to pay a cost of \$ 24 per barrel for the crude produced from these oil-fields, and, according to it, the said allegation of the appellants is purely a figment of imagination. The GOI specifically denies the allegation of the appellants that the GOI is paying a premium of \$ 4 per barrel over and over the international price of crude either on the ground that the quality of crude is superior or on the ground of its locational advantage. It reiterates and contends that it has the first option to purchase the crude produced from these oil-fields at an international market price to be paid to the contractor on the basis of an internationally accepted standard called price of Brent crude with a discount to the advantage of the GOI of 10 cents per barrel. Therefore, it is argued that as a matter of fact, instead of paying \$ 4 per barrel as premium over and above the international price, the GOI is actually paying \$ 0.10 cent less than the international price of crude of similar quality. They also deny that the purchase of crude from the contractors would be costlier than the price the GOI would have paid for purchase of similar crude from the ONGC as contended by the appellants. According to this respondent, for the month of June, 1997, as per the price fixation formula in the contract, the purchase price that the GOI paid to the contractors came to US \$ 18.969 per barrel only and this payment was inclusive of cess and royalty which itself would amount to about \$ 5 per barrel as the calculation based on the conversion factors and exchange rate of the day. They also contend that the price paid by the GOI to the ONGC cannot be compared with the price that the GOI has agreed to pay under the contract because the price payable by ONGC was an administered price. They further contend that the take of the GOI as a whole in the contract is over 80% of the project surplus and not as contended by the appellants. Respondent Nos.4 and 5 in the statements filed before the court and also during the course of their arguments, denied the allegation of undue advantage shown to them in fixation of price of crude oil. They have also specifically denied that under the contract the GOI is obliged to pay \$ 4 per barrel extra as premium over and above the international market price for the purchase of crude oil from them. They also contend that, on the contrary, the agreement provides for a concession of \$ 0.10 per barrel from the international price fixed under the contract.

The price fixation in a contract of the nature with which we are concerned, is a highly technical and complex procedure. It will be extremely difficult for a court to decide whether a particular price agreed to be paid under the contract is fair and reasonable or not in a contract of this nature. More so, because the fixation of price for crude to be purchased by the GOI depends upon various variable factors. We are not satisfied with the argument of the appellants that the nation has suffered a huge financial loss by virtue of this arbitrary fixation of crude price. As a matter of fact, the figure mentioned by the appellants of Rs.3,000 crores as a loss under this head of pricing is based on incorrect fact that the consortium is charging \$ 4 per barrel as premium. It is because of this factual error that the appellants came to the conclusion that under the contract the GOI had agreed to purchase the crude from the consortium at an inflated price. We also take note of the fact that under the agreement the respondents are bound to give a discount of \$ 0.10 per barrel on the price of the crude fixed on the basis of the international market rate which, prima facie shows that the fixation of price is reasonable since under all given circumstances the said price will be less than the international market price for Brent crude.

