

M/S Ashoka Smokeless Coal Ind. P. Ltd. & ... vs Union Of India & Ors on 1 December, 2006

Equivalent citations: AIRONLINE 2006 SC 612

Author: S.B. Sinha

Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:

Appeal (civil) 5302 of 2006

PETITIONER:

M/s Ashoka Smokeless Coal Ind. P. Ltd. & Ors

RESPONDENT:

Union of India & Ors

DATE OF JUDGMENT: 01/12/2006

BENCH:

S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T [Arising out of S.L.P. (Civil) No. 20471 of 2005] WITH CIVIL APPEAL NOS. 5329, 5303, 5304, 5305, 5324, 5306, 5307, 5308, 5309, 5310, 5311, 5312, 5313, 5314, 5317, 5315, 5318, 5319, 5320, 5321, 5322, 5323, 5316 OF 2006 [Arising out of S.L.P. (Civil) Nos. 4300, 20541-42, 21792, 22596, 23302, 23305, 23323-23327, 23345, 23374, 24403, 24034, 25059, 25131, 25140, 25149-50, 25192 OF 2005 & 899 OF 2006] WITH T.C. (CIVIL) NOS. 89-124, 126-136 OF 2005 AND T.C. (CIVIL) NOS. 4-5, 7-45, 75, 125, 137-139 OF 2006 WITH CIVIL APPEAL NOS. 5547 OF 2004 & 2972-2976 OF 2005 AND WRIT PETITION (CIVIL) NO. 67 OF 2005 S.B. SINHA, J :

Introduction :

Leave granted in all the special leave petitions.

The validity and/or legality of a scheme framed by the Coal India Limited for sale of coal by Electronic Auction (E-Auction) is in question in these appeals and transferred applications.

"Coal" indisputably plays an important role in the development of economy of the country. It had been the subject-matter of regulatory measures even under the Defence of India Rules. Production, distribution, supply and price of coal were controlled and regulated under the Colliery Control Order, 1945 (1945 Order) framed

under the said Rules. The said Order was continued under the Essential Commodities Act, 1955. Under the Colliery Control Order, the Coal Controller was even authorised to allot quotas of coal to the Central Government as well as the State Governments; although the said procedure is now not in vogue in view of decontrolling notifications issued thereunder by the Central Government from time to time. The quality as well as quantity of coal required by all consumers used to be regulated by the Coal Controller. Coal was the only mineral which was subjected to nationalisation, in terms of the Coking Coal Mines (Nationalisation) Act, 1972 and the Coal Mines (Nationalisation) Act, 1973. Even coal-mining leases granted to the lessees stood terminated by reason of Section 4-A of the Mines and Minerals (Regulation and Development) Act, 1957 in the year 1976.

Coal is used as a primary raw material in many core sectors which are vital for the economy of the country e.g. power, steel, oil etc. Fixation of price of coal by the Central Government, regarding the quality thereof, had all along been subjected to statutory orders. The gradation of coal dependent upon the quality thereof was to be determined by the "Coal Board" constituted under the Coal Mines (Conservation and Development) Act. Quality of coal may depend not only on the location of the coal mines but also on the particular seams wherefrom it is extracted. Requirement of maintenance of fixed price of coal on an all-India basis, as far as practicable had all along been considered to be imperative in the economic and industrial development of the country.

Control over coal :

Coal indisputably is an essential commodity. Its importance is widely accepted. The Essential Commodities Act, 1955 was enacted inter alia for securing equitable distribution and availability of essential commodities at fair price. Coal despite partial deregulation having regard to Colliery Control Order, 2000 (2000 Order) is still a regulated commodity.

1945 Order made provisions for regulating production, supply and distribution of coal. It dealt with class of coal, grade of coal, size of coal and price of coal. Clause (3) empowered the Central Government to prescribe classes, sizes, grades, etc. into which coal may be categorized as also the specifications thereof on the said basis.

Whereas coking coal having inherent property of swelling on heating is essentially used for metallurgical purposes in the steel plant for production of steel; all other categories of coal are non-coking coals. Non-coking coal is used as a raw material in manufacturing processes such as cement, graphite, soft coke, domestic fuel and for production of various products such as glass, food processing, ceramics, chemicals, re-rolling mills, salt glazed stoneware pipes, refractory used for steel making etc. The different sizes of the coal are inter alia known as 'Run of the Mine', 'Steam' and 'Slack'. The price of coal depends not only with reference to the grade but size as also

the seams situated in the coking coal mines or coal mines, as the case may be.

Clauses 12B and 12E of the 1945 Order were, however, invoked by the Central Government from time to time by issuing notifications as a result whereof controls over price and distribution of coal were withdrawn. However, complete regulation over coking coal used for metallurgical industries was retained.

Several notifications leading to deregulation as regard price and distribution of coal had been issued from time to time. Distribution and pricing of coal came to be controlled in a phased manner. A circular was issued on 5.1.1991 that Coal India could issue coal clearance/ linkages upto 5,000 metric ton per month. By a notification dated 23.2.1996, price, distribution of some grades of coal were deregulated whereas the same was extended to certain other grades of coal on 12.3.1997. A clarification was issued that the coal companies can determine the price to be charged for the coal produced from time to time.

On and from 1.1.2000, the 1945 Order was repealed and replaced by the Colliery Control Order, 2000 (2000 Order); in terms whereof control and regulation over coal, as was prevailing under the 1945 Order, was done away with. In terms of the said order, the functions as regards categorization of coal, disposal of coal, stock vested in the Central Government, whereas the Coal Controller was conferred with the power of surveillance over quality. By reason of the said Order, the Central Government, however, apart from certain other statutory functions to be performed by coal controller retained the power to issue directions for regulating disposal of stocks of coal.

Nationalisation of coal :

Both coking coal mines and coal mines were subjected to nationalization in terms of Coking Coal Mines (Nationalization) Act, 1972 (for short, 'the 1972 Act') and the Coal Mines (Nationalization) Act, 1973 (for short, 'the 1973 Act'). The said Acts, as would appear from Section 2 thereof, were enacted with a view to give effect to the provisions of Article 39(b) of the Constitution of India. Under the said Acts, both Coking Coal Mines and Coal Mines vested in the Central Government under the said Acts.

The preamble of both the Nationalisation Acts are in the same vein. The Preamble of the 1973 Act states that "control of such resources are vested in the State and thereby so distributed as best to subserve the common good." By reason of the said statutes, the coal companies had not only acquired coking coal mines and coal mines but also have been carrying on business in coal. Indisputably, they enjoy a monopoly character.

It is also not in dispute that there had been huge demand of coal both from the core sector as also non-core sector consumers.

The Central Government, however, issued appropriate notifications whereby and whereunder the said coal mines both in terms of the 1972 Act as also the 1973 Act instead of continuing to vest in the Central Government vested in the Government companies specified therein who are parties herein.

Linkage :

After the nationalization of coal, consumers were categorized in two main sectors, namely, core sector and non-core sector. Linkage system admittedly at the first stage had been evolved for core sector. In the year 1993, a Standing Linkage Committee was set up for supply of coal to thermal power stations.

Linkage was extended also to cement in the said year in terms of Resolution No.CI-21(20/73 dated 19.11.1973. The scheme for linkage of coal started in the year 1973 in terms of the resolution dated 6.1.1973, whereby, inter alia, a Standing Linkage Committee consisting of the members specified therein, was set up, the relevant provision whereof reads as under :

"No.CI-21(2)/72 The Government of India have been considering for some time past the question of constituting a Standing Linkage Committee for the planning of coal supplies to thermal power stations in view of the need to supply fuel of appropriate quantity to the various power stations and at the same time to make the most economic use of the available capacity for the production and transport of coal "

The terms of reference of the Committee were as under :

"(1) To review from time to time the coal requirements of the existing thermal power stations and for establishing rational linkages with collieries for raw coal supplies and with washeries for the supply of middlings having regard to :

(a) the capacity of coal production, available as well as planned from the nearest source which would avoid or minimize the rail transport.

(b) the quality of coal required by the power stations.

(c) the availability of rail and other means of transport and

(d) the pattern of consumption of coal;

(2) To plan supplies of coal for thermal power stations already under construction and to link them with sources of coal supply;

(3) To advise from time to time regarding the planning and development of the additional capacity for coal production which should be developed in each coalfield having regard to the future thermal power development programmes in the various regions;

(4) To examine from time to time the extent to which the linkages already established between the power stations and the sources of coal supply are being observed and to suggest steps necessary for ensuring their proper observance;

(5) To advise the Government on the feasibility of locating new thermal power plants having regard to the possibility of economic supply of coal; and (6) To examine all matters that may be referred to the Committee by the Department of Mines, Ministry of Irrigation and Power, Ministry of Railways or the Planning Commission regarding the changes in the linkages of power stations with coalfields and to advise the Government suitably in such matters.

3. The Committee should normally meet once in three months. The Department of Mines will provide the required Secretarial assistance to the committee."

The coal companies state :

"That after the nationalization, coal consumers were categorized into two main sectors, namely, core sector and non-core sector. The core sector consumers include the vital sectors of national economy related to infrastructural development as for example, power, steel, cement, defence, fertilizer, railways, paper, aluminium, export, central public sector undertaking etc. All other remaining industries/consumers constituted non-core sector. A table showing comparison in growth in production and dispatches to different industrial sectors which shows a phenomenal growth in production of coal and also commensurate growth in coal dispatch particularly in the power sector is as under :

COMPARATIVE COAL DISPATCHES FROM COAL MINES AUTHORITY LTD. IN 1974-75 AND COAL INDIA LTD. IN 2004-05 PRODUCTION (Figs. in Million tones)
 Item From CMAL in 1974-75 From CIL in 2004-05 Coal Production 78.99 323.88 Coal Dispatch 72.83 319.12 SECTOR-WISE BREAK-UP OF COAL DISPATCH
 Item Quantit y % age Quantit y % age Power* 20.16 27.66 249.26 78.11 Steel CPP 1.22 1.67 6.427 2.01 Steel plants 8.71 11.95 5.654 1.77 Loco 12.82 17.59 0.00 0.00 Cement (including Cement CPP) 3.48 4.77 10.043 3.15 Fertilizer 0.95 1.30 2.150 0.67 Export 0.528 0.72 0.021 0.01 Paper 1.297 1.78 2.016 0.63 Others 23.67 32.55 43.55 13.65 Total 72.83 100.00 319.12 100.00 *Excluding Captive Power Plants (CPPs)"

The linkage scheme applied both to core and non-core sector. Consumption of coal by the core sector comprises of about 94.61% where as non-core sector consumes about 5.4 % of total production of coal.

Linkage of non-core sector :

In the non-core sector, the purchasers can be divided in three categories, namely, those who manufacture smokeless fuel or briquette, those who manufacture commodities like glass etc. to which reference has been made heretobefore, and those who manufacture hard coke. Before us, some of the appellants are also traders.

Having regard to the huge demand of coal by non-core sector, linkage system was introduced for non-core sector consumers also. Coal India Limited evolved such a system in November 1978 keeping in view several factors including logistics of coal movement as also the quality of coal required by the concerned industries.

The said linkage of coal was to be determined on the basis of : (i) availability of coal; (ii) requirements thereof in respect of each industry as certified by the State; and (iii) the capacity of the railways to transport coal.