It was next contended that under the contract no ceiling is put on the operating expenditure (OPEX) and no disincentives have been built into the contract for exceeding OPEX, absence of which might lead to the escalation of OPEX, thereby reducing the take of the Government in the PSC. In support of this contention, the appellants have relied on the observations of the CAG who in his report has noted moreover in absence of a clear enunciation of principles of computing cost escalation and control in the respective contract, the Management Committee cannot exercise cost control to any meaningful extent as such Government take and the ultimate benefit of the PSC is unduly flexible and uncertain. Based on this observation, the appellants contend that by leaving open the OPEX without a ceiling, the GOI has permitted the JV to charge practically any amount as they would like under this head thereby making the profit of the GOI only an illusion. As an example they point out that while ONGC incurred the OPEX of \$2 per barrel, the OPEX incurred by the JV at the time of the filing of the petition was more than \$6 per barrel. On behalf of the respondents, it is contended that it is practically impossible to put a ceiling/cap on the OPEX because of the market conditions and other unforeseen factors, they deny that it is open to the JV to increase the OPEX unreasonably because the contract provides for a budgetary control by the Operating Committee (Management Committee) to which budgetary estimates of production cost or operating cost have to be submitted. According to the terms of the contract, this Committee has the power of review or revise any such work programs, costs and budgets. They point out that this Committee among others consist of the representatives of the GOI and ONGC and the Director General of Hydrocarbons is the monitoring authority of this Committee. They also point out that the decision of this Committee has to be unanimous and because of the very nature of the constitution of the Committee, any arbitrary or unreasonable increase effecting the take of the Government in the PSC is impossible. Respondents 4 and 5 have also submitted that though it is a fact that in the initial stage of the working of the contract the operating expenses was in the range of \$6 per barrel which was as expected because of the heavy expenditure they had to incur at the initial stage to make improvements on the wining of the oil, they point out that over the years the said expenditure has come down to \$2.49 per barrel which almost equals to what was promised in the bid offer. From the arguments referred to herein above, it is clear that though under the contract no ceiling limit as such has been imposed on the OPEX, in our opinion, the apprehension of the appellants cannot be accepted as a likely happening because of the in built safety of budgetary control by the Committee constituted under the said contract wherein the representatives of the GOI and the ONGC have an unassailable role in accepting in the proposal for increase in the OPEX or not. Therefore, there can be no apprehension that Respondents 4 & 5 can bulldoze their way into increasing the OPEX to the detriment of the interest of the GOI. We also accept the explanation given by the respondents that in a contract like the one under our consideration which is for a period of 25 years and taking into consideration the nature of the contract, it would be well nigh impossible to prefix or put a ceiling on the operational expenses. The argument of the appellant that respondent Nos.4 and 5 have already increased the OPEX from \$2 to \$6 is also satisfactorily rebutted by the respondents who have established that the increase in the operating expenses during the initial stage of the contract has since been reversed and as at present the operational cost is only \$2.49. We are satisfied that even though there is no ceiling on the operational expenses to be incurred by the JV and no undue advantage of such absence of ceiling can be taken by the JV because of the in built budgetary control in the contract. Therefore, we are of the opinion, that there is no substance in this allegation of the appellant. The next ground of attack by the appellant is that large sums of money spent by the ONGC in

development of oil wells, which have accrued to its value, were not given credit in the contract while the sums of money spent by respondent Nos.4 and 5 just prior to the signing of the contract were taken note of and a provision was made in the contract for reimbursement of these expenses to respondent Nos.4 and 5. The appellants contend that this type of concession given to the said respondents exposes the extent to which the GOI has sacrificed the nation's interest in entering into the impugned contract. The appellants also rely on the observations of the CAG in this regard in its report. The respondents have denied these allegations. They contend that while the amount spent by the ONGC was during the period when the ONGC was still exploiting and extracting oil from the wells and, consequently, it was deriving monetary benefits from such investment made by it. Respondent Nos.4 and 5 have specifically stated that during the negotiations this question of reimbursing the ONGC for its past expenses on development of the wells was discussed and when such repayment of the past costs was insisted upon, they made a counter offer to the GOI that if the said expenses of the ONGC are to be reimbursed then they are willing to agree for the same with reduction in the royalty and cess and other amounts payable by it. This modified offer was not acceptable to the GOI, hence the same was not further pursued. In regard to the costs incurred by respondent Nos.4 and 5 as to which the contract provided for reimbursement, it was pointed out that this investment by respondent Nos.4 and 5 had gone into the development of the oil wells when it was still being exploited by the ONGC. Consequently, the ONGC derived financial benefits from this investment while respondent Nos.4 and 5, who actually invested this amount, had no benefit whatsoever. This fact was also discussed at the time of the negotiations and the GOI considered it prudent to agree to the present terms in the PSC. It was averred that the amount spent on the wells by the ONGC for its development and the possibility of repayment of the amount spent by respondent Nos.4 and 5 was taken into account by the said respondents while offering their bids. We have considered the arguments of the parties in this regard and we agree with the respondents that from the investments made by the ONGC as also by respondent Nos.4 and 5 on these oil wells, the production of oil in these wells had increased and the benefit of this increase had gone exclusively to the ONGC and the GOI; and respondent Nos.4 and 5 had no share of benefit from such developmental activities; be it the investment by the ONGC or their own investment on these wells. Furthermore, these are matters of commercial prudence and in the background of the fact that the ONGC and the GOI both together had the benefit of these investments in the form of increased oil production and consequential benefit of receiving their take from such exploitation of oil, we do not think we can accept the argument of the appellants that these terms were agreed to by the GOI with a mala fide intention of granting undue advantage to respondent Nos.4 and 5. As observed earlier, we will also have to bear in mind the fact that the contract in question involves the payment of consideration under different heads in one basket. The contents of this basket cannot be assessed individually nor can the court say that the receipt from a particular item in the basket is arbitrarily low, because the take of the GOI in the contract is as a whole from the total receipt from the basket. At this juncture, we would like to notice the observations of this Court found in *Kasturi Lal Lakshmi Reddy v. State of J. and K.* (1980 3 SCR 1338 at 1357) wherein this Court had held :

We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular

action, that the Court would have to decide whether the action of the Government is reasonable and in public interest.

It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations levelled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral considerations alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants. Therefore, the above contention of the appellants also fails. While considering the allegations levelled against the acceptance of the impugned contract, we may usefully refer to the observations of this Court in the case of *Tata Cellular v. Union of India* (1994 6 SCC 651) which are as follows :

The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the courts ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the court is concerned with the merits of the decision under appeal. Since the power of judicial

review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The duty of the court is thus to confine itself to the question of legality. Its concern should be (1) whether a decision-making authority exceeded its powers ? (2) committed an error of law; (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached or, (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. (ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (iii) Procedural impropriety. Applying the above principle, we find it difficult to come to the conclusion that the decision of the GOI in accepting the bid of respondent Nos.4 and 5 on the advice of the Committee of Secretaries is so unreasonable as to accept the prayer of the appellants to grant the reliefs sought for in this appeal. Appellants rely upon another factual circumstance which is outside the terms of the PSC to establish their contention that the contract in question was awarded to respondent Nos.4 and 5 because of certain collateral considerations. In this behalf, they contend that there is a clear and specific evidence to show that respondent No.4 had paid certain sums of money to the then Minister of Petroleum at or about the time when the offer of respondents 4 and 5 was being considered by the GOI. In support of this contention, the appellants rely on a statement purported to have been made by the Private Secretary to the said Minister to the CBI while the latter was investigating a case of bribery. As per the said statement, respondent No.4 paid to the said Minister a sum of Rs.4 crores between June, 1993 and December, 1993 which fact, according to the appellants, is sufficient to come to the conclusion that awarding of the contract to respondents 4 and 5 was influenced by some collateral consideration. It is to be noted here that the said statement of the Private Secretary to the Minister which was made to the CBI, was subsequently retracted by the said Private Secretary.

Therefore, it will not be safe to rely upon a retracted statement to come to the conclusion that the contract in question is actuated by collateral consideration. At this stage, it may not be out of place to mention the fact that though there were a number of parties who have offered their bids pursuant to the invitation of the GOI in regard to various oil fields, and in regard to Panna-Mukta oil fields, there were as many as 8 other bidders; none of them has come forward to question the validity of this contract. It is also to be noted that another similar petition (PIL) was filed before the Bombay High Court which came to be dismissed and the petitioners therein did not pursue the matter further; and one more writ petition filed before the Delhi High Court also met with the same fate by the impugned common judgment, the said writ petitioner has not chosen to assail the judgment of the Delhi High Court. This leaves us to consider the argument of the appellants in regard to the conduct of the CBI before the High Court as respondent No.2 in the writ petition. Though the appellants have made many allegations against the investigation conducted by the CBI in this case, we do not think it is necessary for us to go into all these allegations except confining our consideration to the stand taken by the CBI before the High Court as to the existence of Part- II File No.1/636/D/95/AC/BOM said to have been opened by the then Superintendent of Police, CBI, Mumbai. According to the appellants, the said file is in continuation of Part I file which was meant to be sent to the headquarters. In the writ petition, it was specifically alleged that this Part II file was opened in the Anti Corruption Branch-II CBI, Mumbai sometime in March, 1996 itself and the same was segregated from the original file and withheld by some officers of the CBI with ulterior motives. In reply to the said allegation, the CBI filed a counter affidavit before the High Court verified by one Shri K.Surenderan Nair, Deputy Superintendent of Police, CBI Special Task Force, New Delhi, wherein in paragraph 4 of the said affidavit it is stated thus : So far as Part-II of File No.1/636/D/95/AC/BOM in which Shri Y.P.Singh, the then Superintendent of Police-II, ACB, Mumbai Branch allegedly recommended that a FIR be registered and a Regular Case started, it was got checked up with Dy.Inspector General of Police, ACB Mumbai who has intimated that no such file is in existence in ACB Mumbai Branch. (emphasis supplied).