Whenever an allotment was made, the quantity and quality of coal as also the collieries from which the same could be lifted used to be mentioned in the Linkage Advice Letter, a sample copy whereof is as under :

"COAL INDIA LIMITED MARKETING DIVISION 15, PARK STREET, CALCUTTA-700 016 Ref: No.CIL/C4A/48912/ Dated :

To :

M/s_____ (Supply of coal/coke shall be Regulated as per extant guideline MOC/CIL) LOCATION/DESTINATION Dear Sir(s), Sub: Linkage Advice Letter Ref. Your application in the Data-Sheet for Coal/Coke Linkage.

Please refer to your application in Data-Sheet for grant of linkage of coal/coke.

Your application for issue of "Final Linkage Advice Letter" has been received in CIL. The details of your installed unit indicating the nos., dimensions, specifications, capacity etc., of the burning equipment/oven/plan and machinery have been received.

On the basis of relevant information, the maximum permissible quantity (MPQ) of coal which can be consumed by your unit/plant has been worked out and it has been decided to fix up final linkage for your unit as per the following :

GRADE SIZE MODE OF TRANSPORT COAL COMPANY FIELD CONTACT OFFICE
MAXIMUM PRERMISSIBLE QUANTITY (MPQ)/MONTH However, coal will be
supplied by the Linked Coal Company on the basis of annual
sponsorship/recommendation from the concerned sponsoring authority.

The linkage of coal will be subject to the conditions as mentioned below/overleaf.

Yours faithfully, Dy. Chief Sales Manager (Linkage), Coal India Ltd. (HQ)"

Some of the conditions of such linkage which are relevant for our purpose are as
under :

"1. "Linkage" is a clearance to the linked coal company for supplying coal to the unit,
subject to "availability" and in accordance with the "directives", if any from time to
time, of the appropriate competent authority regulating "disposal of stock of coal".
Linkage does not establish any right for the linked unit to claim coal from any
particular coal company/coalfield/source/grade etc.

4. Coal allotted against the linkage is for actual consumption in the linked unit and cannot be
delivered or sold to others except with prior written consent of Government of India/Coal India
Limited.

9. "Linkage" is subject to cancellation in case of :-

(a) Any violation of the terms and conditions contained herein.

(b) Data furnished in the Data Sheet are found to be incorrect/suppressed.

(c) any discrepancy between coal lifted, coal consumed and stock of coal is detected.

10. The conditions of "Linkage" may undergo change(s) as may be decided by the Competent
Authority from time to time."

The consumers drawing coal prior to introduction of non-core sector linkages from Coal India Ltd.
were categorized as traditionally linked consumers and were allowed to draw coal from subsidiary
companies thereof based on the past trend and treated at par with newly linked consumers in post
1978 period. However, conditions of linkages were made equally applicable to them. In 1982,
non-core Linkage Committee was constituted by Coal India Ltd. as a part of the process of
simplification of procedures for distribution of coal.

The quantity of supply of coal initially used to be dependent on the sponsorship by the sponsoring
authorities. Sponsorship was mandatory for the movement of coal by rail. Preferential Traffic
Schedule provided the list of the authorities/agencies who were authorized to sponsor. Sponsoring
agencies used to recommend the quantity of coal depending upon the requirements of the consumer

as also the size thereof and mode of supply. Based on such sponsorship and considering other factors including the availability of coal, the quantity of coal required to be supplied to a particular non-core sector consumer used to be determined. Even after the sponsorship, and link capacity of the consumer, railway had its own ceiling limits which were made with a view to provide sufficient checks and balances in the determination of the quantity of coal supply. The same system of sponsorship was adopted for determination of quantity of coal supply through road and other modes. It is, however, not in dispute that the price of coal to be paid had never been part of the linkage arrangement.

Till 1998 State authorities were asked by Coal India Ltd. to assess the quantity of coal required by individual units whose case used to be sponsored by them. But it appeared that there were cases where such assessments were not made or even if, they were made, the same was done perfunctorily. As a result, Coal India Ltd. started quantitative assessment through its Technical Committees and started mentioning the quantity of coal requirement for the industry in its linkage advice letter. Thereafter, in absence of any ceiling limit imposed by the railways for movement, a tendency was noticed on the part of the State sponsoring authorities to issue sponsorship indiscriminately without due regard to availability of coal, transport capacity and actual consumption. In view thereof as also due to insufficient attention to details, linkages used to be granted indiscriminately with total linked quantity being several times higher than the actual availability. In order to minimize the mismatch between the linked demand and availability of coal, steps were taken in terms of the Linkage Conditions and the linked quantity was reduced in respect of the linked non-core sector consumers who were not drawing full linked quantity of coal. Since quantity commitments were subject to availability of the total quantity for which linkages got granted, it exceeded the availability manifold. For example, during the year 2000, total sponsorship received for industries alone worked out to be about 6000 wagons per day of which the share of UP alone was about 5300 wagons per day. On the other hand, the total wagon loading for non core sector by Coal India Ltd. was for about 1300 wagons per day. To balance such unrealistic grant of linkage the concept of MPQ (Maximum Permissible Quantity), which is defined as maximum valid order booking by a linked consumer in any of the three preceding calendar year was introduced. Besides, there were other conditions under which the linkages could get lapsed or snapped, being dependent upon the period of non-drawal or diversion/misuse of coal. That despite healthy growth rate of coal, demand for core sector, particularly power sector grew at a stupendous rate. At the other end, the total quantity for which linkages were granted had far exceeded the availability.

The system of linkage in its present form led to a situation where quantitative demand in respect of non-core sector linkage consumers exceeded the coal availability in the subsidiary companies. Allegedly, owing to this mismatch in respect of demand and availability of coal, Coal India discontinued grant of fresh linkages to non-core sector consumers. Similarly, revival of snapped/lapsed linkages were also discontinued in the light of the abovementioned facts and circumstances. Thus, since no new linkage could be granted after 2001 for non-core sector consumers, the consumers having no linkage were constrained to purchase coal from black market at a higher price. Even consumers having linkage had to depend on secondary market if they wanted enhancement in supply of quantity of coal. The existence of high premium price in secondary market tempted the linked non-core sector consumers to unauthorized diversion/sell in the open

market after purchasing it at notified price from nationalized coal companies.

On 6th June, 2001, Coal India Ltd. in the meeting of the Board of Directors effected decentralization and authorized each subsidiary companies to decide their own policies for sale of coal to non-core sector, including the price to be charged. It may be noted that on 1.1.2000, coal became a deregulated commodity, i.e., its price could not be controlled by the Central Government and thenceforth, it was Coal India Ltd. which became entitled to determine its price. It was further decided that no fresh linkages would be issued. The system of sponsorship was also discontinued.

It is not in dispute that the linked consumers might not get the entire amount of coal which was required by them.

After the introduction of MPQ system, the total quantity of coal offered to non-core sector remained variable and supply of coal was within the range of 45% to 75% of the demand made by the concerned industries.

Such allotment of coal used to be monthwise.

However, the said linkage system was necessarily dependent upon the sponsorship by the sponsoring authorities. In para 27 of its counter affidavit the Union of India states :

"That the quantity of coal supply was, initially, determined based on the sponsorship by the sponsoring authorities. Sponsorship was mandatory for the movement of coal by Rail. The Preferential Traffic Schedule provided the list of the authorities/agencies who were authorized to sponsor. The said sponsoring agency would recommend the quantity requirement of the consumer and also the size of coal and mode of supply. Based on such sponsorship and considering other factors including the availability of coal, the quantity of coal to be supplied to a particular non-core sector consumer was determined. Even after the sponsorship, and link capacity of the consumer, railway had its own ceiling limits which were with a view to provide sufficient checks and balances in the determination of the quantity of coal supply. The same system of sponsorship was adopted for determination of quantity of coal supply through road and other modes "

Alleged Misuse of Linkaged sponsorship and New Sales Policy :

Linkage and sponsorship although had come into being, a notification was issued by the Central Government on 25.6.1992 under the Colliery Control Order purported to be keeping in view the misuse of the said system of linkage.

However, linkage system continued so far as the industries who had been granted the said benefit are concerned. Need, however, was again felt for genuineness or otherwise of the existing linked consumers wherefor a verification process was started.

It is not in dispute that a decision was taken on 13.10.2001 by the coal industries themselves that the price increase in the non-core sector may not be carried out more than once in a period of one year.

A new sales policy for non-core sector was introduced in terms whereof it was noted that long term commitment by way of fresh linkages may not be advisable. In principle, a decision was taken that existing linkages would not be snapped. However, a verification was to be carried out for the purpose of finding out genuine consumers restricting only to the level of MPQ as it then stood. However, on 28.01.2003, a decision had also been taken that Open Sales Scheme would not affect the supply to core sector as also linked/ sponsored consumers. However, an exception was made in respect of the Central Government Agencies and the State Government Agencies pursuant where to or in furtherance whereof apart from NCCF, State Government and Central Government like BISCO MAUN and Jharkhand State Mineral Development Corporation were directed to be entitled to supply coal at 20% above the notified price.

On or about 23.08.2001, a resolution was passed, inter alia, for removing the difference between OSS price and the price of the linked consumers. It was recommended that the coal companies should expand trends channel network scheme so as to achieve the twin objective of market friendly and at the same time ensure their best fiscal interest.

To prevent misuse of linkage, verification of the units of the linked consumers was undertaken. As a result of such verification it was allegedly found as would appear from the following statement made in the counter affidavit :

"That a copy of the minutes of the meeting taken by the Minister for Coal and Mines on 21.3.2002 regarding new coal sale policy of Coal India Ltd. was forwarded, amongst others, to the Chairman-cum- Managing Director of the subsidiary companies of Coal India Ltd. along with the Director (Marketing), Coal India Ltd. It was noted in the minutes that the total number of linked units were 7015 out of which linkage of 2217 had been snapped. That the total number of units having valid linkage as on date was 4798 out of which 3317 units had been verified either by State Government/sponsoring agencies or by internal vigilance units of coal companies. While 3064 were reported to be existing, 253 units were found to be either non-existing or non-operating. It was further noticed that during coal company wise review, it was noted that in cases where vigilance departments of coal companies had verified the units, about 40-50% of the units were found to be either non-existing or non-operational. On the other hand, the State Government/sponsoring agencies had reported more than 90% of the verified units to be in existence. The coal companies were advised to get the verification done through vigilance ."

With a view to consider the matter afresh, a meeting of the Standing Committee on Coal and Steel (2004-2005) took place wherein it was resolved :

"6.5 The Committee also note that as admitted by Secretary, Department of Coal, there are 4000 odd industries in the business out of which there might be some bogus companies not using coal and black marketing it. The Committee feel that there is a wide spread apprehension that bogus companies are operating in the transportation and black marketing of coal thereby causing immense loss to the coal sector ultimately affecting the economy of the country. The Committee further note that quality of coal is closely linked to effective materialization of linkage. The Committee are dismayed to note that out of 8,000 odd industries getting coal quota, 4,000 such industries, who were reported to be bogus, had been eliminated after inspection carried out by the Department of Coal. The Committee, therefore, strongly recommend that the Department of Coal should take a pro-active and corrective decision in the award of coal transportation contract. The Department should also undertake an exercise to identify and weed out the bogus companies which are in the business of black marketing of coal. The Committee further recommend that the Department of Coal should give a fresh look at the whole gamut of coal linkage and come out with a clear cut policy. The Committee would like to be apprised of the action in this regard."

According to the coal companies, however despite such stringent steps taken as regard the maladies of demand of coal by the non-existing units and/or demand of coal in excess of the requirement of the linked units and concentration of purchase of coal at the hands of a few traders did not work to their full satisfaction.