It is based on the use of the words no such file is in existence which made the appellants contend before the High Court that a deliberate incorrect statement was made by the CBI in its affidavit filed before the High Court with a view to deny the allegation made by the writ petitioners as to the motive of the superior officers of the CBI to suppress the contents of Part-II file opened by said Mr. Y.P. Singh, Superintendent of Police. The writ petitioners before the High Court in their rejoinder affidavit reproduced certain portions of the said Part-II file which contained the notings of the senior officers of the CBI including the one dated 11.4.1996 of Mr. Raghuvanshi who instructed Mr. Nair to swear to the first affidavit of the CBI. Still when the CBI filed the first affidavit before the High Court on 19.8.1997, Mr. Raghuvanshi instructed the deponent of the said affidavit to state before the court that no such file is not in existence in ACB Mumbai Branch. When the rejoinder affidavit was filed, it seems the CBI was caught on the wrong foot and it tried to wriggle out of the situation by filing another affidavit this time sworn to by Mr. Raghuvanshi himself wherein an ingenuous stand was taken that the intention of the CBI in informing the court in the first affidavit by using the words no such file is in existence in ACB Mumbai Branch was to intimate the court that no such file was available at the time of filing of the first affidavit. While examining this belated explanation of the CBI we have to bear in mind that the first affidavit of the CBI was, among other facts, in reply to the specific allegations of the writ petitioners as to the opening of and the contents

of Part II file which, according to the writ petitioners, was being suppressed by the CBI from the Court. As a matter of fact, in para 18 of the writ petition, it was stated thus :- Part-II file containing recommendation of registering a regular case in the matter was withheld by the then Joint Director, CBI Shri Mahendra Kumawat and was not sent to the head quarters.

While the CBI had to explain this averment made in para 18 of the writ petition, if really it wanted to convey to the Court as to the non-availability of Part II file to comment on the above allegation, one would have expected the CBI to come forward with a simple explanation that it is unable to respond to the above allegation in view of the fact that the said file was not traceable instead of averring in the affidavit that no such file is in existence. The use of the words no such file clearly indicates that what the CBI intended to convey to the Court in the first affidavit was to tell the Court that such file never existed and it is only when the reply to the said affidavit was filed by the writ petitioners with a view to get over the earlier statement, the second affidavit was filed by Mr. Raghuvanshi interpreting the word existence to mean not traceable. In the circumstances mentioned hereinabove, we are unable to accept this explanation of the CBI and are constrained to observe that the statement made in the first affidavit as to the existence of Part-II file can aptly be described as *suggestio falsi* and *suppressio veri*. That apart, the explanation given in the second affidavit of the CBI also discloses a sad state of affairs prevailing in the Organisation. In that affidavit, the CBI has stated before the Court that Part II file with which the Court was concerned, was destroyed unauthorisedly with an ulterior motive by none other than an official of the CBI in collusion with a senior officer of the same Organisation which fact, if true, reflects very poorly on the integrity of the CBI. We note herein with concern that courts including this Court have very often relied on this Organisation for assistance by conducting special investigations. This reliance of the courts on the CBI is based on the confidence that the courts have reposed in it and the instances like the one with which we are now confronted with, are likely to shake our confidence in this Organisation. Therefore, we feel it is high time that this Organisation puts its house in order before it is too late.

Leaving apart the above observations of ours in regard to the CBI, having considered all the materials placed before us and the arguments addressed, we are satisfied that on the facts and the circumstances of this case, the prayer of the appellants to direct a criminal investigation into the deal in question by an appropriate agency, as prayed for in the appeal, cannot be granted.

For the reasons stated above, the appeal fails and the same is hereby dismissed.

J. (S P Bharucha)