Open Sales Schemes (OSS) :

On or about 03.11.1998 Open Sales Schemes (OSS Scheme) was introduced as a result whereof some amount of coal was to be supplied to the traders directly wherewith the linkage system has nothing to do.

It was clarified that the OSS in no way affect despatches to linked/sponsored consumers. In terms of 1945 Order, however, the Government of India used to fix and notify prices of various grades of coal on the basis whereof the Coal India Ltd. and its subsidiaries used to sell coal to all classes of consumers. The said scheme was also subjected to certain restrictions, in terms whereof, it was impermissible for one purchaser to purchase coal for more than 33% from each colliery. The linked consumers or the sponsored consumers, were not entitled to take part in such open sales schemes.

The coal companies contend that the schemes of linkage, sponsorship or OSS were part of the policy decisions which were taken by them from time to time with a view to meet the exigencies of the situation which were prevailing then. Keeping in view,

however, the fact that the supply could not meet the demand which to a great extent was artificial and man-made, a new policy decision was required to be evolved so as to meet the new situation; particularly when measures taken to prevent black marketing of coal by procuring coal in excess of their requirements and/or the units being non-existent as also by the traders, did not fructify.

E-Auction :

A new scheme known as E-Auction was made purportedly to meet the liberalization policy of the Central Government in regard to import of coal and opening of private coal mines and to provide pragmatic and transparent system of distribution of coal. 4.8 million tones of coal were offered to the non-core sector in 2003-04. The quantity earmarked for non-core sector was restricted to 933 validly linked consumers. The objectives of the said scheme are stated to be as under :

"OBJECTIVES :

The present system of sale of coal to non-core sector consumers needs to be made more pragmatic and transparent by accommodating the following changes :

- a) A consumer having requirement of specified quality of coal from a particular colliery/source and siding/pilot should have an access to buy coal by paying the market determined price for the same.
- b) This approach would enable the non-core sector consumers to receive coal of their choice, on payment of market price, determined through Auction confined to non-core sector consumers."

Clause 3 thereof provides for methodology of offer and sell of coal under E-Auction, in the following terms :

"On pro-rata basis the availability of coal is roughly 45% of the entitled quantity of the linked non- core consumers of coal and that is also subject to availability. The quantity so arrived at will be called allocable quantity (AQ) and shall be worked out for each non-core-sector consumers annually (for the sake of proper distribution, this will be every month and bidding will be restricted to such prorated quantity every month). With increased availability of coal for non-core sector, the AQ-(MPQ of individual) X total coal availability for a particular month divided by total monthly MPQ.

xxx xxx xxx 3.3 Whilst in the case of existing consumers entitlement would be governed by the MPQ (Maximum Permissible Quantity) of the last 7 years, supplies against the requirement of new consumers will depend on the satisfaction of the coal company and availability of coal.

3.4 Around 20% of the total non-core-sector coal available would be made available to official agencies nominated by State/Central Govts. For distribution to the small and tiny consumers. Coal to the State Govts. May be priced at the average cost arrived at the E-auction for that particular grade of coal during that month."

Clause 4 provides for E-Auction process whereas clause 5 provides for terms of payment. The concept of E-Auction is stated to be as under :

"In order to bring about some transparency in marketing of coal by the Non-core Sector consumers. An initiative was taken recently by Bharat Coking Coal Ltd. (BCCL), a SUBSIDIARY OF Coal India Limited (CIL) for sale of coal A/c Non-core Sector Consumers through E-auction on trial basis going by succeeds of this trial. It is being considered to extend this scheme in other coal companies of CIL also. In a phased manner, to cover all the consumers of non-core Sector, including non-

consumers/traders.

The broad benefits and modalities for subsequent trial run for sale of coal though E-auction are as under :

Benefits :

i) Elimination of differences between linked and non-linked consumers as directed by Calcutta High Court.

xxx xxx xxx"

The concept of sale of coal through E-Auction was introduced on trial basis by BCCL in October 2004.

E-Auction was also introduced by North Eastern Coal Limited.

As an interim measure, a decision was taken to sell about ten millions tones of coal through E-Auction in 2005-06, in various subsidiaries of Coal India Limited. The quantity which was to be put on E-Auction and the price thereof was to be in the following order :

"a) 10 million tones only released through e-auction;

b) About 12 million tones released to linked consumers of non-core sector through MPQ concept at e-auction price;

c) 2 million tones to NCCF, 0.5 million tones to Govt. of UP both at average e-auction price."

According to the coal companies approximately 26.5 million tonnes of coal were to be sold at E-Auction price as a result whereof the share of non- core sector in dispatches would be enhanced roughly to the extent of 8% against the present share of about 5.4%. No details in respect thereof, however, have been furnished.

In one of the notices issued on 21.10.2004 for sale of coal to non-core sector through E-Auction, it has, inter alia, been stated :

"BCCL is in the process of reformulating its sale and distribution policy with a view to enable genuine and bona fide non-core consumers to purchase coal of their choice subject to availability at fair market price in a transparent manner.

In order to accord uniform opportunity to all such consumers, it has been decided to sell 1.6 lakhs tones of coal through e-auction in November, 2004, to be conducted by MSTC Ltd., a Govt. of India enterprise, purely on a trial basis.

Sale of coal to such non-core sector will be made only through e-auction to be held on 17.11.04, 22.11.04, 25.11.04 and 29.11.04 respectively.

In the month of December, 2004, coal sold only through e-auction will be delivered.

For on-line registration, genuine consumers of BCCL who are already linked as well as new consumers may apply to BCCL in the prescribed form which is available from the website of MSTC Ltd. at <http://www.mstcindia.com> under the heading BCCL Coal Auction or from the website of BCCL at <http://bccl.cmpdi.co.in> from where it can be down load. Such application forms may also be obtained from the Office of BCCL Dhanbad, BCCL, Kolkata, MSTC, Kolkata or MSTC, Delhi.

Applications forms completed in all respects should reach to Shri S. Mallick, Sales Manager (Road Salews Section), Sales & Marketing Divn., BCCL, Koyla Bhawan, P.O. Koyla Nagar, Dhanbad - 826 005 or Shri K.K. Mazumdar, Sales Manager, BCCL 6 Lyons Range (5th Floor), Kolkata -700 001 in duplicate latest by 4th November, 2004.

After due verification, BCCL will forward this application to MSTC Ltd.. for registration. On being intimated by MSTC, consumers should pay one time registration fee of Rs.10,000/- by way of DD/PO favouring MSTC Ltd., Kolkata and register themselves on-line at <http://www.mstcauction.com>."

The procedure to be followed for E-Auction, is stated to be in the following terms :

"Metal Scrap Trading Corporation, hereinafter referred to as MSTC (a Government of India Undertaking) and M/s Metal Junction Services (a joint venture of Steel Authority of India Ltd. and Tata Iron & Steel Co. Ltd.), specialized in conducting

electronic auction have been engaged to conduct sale of coal through e-auction by the subsidiary producing companies of Coal India Ltd. Under the scheme, the interested buyers are required to initially register themselves with the abovesaid auctioneering agencies and are also published for information to all concerned, well in advance. The information displayed in advance about an auction includes details of the source, quantity, grade, size, mode of transport as well as the floor price. E- auctions are conducted for each of the Subsidiary Companies separately under the scheme. Each subsidiary company conducts on an average four auctions every month except NCL which conducts at least two auctions in a month. A chart setting out details of e-auction conducted in the month of January, 2006 would show that till 19th of January, 2006, 26 auctions have already been conducted. The buyers are required to deposit requisite Earnest Money Deposit (hereinafter referred to as EMD) for coal they desire to bid with the auctioneering agencies. At present, the participants are required to deposit an EMD of Rs.100/- against their per tonne requirement. The bidding is conducted by the auctioneering agency for specified period which is extended subject to the status of the bidding. On conclusion of the electronic bidding, the agencies forward a list of successful bidders along with EMD, the allotted quantity, bid price, etc. to the subsidiary company for taking further action for release of coal. Simultaneously, the successful bidders are also informed by the agencies through electronic mail. The successful bidders are required to deposit full value of coal within eight working days from the date of completion the bidding at the headquarter sales department of the concerned subsidiary company of Coal India Ltd. along with relevant documents for obtaining the release order and subsequently are required to arrange for movement of coal from the respective projects/mines of the concerned subsidiary company within a validity period of 45 days."

The Central Government, however, by a letter dated 08.04.2005 addressed to the Coal India Limited, kept the linkage system alive despite introduction of E-Auction.

Exceptions to E-Auction :

On 20.07.2005, the Ministry of Coal by a circular letter stated :

"The total quantity earmarked for State Government agencies may be increased by one million ton so as to reserve a total quantity of 3 million tones of coal for the year 2005-6. The State Government agencies who are distributing coal to SSI and tiny units are to be supplied coal by the subsidiary companies of CIL at the floor price (i.e. 20% above the notified price of a price of a particular grade) instead of the weighted average e- auction price in view of the reported high e-auction price."

The Central Government, thus, directed the coal companies to supply coal to NCCF and other agencies at 20% above of the notified price instead of weighted average E-Auction price; thereby taking them out of the purview of E-Auction. Similar benefit was extended to the agencies of the Central Government and the State Governments. By a letter dated 08.04.2005, the Ministry of Coal

allocated supply of coal of 2 MT each to be supplied to NCCF and the State Governments nominated agencies for the financial year 2005-06. Yet again on 20.07.2005 the Ministry of Coal directed that the price to be charged for supply of coal to NCCF and the State Government nominated agencies to be at a floor price i.e. 20% above the fixed notified price of a particular grade instead of weighted average E- Auction price. The quantity of supply of coal to the State Government nominated agencies was further increased by one MT for 2005-06. This Court's attention has, however, been drawn to various cash memos. issued by the NCCF, from a perusal whereof it would appear that the NCCF instead of supplying coal only to a cross-section of tiny and small consumers e.g. potters, blacksmith, tea stall vendors, who require a very small quantity of coal for running their business, had been selling coal even to linked consumers. The Chairman of Coal India Ltd., however, vide letter dated 30.09.2005 addressed to the Chief Secretaries of various State Governments sought to define the tiny and small consumers stating that those whose consumption was less than 500 tonnes per year would come within the purview thereof. Admittedly, small consumers were to be charged not exceeding 105% of the base price at which coal had been received from Coal India Ltd and its subsidiaries. By the said letter, it was directed that the coal bill to the tiny/small consumers shall separately include base price and other charges like transportation, royalty, taxes, etc. Representations to set up smokeless fuel units :

The coal companies themselves used to produce soft coke and other derivatives of coal for use as alternate fuel for domestic consumption.

The Government of India, Ministry of Coal, by way of a letter dated 27.03.1997, addressed to the Chairman, Coal India Ltd., Calcutta, asked him to take urgent necessary actions to popularize the technology given by CFRI by giving more linkages to the intending entrepreneurs and also encourage stepping up of production of, SSR and Briquettes in order to ensure availability of alternate fuel for domestic consumption.

On or about 07.05.1989, advertisements had been published in many leading newspapers including 'The Statesman', wherein it was stated :

"Special smokeless fuel is a popular product suitable for cooking by millions of houses, canteen kitchens, hostels bit and small etc. in part of States of Northern, Western, Eastern, Central and South India.

So long the new technology was reserved for Coal Producing Companies due to a restriction on coal linkage.

Now you can also make it. Coal India assures to provide both coal and the manufacturing technology if it is not available with enthusiastic entrepreneurs etc. It can be manufactured by State Undertaking/Corporations, Joint Sector Enterprise and also by Private Entrepreneurs etc."

The entrepreneurs some of whom are Appellants before us are small scale industries. They are registered with the Directorate of Industries of the respective States. They are also linked industries for the purpose of obtaining supply of coal from the coal companies herein. The entrepreneurs some of whom are Appellants before us having been so invited, pursuant to or in furtherance of the promises made by them allegedly set up plants for manufacturing smokeless coal.

Proceedings before different High Courts :

Some traders filed a writ petition before the Gauhati High Court. By a judgment and order dated 08.04.2005 the Gauhati High Court set aside the E-Auction scheme, inter alia, holding the method adopted for the said purpose to be arbitrary in nature. In any event, it was held that the Chairman of Coal India Limited had no authority to issue such direction or to frame such a scheme. For the purpose of working out the feasibility of sale of coal at E-Auction, a committee was directed to be constituted. Civil Appeal Nos.2972 to 2974 of 2005 have been filed by Coal India Limited against the said judgment.

When the scheme of E-Auction was introduced in Western Coal Field Limited, its authority was questioned before the Madhya Pradesh High Court by way of a writ petition. By a judgment and order dated 29.09.2005 the said High Court, however, held the said scheme to be legal and valid.

Special Leave Petition (Civil) No.24034 of 2005 has been filed thereagainst.

Before the Calcutta High Court, one Bijoy Kumar Poddar filed a writ petition questioning the validity of the sponsorship scheme. The said writ petition has been allowed.

Findings of the Gauhati High Court. :

Before the Gauhati High Court, as noticed hereinbefore, the traders filed a writ petition. Five writ petitions were filed by traders and SSI owners, inter alia, questioning a notice of E-Auction which was for sale of coal loaded in rakes. One rake consists of 41 wagons having about 60 MT of coal in each wagon. By reason of the said notice, it was directed that if the bid was for one rake only, floor price thereof would be about Rs.49 lacs. The High Court held that the petitioner therein had the locus standi to challenge the impugned notices and the Chairman, Coal India Ltd. was not competent to take any policy decision as regard sale of coal by E-Auction. It was observed that by reason of the said policy decision all other modes of sale of coal having been superseded, the same was not valid. Having regard to the state of affairs prevailing in the North Eastern States, the process of tender was held to be not safe as inter alia it was noticed that no-one from Arunachal Pradesh had registered for purchase of coal through E-Auction. It was further held that the criteria laid down therein did not take into account the situation prevailing in the North Eastern States

and, thus, violative of Article 14 of the Constitution of India. It was found that as in the North Eastern Region, there was shortage of electricity, the traders and linked consumers would find it difficult to bid through E-Auction. The learned judges directed constitution of a committee comprising of the representatives from the Ministry of Information and Technology, Ministry of Power, BSNL and CIL, which was to be chaired by the Secretary, Ministry of Coal, so as to enable it to take a decision as to how best the said policy decision can be implemented.

Findings of the Madhya Pradesh High Court :

Linkage is not a matter of right and dependent upon certain conditions precedent. In view of the decision in *Pallavi Refractories & Ors.v. SCCL & Ors.* [(2005) 2 SCC 227], the dual pricing policy adopted could not be found fault with. Even the commercial principles laid down therein pointed out that E-Auction is valid in law. Price fixation by E-Auction is not arbitrary. Change of price by reason of E-Auction being a normal facet in commercial transaction is not bad in law.

Findings of the Calcutta High Court :

The question as to whether a direction can be issued upon the Coal India Ltd. to supply coal by road movement and without sponsorship in the wake of coal being controlled came up for consideration before the Calcutta High Court. The stand of the coal companies therein was that the consumers of both core and non-core sectors were entitled to equitable distribution of coal. The Calcutta High Court observed that mini classification on the basis of sponsorship system is ultra vires the Constitution of India.

Coal India Limited filed a SLP before this Court on 30th July, 2004 (Civil Appeal No.5547 of 2004) inter alia taking a categorical stand before this Court that the linked consumers form a separate class. On the said averments, it obtained an order of stay of the operation of the judgment of the Calcutta High Court on 8.10.2004. However, despite the same, they implemented the judgment of the Calcutta High Court by taking a conscious decision in that behalf within a short span of time.

Coal India Limited and other coal companies have filed several transfer applications which having been allowed, the writ petitions have been transferred to this Court.

Proceedings before this Court :

Civil Appeal Nos.2972 and 2975 of 2005 arises out of a judgment of the Gauhati High Court dated 08.04.2005. Questioning the judgment and order of the Madhya Pradesh High Court dated 29.09.2005, S.L.P. (Civil) No.24134 of 2005 has been filed.

Coal India Ltd. has filed Civil Appeal No.5547 of 2004 which arises out of the judgment of the Calcutta High Court in Bijoy Kumar Poddar's case.

In the meantime, writ petitions were filed in several High Court including Calcutta High Court, Jharkhand High Court, Allahabad High Court and Madhya Pradesh High Court, questioning the validity of E- Auction. Different interim orders were passed by the said High Courts. Several special leave petitions were filed thereagainst by the parties. Coal India Limited filed a large number of transfer applications which were allowed. All the transfer applications and the appeals against the judgments of the Gauhati High Court, Madhya Pradesh High Court and the Calcutta High Court and other High Courts were taken up for hearing together.

Categories of the matters before us :

There are four categories of consumers who are aggrieved by introduction of the scheme of E-Auction : (i) non-core linked consumers who are manufacturers of smokeless coal; (ii) non-core sector consumers who are manufacturers of various products wherein coal is raw material; (iii) hard coke owners although a non-core linked category but had been recommended for being included in core category; and (iv) traders.

Submissions :

We would, for better appreciation of the contentions raised on behalf of different categories of the consumers of coal, notice the submissions of the learned counsel appearing for the parties in the following seriatim :

- (i) General
- (ii) Manufacturers of smokeless coal
- (iii) Manufacturers of Hard coke
- (iv) Traders
- (v) Union of India and Coal India Limited
- (vi) MSTC General :

The contentions of the writ petitioners before the different High Courts, who are before us, are :

- (i) Nationalization Acts having been enacted for giving effect to the constitutional goal enshrined under Article 39(b) of the Constitution, the coal companies are bound

to implement the same and in that view of the matter they cannot fix arbitrary price of coal which is a national resource;

(ii) Coal is not only an essential commodity but also being raw material used by a large number of manufacturing industries is required to be distributed at a fair and reasonable price;

particularly in view of the fact that the coal companies have been exercising monopoly power thereover.

(iii) As NCCF is supplied coal without taking recourse to the E- Auction scheme, there is no reason why non-core sector linked industries shall not be treated alike; NCCF having been belonging to the category of trader as that of the writ petitioners, they could not have been discriminated against in regard to fixation of price of coal as a result whereof the small scale industries may either purchase coal through E-Auction or purchase coal from NCCF, which would give rise to dual pricing and, thus, the same is unreasonable;

(iv) The State agencies like BISCAUMAN and Jharkhand State Mineral Development Corporation also having been brought at par with the linked consumers could not have been given priority for the purpose of trading in coal;

(v) The power to fix prices for the essential commodities must maintain an inbuilt character having regard to the fact that the coal companies have been given the monopoly status in terms of clause 6 of Article 19 of the Constitution of India;

(vi) The price through E-Auction being artificially inflated one, the same has caused uncertainty as a result whereof the manufacturers cannot fix price for their products;

(vii) The Central Government and/or coal companies having themselves made a policy decision that the price of coal should not be varied at least for one year, the scheme of E-Auction being inconsistent therewith, must be held to be unreasonable;

(vii) Fixation of arbitrary price of coal which being a scare commodity would give rise to unhealthy competition amongst various manufacturers, which would not only be contrary to the object and spirit of Article 39(b) of the Constitution but also thereby millions of people who use it as a fuel would be highly prejudiced;

(viii) The coal companies being 'State' within the meaning of Article 12 of the Constitution of India cannot resort to be high profiteering at the cost of common men.

(ix) The Government companies cannot be permitted to forsake its public duty, its dealings with the consumers must be fair and non-discriminatory.

Manufacturers of Smokeless Fuel and Briquettes :

It was submitted that having regard to the fact that several small scale industries were established, (which were manufacturing smokeless coal and briquette) pursuant to or in furtherance of the promises made by the coal companies in their advertisements, its product being meant for consumption of rural people etc. and also being an environmental friendly fuel, the scheme must be held to be opposed to the doctrine of promissory estoppel. The Smokeless Coal meets the need of the rural people also and in that view of the matter the Central Government having taken upon itself control of coal, which is an essential commodity in terms of the 2000 Order could not have permitted resort to E-Auction as by reason thereof prices have been shot up creating uncertainties besides hardship. It was submitted that in view of Section 2(ii), Section 3(1) and 3(2)(c) of the Essential Commodities Act, it was incumbent upon the Central Government to fulfill the object thereof, namely, making a scarce commodity available to the people at an affordable price.

Mr. V.A. Bobde, the learned Senior Counsel appearing on behalf of the sixteen petitioners who have set up their industries in the Vidarbha region of Maharashtra which is industrial backward region, submitted that they had also been assured supply of coal for meeting the demand of the rural people and in that view of the matter by reason of taking recourse to E- Auction, unreasonable burden had been put on them, which must be held to be bad in law. Mini classification in the non-core sector into tiny and small units and SSI Units and the dual pricing policy within the non-core sector itself, so far as the same relates to small and genuine coal units, is plainly arbitrary, unfair and inequitable and only because some units are not genuine consumers, the same would not mean that all the consumers would be deprived of a valuable national assets.

Hard Coke :

Some of the appellants before us are manufacturers of hard coke. It is not in dispute that hard coke although does not come within the purview of 'core sector', for the purpose of distribution of coal, recommendations have been made by the Ministry of Steel that it should be included in the said category. The said move, however, has been opposed by the Ministry of Coal and Energy. We would, therefore, proceed on the basis that hard coke comes within the purview of non-core sector.

Mr. Dipankar Gupta, the learned Senior Counsel appearing on behalf of the Hard Coke Oven Plants, submitted : (i) that as the hard coke manufactured by the hard coke owners having been recommended to be brought within the purview of core sector by the Ministry of Steel, certain attributes to their being belonging to a special category within the non-core sector must be held to have been made out and, thus, all the 106 hard coke ovens manufacturing hard coke form a special class and in that view of the matter their right to obtain coal of a particular grade cannot be denied as linkage system continues to be operative despite the introduction of the scheme of E-Auction; (ii) hard coke manufacturing units could not, thus, have been clubbed

together with the traders as a result whereof unequals are being treated on equal footing, which is ultra vires Article 14 of the Constitution of India Drawing our attention to a chart showing supply of coal to the hard coke manufacturers before and after introduction of the scheme for E- Auction, it was contended that for a few months in a year, there had been no supply of coal at all.

It was submitted that coal of choice is not a concern of hard coke owners although they may be relevant for traders as linkage still continues, in view of the letter dated 19.05.2005.

Traders :

Mr. Altaf Ahmad, the learned Senior Counsel appearing on behalf of the traders, drew our attention to various clauses of the E-Auction scheme and submitted that whereas under the Open Sales Scheme (OSS) rights of the traders were safeguarded and in particular having regard to the fact that from each colliery not more 33% per cent could be purchased by one trader, now all lots having been made open to all consumers irrespective of the fact as to whether they belong to the linked core sector or linked non-core sector or others have been allowed to bid in E-Auction along with traders, as a result whereof traders are put to a great disadvantage. In this behalf our attention has been drawn to the fact that both manufacturers of core sector and non-core sectors have been offering their bid in the auctions which is against the concept of fair distribution of an essential commodity. According to the learned counsel participation of all categories of consumers would be unlawful, being contrary to the professed policy of the coal companies in view of the OSS Scheme.

Submissions on behalf of Union of India Mr. Gopal Subramanyam, the learned Additional Solicitor General appearing on behalf of the Union of India, would raise the following contentions :

- (i) Keeping in view the fact situation that it was found that there had been gross abuse of the process both in respect of the linkage scheme as also open sales scheme, the coal companies had to resort to E-Auction which satisfies the test of public interest;
- (ii) Materials have been brought on records to show justification of E-Auction; the same is sustainable in law;
- (iii) Taking recourse to E-Auction by way of an experiment was made to overcome a difficult situation;
- (iv) As there had been no complaint about functioning of the said scheme in view of the fact that 12000 out 16000 non-consumers are satisfied therewith; no grievance can be raised that by reason thereof the coal companies had taken recourse to any

arbitrary measure;

(v) E-Auction had to be introduced in view of the fact that linkage and sponsorship as also open sales schemes were found to be defective and furthermore in view of the fact that both linkage and sponsorship schemes had come to an end;

(vi) The Central Government took recourse to the deregulation of coal as it was found that by taking recourse to the linkage, obstructions have been created to free and fair distribution of coal as also the movement thereof. Moreover each consumer must be given equal access thereto;

(vii) Only because the linked consumers would have to pay a higher price, the same by itself cannot be said to be unfair and unreasonable in view of the fact that even in terms of the linked scheme the price of coal was not fixed nor any representation had been made as regards obligations on the part of Coal India Ltd. to supply coal of a specified quantity at a specified price.

(viii) Linkage system came into being merely out of a practice and by reason thereof the linked consumers have not derived any vested right either in law or under contract;

(ix) The concept of E-Auction was visualized by the coal companies who were even otherwise free to take such a decision and it received the imprimatur of the Central Government which would be deemed to be a direction in terms of clause 6 of the Colliery Control Order;

(x) Classification between core and non-core sector being valid, dual pricing is permissible in law;

(xi) Although the coal companies are monopolies, the demand and supply situation as also the market forces should be given a free play, which, thus, would not come within the purview of clause 6 of Article 19 of the Constitution of India.

Submissions on behalf MSTC :

Mr. T.R. Adhiyarjuna, the learned Senior counsel would submit that the Gauhati High Court has committed a manifest error in holding that E- Auction is not possible in North Eastern Region in India. The learned counsel submitted that the procedure which is adopted for conducting E- Auction is absolutely transparent and fair.

Policy Decision as regards Pricing :

Reasonableness of dual pricing :

Price fixation has a direct relationship with the fiscal health of the country. Finance is one of the most important catalysts. The modality of price fixation will depend upon the nature of the commodity, the provisions of the concerned statute governing the same and other relevant factors. When price is fixed in terms of the provisions of the Essential Commodities Act, the State would be governed by the doctrine of public necessity. It may in terms of its statutory power and having regard to the penal provisions engrafted therein compel a manufacturer or a dealer of an essential commodity to sell it to the public at a reasonable price or at no profit. Price fixation by the State for its own benefit, however, have an element of profit. Whenever a dual price is resorted to, the same must be rational. The formula for fixing the dual price may be reasonable only under certain circumstances. [See Union of India and Others etc. v. Hindustan Development Corpn. and Others [(1993) 1 SCC 467].

In Gujarat Ambuja Cement Ltd. and Another v. Union of India and Others [(1998) 8 SCC 208], this Court had the occasion to consider the matter relating to fixation of price of coal wherein in terms of the Colliery Control Order, 1945, the quotas thereof were allotted by the Central Government to the consumers.

A Government company having regard to the constitutional scheme, therefore, cannot forsake its public duty [See Hindustan Zinc Ltd. etc. v. Andhra Pradesh State Electricity Board and Others (1991) 3 SCC 299]. It can neither have a private thrust nor aggrandizement of the wealth at the cost of the common man.

In Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu Bros. and Others etc., [(1986) 4 SCC 198], the law was laid down in the following terms :

" It is a public utility monopoly undertaking which may not be driven by pure profit motive not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit; even as a private corporate body may be inspired to earn huge profits with a view to paying large dividends to its shareholders. But it does not follow that the Board may not and need not earn profits for the purpose of performing its duties and discharging its obligations under the statute. It stands to common sense that the Board must manage its affairs on sound economic principles. Having ventured into the field of commerce, no public service under taking can afford to say it will ignore business principles which are as essential to public service undertakings as to commercial ventures "

It was, however, observed :

" The Board is not expected to run on a bare year- to-year survival basis. It must have its feet firmly planted on the earth. It must be able to pay the interest on the loans taken by it; it must be able to discharge its debts; it must be able to give efficient and economic service; it must be able to continue the due performance of its

services by providing for depreciation etc.; it must provide for the expansion of its services, for no one can pretend the country is already well supplied with electricity. Sufficient surplus has to be generated for this purpose. That we take it is what the Board would necessarily do if it was an ordinary commercial undertaking properly and prudently managed on sound commercial lines. Is the position any different because the Board is a public utility undertaking or because of the provisions of the Electricity Supply Act? "

[See Oil and Natural Gas Commission and Anr. v. Association of Natural Gas Consuming Industries of Gujarat and Ors. [(1990) Supp. SCC 397]].

In Gujarat Ambuja Cement (supra) the question arose as to whether charging of 10% premium over the price given in Table II of the Notification which was issued under the Colliery Control Order was so unreasonable and arbitrary so as to attract Article 14 of the Constitution of India. In that case, the parties adduced evidences, but the High Court did not consider the same in the perspective thereof, and on that premise the matter had been remitted to the High Court for consideration of the grievances of the petitioner therein having regard to the materials brought on record. [See also Dr. P. Nalla Thamphy Thera v. Union of India and Others (1983) 4 SCC 598] While fixing the price of an essential commodity like coal, the capacity to bid of small manufacturers may also be taken into account. The court exercising a power of judicial review in a given situation may determine the question on the basis of the material brought on records. [See Gujarat Ambuja Cement Ltd. (supra)] However, dual pricing having regard to a distinct classification between a core sector and non-core sector is permissible. [See Pallavi Refractories (supra)] The State, however, while distributing its largess at a price, if involved in distribution of a commodity, which would attract the provision of Article 39(b) of the Constitution of India, would stand on a different footing.

'Business' is a word of wide import. It, in the context of application of a statute governing a monopoly concern and also with an essential commodity, would indisputably stand on a different footing from the business concern or a private person. The Central Government as also the coal companies having regard to the provisions of the Nationalisation Acts must be visualized not as profit earning concerns but as an extended arm of a welfare State. They are expected to harmonize the business potential of a country to benefit the common man. The power of the Central Government to carry on trade on business activities emanates from the constitutional provisions contained in Article 298 of the Constitution of India. The coal companies, therefore, were under a constitutional obligation to fix a reasonable price. They must differentiate themselves from the private sectors which thrive only on a profit motive. As public sector undertakings, the coal companies, thus, would have a duty to fix the price of an essential commodity in such a manner so as to subserve the common good. Although the provisions of Section 3(2)(c) of the Essential Commodities Act are not attracted in relation to coal in view of the

deregulation of price by the Central Government under the 2000 Order, the reasonable attributes for the purpose of fixing the price of coal should be borne in mind.

While fixing such price, ordinarily the State act in the same manner that a public utility would conduct itself in this regard. This Court in Oil and Natural Gas Commission and Anr. v. Association of Natural Gas Consuming Industries of Gujarat and Ors. [Supra], opined that the price fixed should be the minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. Therein this Court further noticed :

"34. In another article on "The Public Sector in India", quoted in Issues in Public Enterprise by Sri K.R. Gupta, Dr Rao is quoted as saying (at p. 84):

"... the pricing policy should be such as to promote the growth of national income and the rate of this growth ... public enterprises must make profits and the larger the share of public enterprises in all enterprises, the greater is their need for making profits. Profits constitute the surplus available for savings and investment on the one hand and contribution to national social welfare programme on the other; and if public enterprises do not make profits the national surplus available for stepping up the rate of investment and the increase of social welfare will suffer a corresponding reduction;.... Hence the need for giving up the irrational belief that public enterprise should, by definition, be run on a no-profit basis."

In dealing with the fixation of tariff under the Electricity (Supply) Act, 1948, this Court in Hindustan Zinc Ltd. (supra), opined that the tariff cannot be fixed in such a manner by the Board while acting as a private trader and shedding its public utility character. It was observed :

" In other words, if the profit is made not merely for the sake of profit, but for the purpose of better discharge of its obligations by the Board, it cannot be said that the public enterprise has acted beyond its authority "

In Dr. P. Nalla Thampy Thera v. Union of India [(1983) 4 SCC 598], this Court observed :

"25. We have said earlier that the Railways are a public utility service run on monopoly basis. Since it is a public utility, there is no justification to run it merely as a commercial venture with a view to making profits. We do not know at any rate it does not fall for consideration here if a monopoly based public utility should ever be a commercial venture geared to support the general revenue of the State but there is not an iota of hesitation in us to say that the common man's mode of transport closely connected with the free play of his fundamental right should not be ."

In M/s S.N. Govinda Prabhu and Bros (supra), this Court observed that profit is not to be shunned but that service and not profit should inform actions of a Board. It was further observed :

" We do not think that either the character of Electricity Board as a Public Utility Undertaking or the provisions of the Electricity Supply Act preclude the Board from managing its affairs on sound commercial lines though not with a profit-thirst "

As regard limitation of judicial review of price fixation after referring to the decision of the Constitution Bench of this Court in *Shri Sitaram Sugar Company Ltd. v. Union of India* [(1990) 3 SCC 223], this Court in *Oil and Natural Gas Commission and Another v. Association of Natural Gas Consuming Industries of Gujarat and Others* [1990 Supp SCC 397] observed :

" It is, however, not necessary here to enter into a discussion of this and the earlier cases because those cases were primarily concerned with the question whether the price fixation had been made in consonance with the requirements of the relevant legislation fixing prices of essential commodities in the interests of the general public and also because ONGC does not deny that, as a State instrumentality, its price fixation should be based on relevant material and should be fair and reasonable. None of these decisions hold that the cost plus method is the only relevant method for fixation of prices. On the contrary, there are indications in some judgments to indicate that not a minimum but a reasonable profit margin is permissible. Even in relation to a public utility undertaking like the State Electricity Boards where the duty not to make undue profits by abusing its monopoly position is clear "

The action on the part of the State even in the matter of fixation of price of an essential commodity, thus, must be viewed from different angles, some of which we shall advert to hereinafter.

Article 39(b) Concept :

Article 39(b) was incorporated in the Constitution to indicate the necessity for ensuring equitable distribution of resources.

In *State of Karnataka and Anr. v. Shri Ranganatha Reddy and Anr.* [(1977) 4 SCC 471], this Court analyzed the constitutional provisions contained in Article 39(b) of the Constitution, stating :

" The key word is "distribute" and the genius of the Article, if we may say so, cannot but be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in the article has a strategic role and the whole article a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources. Its goal is so to undertake distribution as best to subserve the common good. It re- organizes by such distribution the ownership and control.

"Resources" is a sweeping expression and covers not only cash resources but even ability to borrow (credit resources). Its meaning given in Black's Legal Dictionary is:

"Money or any property that can be converted into supplies; means of raising money or supplies; capabilities of raising wealth or to supply necessary wants; available means or capability of any kind."

And material resources of the community in the context of re-ordering the national economy embraces all the national wealth, not merely natural resources, all the private and public sources of meeting material needs, not merely public possessions. Every thing of value or use in the material world is material resource and the individual being a member of the community his resources are part of those of the community "

[Also see *Samatha v. State of A. P.*, (1997) 8 SCC 191] Coal, being such a vital product to the Indian industries and the common man, nationalization of coal was necessary for realization of the ideals contained in Article 39(b) of the Constitution.

In *Sanjeev Coke Manufacturing Company etc. v. M/s Bharat Coking Coal Limited and Anr. etc.* [(1983) 1 SCC 147], this Court observed :

" Coal is, of course, one of the most important known sources of energy, and, therefore, a vital national resource. While coal is necessary as a source of energy for very many industries, coking coal is indispensable for the country's crucial iron and steel industry. So, Parliament gave the first priority to coking coal. First there was legislation in regard to the coking coal mines and then there was legislation in regard to all coal mines, coking as well as non-coking. By the Coking Coal Mines (Nationalisation) Act all coking coal mines known to exist in the country were nationalised. Coke oven plants which were part of the coking coal mines so nationalised being in or belonging to the owners of the mines also stood automatically nationalised. Other coke oven plants which did not belong to the owners of the mines but which were located near about the nationalised coking coal mines were also identified and nationalised by express provision to that effect. At that stage of the rationalisation and nationalisation of the coal mining industry, it was apparently thought necessary and sufficient to nationalise such coke oven plants as were in or belonged to the nationalised coking coal mines or as were identified as located near the nationalised coking coal mines, leaving out all other coke oven plants.

The nationalisation of the coking coal mines and the coke oven plants was "with a view to reorganising and reconstructing such mines and plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet the growing requirements of the iron and steel industry and for matters connected therewith or incidental thereto". We do not entertain the slightest doubt that the nationalisation of the coking coal mines and the specified coke oven plants for the above purpose was towards securing that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good".

[Also see L. Abu Kavur Bai - State of T. N., (1984) 1 SCC 515] Article 37 of the Constitution of India provides that the provisions contained in Part IV of the Constitution of India shall not be enforceable by any court and it enjoins upon the State to apply the provisions of this Part in making laws.

It is of some interest to note that whenever an action is taken by a State in consonance with the provisions laid down in the Directive Principles of State Policy as envisaged under Part IV of the Constitution of India, the same is considered to be a reasonable action.

In M.R.F. Ltd. v. Inspector Kerala Govt. and Others [(1998) 8 SCC 227], a question arose as to whether the rights of industrial concerns under Article 19(1)(g) are said to be affected having regard to the provisions of the Kerala Industrial Establishments (National and Festival Holidays) (Amendment) Act, 1990 whereby the number of national holidays were increased. In view of Article 43 of the Constitution of India, the restriction imposed were held to be reasonable restrictions stating:

"The plea under Article 14 also cannot be entertained. The decision by legislative amendment to raise the national and festival holidays is based upon relevant material considered by the Government, including the fact that the holidays allowed by the Central Government and other public sector undertakings were far greater in number than those prescribed under the Act. As pointed out earlier, the Act is a social legislation to give effect to the Directive Principles of State Policy contained in Article 43 of the Constitution. The law so made cannot be said to be arbitrary nor can it be struck down for being violative of Article 14 of the Constitution."

Therein it was also observed :

"In examining the reasonableness of a statutory provision, whether it is violative of the Fundamental Right guaranteed under Article 19, one cannot lose sight of the Directive Principles of State Policy contained in Chapter IV of the Constitution as was laid down by this Court in Saghir Ahmad v. State of U.P. as also in Mohd. Hanif Quareshi v. State of Bihar.

12. This principle was also followed in Laxmi Khandsari case in which the reasonableness of restrictions imposed upon the Fundamental Rights available under Article 19 was examined on the grounds, amongst others, that they were not violative of the Directive Principles of State Policy."

[Also see B. P. Sharma v. Union of India, (2003) 7 SCC 309; AIR 2003 SC 3863; State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 SCC 26; State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534] It may not be correct to say that any action which is not in consonance with the provisions of Part IV of the Constitution would be ultra vires but there cannot be any doubt whatsoever that the principles contained therein would form a relevant consideration for determining a question in regard to price fixation of an essential commodity. Directive Principles of

State Policy provides for a guidance to interpretation of Fundamental Rights of a citizen as also the statutory rights.

We have noticed hereinbefore that coal was nationalized under Coking Coal Mines (Nationalization) Act, 1972 and Coal Mines (Nationalization) Act, 1973. We have also noticed that the said Acts were enacted so as to fulfill the constitutional object contained in Article 39(b) of the Constitution of India.

In terms of the Nationalization Acts indisputably the coal companies as also the Union of India were bound to take action in furtherance of the task of achieving the purport and object for which the coking coal mines and the coal mines were nationalized. The Parliament also enacted Coal Mines (Nationalisation) Amendment Act, 1976 . In the year 1976, even mining lease of all the coal mines were rescinded. The constitutionality of the 1976 Amendment Act was upheld by this Court in *Tara Prasad Singh and Others v. Union of India and Others* [(1980) 4 SCC 179] stating that the Nationalization Act was enacted in furtherance of Article 39(b) in the following terms:

"35. The Nationalisation Amendment Act needs no preamble, especially when it is backed up by a Statement of Objects and Reasons. Generally, an Amendment Act is passed in order to advance the purpose of the parent Act as reflected in the preamble to that Act. Acquisition of coal mines, be it remembered, is not an end in itself but is only a means to an end. The fundamental object of the Nationalisation Act as also of the Nationalisation Amendment Act is to bring into existence a state of affairs which will be congenial for regulating mines and for mineral development. "

It may be true that prices are required to be fixed having regard to the market forces. Demand and supply is a relevant factor as regards fixation of the price. In a market governed by free economy where competition is the buzzword, producers may fix their own price. It is, however, difficult to give effect to the constitutional obligations of a State and the principles leading to a free economy at the same time. A level playing field is the key factor for invoking the new economy. Such a level playing field can be achieved when there are a number of suppliers and when there are competitors in the market enabling the consumer to exercise choices for the purpose of procurement of goods. If the policy of the open market is to be achieved the benefit of the consumer must be kept uppermost in mind by the State.

Can the consumer be expected to derive any such benefit from a monopoly concern? Would a situation of this nature lead to a hybrid situation where a coal company is allowed to fix its own price which may not be a fair price? These are some of the questions which were required to be kept in mind by the coal companies before formulating a policy of fixing price of an essential commodity.

The State when exercises its power of price fixation in relation to an essential commodity, has a different role to play. Object of such price fixation is to see that the ultimate consumers obtain the essential commodity at a fair price and for achieving the said purpose the profit margin of the manufacturer/producer may be kept at a bare minimum. The question as to how such fair price is to be determined *stricto sensu* does not arise in this case, as would appear from the discussions made

hereinafter, as here the Central Government has not fixed any price. It left the matter to the coal companies. The coal companies in taking recourse to E-Auction also did not fix a price. They only took recourse to a methodology by which the price of coal became variable. Its only object was to see that maximum possible price of coal is obtained. The Appellants do not question the right of the coal companies to fix the price of coal. Such prices had been fixed on earlier occasions also wherefor legally or otherwise the Central Government used to give its nod of approval. The process of price fixation by the Central Government in exercise of its powers under the 1945 Order continued from 1996 to 2004.

Does E-Auction ultimately lead to fixation of a price ? The answer to the said question must be rendered is a big emphatic 'No', as by reason thereof even the coal companies would not know what would be the price of different varieties of coal. The issue must be determined from the perspective as to whether the coal companies can be allowed to say that despite their monopolistic character and they being a 'State' can fix a price which would otherwise be unfair or unreasonable.

The State or a public sector undertaking plays an important role in the society. It is expected of them that they would act fairly and reasonably in all fields; even as a landlord of a tenanted premises or in any any other capacity. [See Baburao Shantaram More v. The Bombay Housing Board and Another , 1954 SCR 572 at 577, Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, (1989) 2 SCR 751 at 760, 762 and Pathumma and Others v. State of Kerala and Others (1978) 2 SCR 537 at 545] E-Auction is not a mode to fix price. It is only a mode to obtain maximum price. In other words, deriving the optimum benefit by sale of coal is the goal. While doing so State does not have to follow the principles of fixation of price. It is not required to apply its mind as to its effect. It treats coal like any other commodity. It treats itself like a private trader. A distinction must be borne in mind when a State intends to part with a privilege or a largess as a competitor in the market and when it is expected to fulfill its constitutional goal enshrined under Article 39(b) of the Constitution.

Monopoly Coal companies are monopolies within the meaning of the provisons of the Nationalization Act. They would be deemed to be monopolies within the provisions of clause (6) of Article 19 of the Constitution of India. Our attention has been drawn to two decisions of this Court in Akadasi Pradhan v. State of Orissa [1963 (Supp) 2 SCR 691 at 715], and State of Rajasthan v. Mohan Lal Vyas [(1971) 3 SCC 705].

In Akadasi Pradhan (supra), it has been held that when a monopoly is created in terms of sub-clause (6) of Article 19, no agency can be appointed who would not answer the description of principal and agent. An agent of a monopoly organization, it was held, cannot be appointed or act on its own.

In Mohan Lal Vyas (supra), it was held that there cannot be any law in violation of the Constitution of India and no monopoly right can be conferred on a citizen under the Constitution, nor can it be justified thereunder.

Constitutionality of E-Auction :

Coal is an essential commodity. Coal India Limited and its subsidiary companies enjoyed the monopoly of production, distribution and sale thereof. The question which arises for consideration is whether in the aforementioned situation a State within the meaning of Article 12 of the Constitution of India can be permitted to take recourse to E-Auction which is not commensurate with the constitutional scheme of this country.

Some of the coal companies admittedly were reeling under financial problems. Three of them became sick industrial undertakings and a reference was made to BIFR. The Union of India in its counter-affidavit states that a decision was taken to take recourse to E-Auction such that sick coal companies could turn around.

Union of India and the coal companies do not deny that they have a monopoly. They do not deny or dispute that they are 'State' within the meaning of Article 12 of the Constitution of India. They have also not raised any contention that the constitutional obligations in terms of Article 39(b) are not required to be complied with.

It is not in dispute that approximately 94 to 95% of the coal is made available to the core sector at a notified price. We have also noticed that NCCF as also various Central Government and State Government agencies were to get coal at the base price + 25% thereof. It is of some significance to note by way of an example that whereas the core sector gets coal at a price of Rs.1155/- per metric tonne, NCCF, BCCL and Jharkhand State Minerals Development Corporation would get the same at a price of Rs.1386/- per metric tonne, but the price payable by other non-core linked consumers and traders having regard to the flexibility of the price in E- Auction, would be a sum of Rs.1660/- to Rs.1900/- per metric tonne.

The linked consumers constitute about 1% of the total production. The linkage system so far as non-core sector consumers are concerned, has been prevailing since 1973. The beneficiaries of the system primarily are manufacturers of hard coke, smokeless fuel and other products for which the coal is essential raw material. The Open Sales Scheme which was meant for traders, in view of the original policy decision of the coal companies, E- Auction was to be applied to the traders for whom the Open Sales Scheme was applicable. It is, however, not in dispute that having regard to the directions issued by the Central Government to the coal companies, all consumers irrespective of the fact that whether they are linked consumers of core sector or non-core sector, were entitled to take part in E-Auction. Ordinarily traders who are outside the scheme of linkage are entitled to take part in E-Auction. E-Auction was resorted to allegedly on the ground that various method tried by the coal companies including the Open Sales Schemes and MPQ failed for one reason or the other. The Central Vigilance Commission also recommended, having regard to the irregularities committed in the matter of sale of coal through OSS, that publicity of tender should be done through website, in terms of the letter dated 18.12.2003 with a view to bring

about greater transparency and to curb malpractice. The coal companies state that such a direction was made in terms of Section 8(1)(h) of the CVC Act, 2003. It was recommended that wherever it is feasible and practical the organization should eventually switch over to the process of e-procurement/e-sale. It is, however, found that the directions are general in nature and no particular direction was issued to the coal companies in terms of Section 8(1)(h) of the CVC 2003 Act which is otherwise permissible in law.

It may be that the practice of E-Marketing and/or E-Advertisement and/or E-Contract is prevailing in various parts of the world but E-Auction, which has a different concept, cannot be equated therewith.

Coal is an essential commodity in terms of Section 3(1) of the Essential Commodities Act. Colliery Control Order was made, inter alia, for securing equitable distribution and availability of higher price of essential commodity. The coal companies as also the Central Government, therefore, have a constitutional and statutory obligation to fulfill. Coal companies exercising monopolistic power, thus, were required to distribute coal equitably and at a fair price.

In Tara Prasad Singh (supra), this Court has categorically considered as to why the Parliament thought it fit to enact the Nationalisation Act i.e. to distribute the resources vested in the State to subserve the common good. The State, it is trite, while fixing the price for the purpose of equitable distribution or otherwise cannot be actuated purely by a profit motive. It should not discharge its functions in such a way as to aspire to earn huge profit specially at the cost of those who are fully dependent upon them for supply of a monopoly item like coal. It cannot be the law that the public sector undertakings while selling essential commodities must suffer loss. It is also not the law that public sector undertakings must distribute subsidy, but what is required in terms of the constitutional scheme adumbrated under Article 39(b) and Article 14 of the Constitution of India is to make the said essential commodity available at a fair price. However, for the purpose of this case, it may not be necessary for us to dilate on the principle of fixation of price, of coal as an essential commodity or otherwise.

Before us the learned counsel for the parties relied upon various decisions of this Court as regard the mode and manner in which deliberations were made on fixation of price of essential commodities over which the monopoly right is exercised. We have also been taken through a recent decision of this Court in Pallavi Refractories (supra). By reason of E- Auction no price is fixed as it would vary from bids to bids. The coal is sold through E-Auction at least twice a month. There will be various places where E-Auction would be conducted simultaneously. In E-Auction, the quantity and quality of coal depending upon its grade, size, colliery from which the same has been extracted, are specified. In such a situation invariably the price for same quality of coal would greatly vary as the bidders would bid having regard to

their own requirement. By allowing repeated bids, a person who may be requiring the essential commodity would not be able to prove the same and its non-availability may result in stoppage of production which would lead to various complications. He would, therefore, be driven to a desperate situation. The only price which is fixed for E-Auction is the reserved price which is 25% above the notified price.

While fixing a fair and reasonable price in terms of the provisions of the Essential Commodities Act (although the price is not dual), it is essential that price is actually fixed. Such price fixation is necessary in view of the fact that coal is an essential commodity. It is, therefore, vital that price is actually fixed and not kept variable. Fixation of price of coal is of utmost necessity as it is a mineral of grave national importance. Non-availability of coal and consequently the other products may lead to hardship to a section of citizens. It may entail closure of factories and other industries which in turn would lead to loss to State exchequer; as they would be deprived of its taxes. It will lead to loss of employment of a large number of employees and would be detrimental to the avowed object of the Central Government to encourage small scale industries.

Coal itself is considered to be a core sector. In terms of the provisions of the Industrial (Development and Regulation) Act, 1951, the Parliament requires the Central Government to take such steps which would enable the SSI units to maintain their viability and strength so as to be effective in : (i) promoting in a harmonious manner the industrial economy of the country and easing the problem of employment; (ii) securing the ownership and control of the material resources of the community such that the same are distributed to subserve the common good.

E-Auction has effect both on price of coal as also the availability thereof to the non-core sector consumers. Their availability would depend upon successful bids of the consumers. It was introduced for a definite purpose viz. to confine the same to the non-core sector and traders. A deviation to a great extent has been made therefrom. Even now the core sectors are taking part in E-Auction, but no step has been taken in this behalf.

The Central Government, however, recently ensured availability of coal to the linked consumers but they have to pay average weighted price.

By its letter dated 08.04.2005, the Central Government informed the Chairman, Coal India Ltd., that supply of coal to non-core sector linked consumers would continue on the basis of MPQ. However, the price for such supplies is to be computed on the basis of average E-Auction, stating :

"The coal supplied to non-core linked consumer on the basis of MPQ would continue. However, the price for such supplies would be computed on the basis of average e-auction rate during the month. Sale of two million tones of coal to small consumers

through NCCP would also continue. However, the price for coal supplies to NCCP would also be governed on the basis of e-auction prices, as mentioned above."

Advantages or Disadvantages of E-Auction :

We may at this juncture notice the purported advantages of E- Auction as submitted on behalf of the Union of India.

i) The system of E-Auction is simple, easily accessible, transparent also offers equal opportunity to all coal customers/intending buyers.

ii) Any citizen of India can participate and purchase coal through E-Auction by sitting in his home/office from any part of the country.

iii) A bidder need not require to meet any formalities such as obtaining licence/quota/sponsorship/linkage etc. and is not required to meet any such formalities.

iv) Even a buyer located in the remote part of India without electricity/computer is free to reach the nearest village/town with a cyber cafi and can participate in the E-Auction without requiring to come to the coal company/coalfield as earlier under OSS

v) A bidder is free to choose the source/quality/quantity and purchase coal at a price determined by him on the basis of demand and supply.

vi) To purchase coal the buyer need not depend on intermediaries/middlemen and can directly purchase through E-Auction. This will reduce the chances of black marketing, if not totally eliminate it.

vii) The buyer saves on middleman's commissions and other incidental charges.

viii) The incidental benefit is also shared by coal company in the form of improved returns i.e. by diverting intermediary's share to coal companies.

ix) There are a large number of outlets for small consumers which enable them to draw their coal supplies from any of the companies/sources instead of limited outlets/coal companies as was the case in earlier schemes.

x) The sale on the auction is held even in remote areas therefore is not subject to any manipulation/influence of antisocial elements.

xi) The system provides for official channel of supplies to all categories of buyers without classification who were otherwise dependent on secondary market (black

market)

xii) The premium under the old system being appropriated by unscrupulous elements got checked/restricted.

xiii) Any buyer of coal under non core-sector including SSI units is able to avail of this opportunity by payment of a little more than the notified price. The system of E-Auction is not aimed at obtaining higher price but endeavours to create an equal opportunity amongst the buyers of non core sector.

However, we may notice that the said claim of the Union of India or the coal companies is not justified. The aforementioned claim of the Central Government is refuted by the consumers stating that the figures given by the Union of India are misleading. Price range of all the subsidiaries have been taken cumulatively instead of taking subsidiary-wise figures. The consumers belonging to core sectors, like power, steel, iron and chemical etc. are big companies like Grasim, Hindalco, Jindal and Haldia Steel who are taking part in the E-Auction as a result whereof the price of coal has shot at the cost of SSI units. Thus, even the linked consumers of core and non- core sectors have been participating therein. Participation of core sector in E-Auction is destructive of its own policy as would appear from the letter of the Ministry of Coal dated 08.04.2005 and, thus, it cannot be justified on the ground of profiteering wherewith the survival of SSI units is involved.

Although claim has been made by the companies that more and more persons are taking part therein, it is difficult for us to accept that out of 16000 consumers 12000 have taken part; as E-Auctions are more frequently done, the possibility of the same persons taking part again and again cannot be ruled out.

It is difficult to comprehend the stand of the Union of India that E- Auction is being taken recourse to by more and more persons and, if that be so, there was no reason as to why the price of coal by E-Auction has declined.

Before us a chart has been filed with a view of show that after introduction of the scheme of E-Auction, supply of coal to many of the coke ovens has decreased affecting their ultimate production. Apprehensions have been raised that ultimately many of the units may have to be closed. We think that the coal companies should see to it that such a situation is avoided.

However, it is not in dispute that auction price being online, no other bidder is aware of the contents of the bid submitted by the bidder. No bidder will have access to the records pertaining to E-Auction so as to ascertain who is the highest bidder or what is the highest bid price; or no bidder would have knowledge or access to the various bids submitted by the bidders against the particular grade of coal so as to arrive at an average E-Auction price of particular grade of coal. Only MSTC and MJCPCL and the companies who are conducting the E-Auction, would have access to the details of the bids submitted by the bidders. No eligibility criteria having been fixed, any person including traders can participate and bid in the E- Auction. Highest price and highest quantity are the only factors for sale/allocation of coal to a bidder in terms of the said scheme; as E-Auction results in traders buying

large quantities of coal. Consequently, the manufacturers of hard coke and smokeless coal as also other small units have to buy coal at prohibitive rates from traders . The methodology for allocation of coal to a bidder of E-Auction is, thus, inequitable, irrational and fortuitous.

The methodology for allocation of coal at this juncture also may be noticed by us :

Allocation is carried out by E-sale software on the following basis:

- a. First preference is given to highest bid price.
- b. If two or more parties bid the same price, then preference for allocation is given to party that placed the bid for higher quantity.
- c. In case two or more parties bid the same price and quantity, then preference is given to the party that placed the bid earlier.

Since a particular grade is allocated/sold at different prices to different bidders, E-Auction ultimately leads to sale of a particular grade of coal at variable prices in the market.

In spite of Government of India's office memorandum promising sale of coal to the linked consumers at average E-Auction rate, sale to linked consumers is being made at the highest bid price and not at the average bid price.

It is accepted that coal is a scarce commodity and the Government companies are not in a position to supply coal as per demand of the same, which may be enormous, despite the fact that a certain level of import of coal is also permitted.

However, the advantages of E-Auction per se or disadvantages thereof may not be decisive as this Court is concerned with the constitutionality thereof. It has not been denied or disputed that by reason of E-Auction price of coal is not fixed. The concept of price fixation is that all persons who are in requirement of the commodity should know the basis or criteria thereof. If a price is fixed, they would be able to lay down their own business policy in such a manner so that they can have a level playing field in the market of competition and such competition is not only between the persons whose end-project is similar or otherwise based on coal but who produce other products not based completely on coal. Variability in the price of coal would affect all who have to depend on coal e.g. we may notice that hard coke is considered to be vital in the manufacturing process of steel. If the price of coal is not fixed, the price of hard coke cannot be fixed, which may give rise to uncertainty in the price of steel or smokeless coal which caters to the needs of the small consumers both for domestic use also for use in the small hotels and/or use in rural areas. It was, therefore, necessary that the price of coal be made known. The contention of the coal companies is that having regard to the availability of LPG, smokeless coal is no longer in use. Ex

facie, the said plea is unacceptable.

Moreover, even fixation of price of LPG in turn would depend upon the fixation of oil products in other countries. The Central Government, it is well known, having regard to the effect that may be caused to the people in general, takes all precautions before fixing the price thereof. The Central Government has never increased the LPG price exorbitantly.

While adopting a policy decision as regards the mode of determining the price of coal either fixed or variable, the coal companies were bound to keep in mind social and economic aspect of the matter. They could not take any step which would defeat the constitutional goal [See *Mahabir Auto Stores and Others v. Indian Oil Corporation and Others*. (1990) 3 SCC 752] Even while fixation of tariff for the supply of electric energy in terms of the provisions of Section 49 of the Electricity (Supply) Act, 1948, only a reasonable profit is contemplated and not profiteering [See *S.N. Govinda Prabhu* (supra) and *ONGC* (supra)].

It may be true as has been held in the aforementioned cases that cost alone did not determine the prices and the same has to be determined upon taking into consideration many complex factors but no decision of this Court says that any arbitrary fixation of price and arbitrary mode of fixation would satisfy the test of reasonableness as contained in Article 14 of the Constitution of India.

The learned Additional Solicitor General placed strong reliance on a decision of this Court in *State of Orissa and Others v. Hari Narain Jaiswal & Ors.* [(1972) 2 SCC 36], wherein this Court held :

"Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order, dated January 6, 1971, can be considered as unconstitutional. As held by this Court in *Cooverjee B. Bharucha* case, one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them

cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids – see *Union of India v. Bhimsen Walaiti Ram*. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government – nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in *Cooverjee B. Bharucha* case was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the Legislature. The High Court erroneously thought that the Government was bound to satisfy the Court that there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make-believe one. The real opinion formed by the Government was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one's rights. Hence, in our opinion, the High Court misapplied the ratio of the decision of this Court in *Barium Chemicals Ltd. v. Company Law Board* and *Rohtas Industries Ltd. v. S.T. Agarwal*."

Citizens may not have any fundamental right to carry on trade or business in a commodity belonging to the Government. But therein, the court was concerned with liquor which was considered to be *res extra commercium*.

We may, however, notice that this Court in *State of Madhya Pradesh v. Nandlal Jaiswal* [(1986) 4 SCC 566] as also *Khoday Distilleries Ltd. and Others v. State of Karnataka and Others* (1995) 1 SCC 574] has clearly held that even in respect of trade of liquor, Article 14 would be applicable.

In *Ramana Dayaram Shetty v. International Airport of India and Others* [(1979) 3 SCC 489 = AIR 1979 SC 1628], this Court held :

" the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. . . The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant "

It is furthermore not a case like *Kasturi Lal Lakshmi Reddy*, represented by its Partner *Shri Kasturi Lal*, Ward No. 4, Palace Bar, Poonch, Jammu and Others v. State of Jammu & Kashmir and Others [(1980) 4 SCC 1], whereupon again the learned Additional Solicitor General relied that the Government cannot act in a manner which would benefit a party but then the said decision would not apply when the State as a monopoly is dealing with an essential commodity.

A monopoly concern is meant to cater to the need of all sections of the people. Whereas the demand of the core sector must be given priority, the Central Government as also the Coal Controller in terms of 1945 Order thought of giving some preference to those industries which produce smokeless coal as well. Smokeless coal producers started manufacture the same on the basis of invention of new technology invented by the Central Fuel Research Institute, an unit of Council of Scientific and Industrial Research Institute as also the Coal Mining and Planning Development of India, which is a subsidiary of Coal India Ltd.

We have noticed hereinbefore that when the coal companies themselves manufactured coke for domestic consumers, the same used to cause health hazards. They intended to outsource production of manufacturing soft coke; wherefor they had asked the Governments of Bihar and West Bengal to encourage setting up of smokeless coal units assuring supply of coal. Such linkage system has, therefore, been developed under which the consumers are linked to specify mines from which they received specified quantities and specified grades of coal on a monthly basis.

Coke oven units, in particular, are linked in the W-II, W-III & W-IV of the non-core sector. The importance of the linkage system despite resort to E-Auction has since been recognized by the Government of India, as would appear from its letter dated 19.04.2005. Whereas manufacturers of hard coke would require coking coal, others

would require only non-coking coal.

The necessity of having a fixed price of coal is supported by sub- section (3) of Section 9 of the MMRD Act, 1957 wherein it was provided that the rate of royalty shall not be revised within three years. [See AIR 1996 SC 2560]. The period of three years has since been altered to a period of four years. Prior thereto a period of five years was fixed therefor. Even the Central Government emphasized the requirement of having a fixed price of coal in a meeting held on 13.10.2001 and took note of the fact that the price increase would cause undue hardship which might be suffered by the small scale industries and which might concern their growth and in that view of the matter, it was decided that the price increase for the non-core sector should not be done more than once in a period of one year. The court while considering such a question cannot also lose sight of the fact that apart from the Essential Commodities Act, 1955, the entire control and regulation of coal has been taken over by the Central Government in terms of Entry 54 of List I as also Entry 52 of List I of the Seventh Schedule of the Constitution of India. In exercise of such power, the Parliament enacted the Industrial (Development and Regulation) Act, 1951 and Mines and Minerals (Regulation and Development) Act, 1957. A constantly variable price per se, therefore, appears to be unreasonable and unfair being opposed to the professed policies under the said Act.

We are not suggesting that the linkage system can never be brought to an end but it may not be appreciated as to how while maintaining the linkage system, they can be deprived indirectly of the benefit therefrom; and how they should be treated equally with other traders. Traders indisputably would require coal but not for their own consumption. If they purchase coal at any price, they would sell the same at a higher price. They would certainly mind variability in the price of coal as the price of their end products would have nexus therewith. Moreover, if the traders would pay higher price for procuring coal, the general consumers would have to pay more. Those who are linked consumers or who are small traders, thus, stand on a different footing. Merely to sell it as a profit to the traders who do not possess the purchasing capacity is not limited or controlled by the market conditions, whereas it is so for the linked non-core sector. The traders themselves create and control the market conditions.

In Mohd. Usman v. State of Andhra Pradesh [AIR 1971 SC 1801], this Court held :

"The proposition of law that the doctrine of equality is attracted not only when equals are treated as unequals but also when unequals are treated as equals and that Article 14 is offended both by finding difference when there is none and by making no difference when there is one is unexceptional. But the rule of equality is intended to advance justice by avoiding discrimination."

[See also Motor General Traders v. State of Andhra Pradesh 1984 (1) SCC 222 Para 10; Indra Sawhney-II v. Union of India (2000) 1 SCC 168, para 27; State of

U.P. v. Johri Mal - 2004 (4) SCC 714 para 41]; and E.V Chinnaiiah etc. v. State of A.P. and Others etc. [(2005) 1 SCC 394 paras 66 to 69].

The coal companies themselves highlighted this distinction in Civil Appeal No. 5547 of 2004 in Bijoy Kumar Poddar's case. We need not, however, deal with the said matter separately as the questions raised are interconnected with the other matters. We may notice at once that the necessity to maintain supply of coal to the linked sector was highlighted by the coal companies themselves in their special leave petitions filed before this Court.

It may be true that the linked consumers get two opportunities to procure coal; once by way of E-Auction and again by way of paying the average weighted price; but availability of coal itself is not certain having regard to the fact that admittedly keeping in view the concept of MPQ, they would not get the full supply for their demand. Even otherwise, a distinction should be made between consumers and traders and thus arises the necessity of different price regimes for the consumers as a class as against traders as a different class.

The original scheme of E-Auction was meant to be applied only to the linked non-core sector consumers and traders. Thus, thereby the policy that the linked consumers should form a class by themselves was sought to be given a go-bye. We have, however, noticed hereinbefore that having regard to the intervention of the Central Government, the coal companies deviated from the said scheme and considered even the non-core sector consumers to be a separate class; as they not only became entitled to take part in the E- Auction along with traders but also were sought to be assured of supply of coal having regard to their own requirements as regard both quality and quantity subject, of course, to their paying the price at the average weighted price. The stand taken by the coal companies before the Calcutta High Court as also before this Court assumes significance only in that context. However, now it appears that the coal companies have given a complete go- bye to the original scheme of E-Auction inasmuch as not only the traders or the non-core sector consumers but also core sector consumers had also been allowed to participate therein. A consumer of coal falling in any category as also a person who intends to purchase coal for his personal use would, therefore, be entitled to take part in E-Auction. Whereas the consumers in the core sector would not only be entitled to allotment of coal at a price fixed by the coal companies but also would be entitled to take part in E-auction. The non-core sector consumers although as linked consumers form a separate and distinct class vis-`-vis the traders, they would not be entitled to the benefit of obtaining coal at a fixed price. The question as regards the discrimination between two categories of consumer assumes some importance.

The effect is that today, while the core sector (92%) on its own and non-core non-linked SSI/Tiny units (through the NCCF/other agencies) (1%) are being supplied coal at a fixed price, on the other hand, the non-core linked SSI/Tiny units

(4%) are being subjected to differential treatment without any rational classification by supplying the coal to the latter on the price to be ascertained by the trader-controlled process of E-Auction and thereby putting the petitioner-units at par with the trader. The scheme of E- Auction is, therefore, ultra vires Article 14 of the Constitution of India. Judicial Review:

The submission of the learned Additional Solicitor General to the effect that the policy decision of a State cannot be the subject matter of judicial review is stated to be rejected.

E-Auction is not a policy decision of the Central Government. Such a policy decision on the part of the executive of the Central Government must be strictly construed in terms of Article 77 of the Constitution of India. Its exercise of such powers has nothing to do with the price fixation by a policy. The State while exercising its power under the Essential Commodities Act, fixes the price keeping in mind several factors, in particular the larger interest of the people. Price fixation of an essential commodity, therefore, is determined on the touchstone of public interest. While doing so the State is expected to follow a rational and fair procedure and for the said purpose may collect data, obtain public opinion, and may appoint an expert committee.

In the facts and circumstances of the case, however, the approach of the coal companies, who according to the Union of India had been given a free hand to determine its price for coal, is only earning profit. It has been accepted that three subsidiary companies and Coal India Ltd. who were sick companies, like Bharat Coking Coal Ltd. (BCCL), have started E-Auction. It has succeeded in its attempt to a great extent as the said coal companies are no longer sick companies. They have proceeded only to safeguard their own interests, as dealer and not as a State. Recourse to E-Auction had been taken primarily by way of a profit motive. No public opinion was sought for and no expert committee was appointed. The statutory and constitutional duties had not been kept in view. Conveniently, while making the said policy decision, the coal companies did not remind themselves that as they are instrumentalities of the State, they are bound to adhere to the Directive Principles of the State and the prime object for which the Nationalization Acts were enacted.

Good governance and good corporate governance are distinct and separate. Whereas good governance would mean protection of the weaker sections of the people; so far as good corporate governance is concerned, the same may not be of much relevance. Even the coal companies in taking recourse to E-Auction did not give effect to the concept of corporate social responsibility.

What would be profiteering has been noticed in T.M.A. Pai Foundation v State of Karnataka [(2002) 8 SCC 481]; Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697] and P.A. Inamdar v. State of Maharashtra [(2005) 6 SCC 537]. In

these decisions, it has been held that although education is an industry, and those who impart education do so as a part of their fundamental right in terms of Article 19(1)(g) of the Constitution of India, profiteering should not be taken recourse to.

In fact the decisions of this Court on price fixation also point out that although a reasonable profit may be permissible, profiteering would not be.

The coal companies evolve price fixation but admittedly they have been doing so at the instance of the Central Government. The Central Government seeks to exercise its statutory power. Such a power, however, is confined to four-corners of the 2000 Order. When there is no control over price, the Central Government is forbidden to issue any direction which will have an impact thereover.

The coal companies which are, therefore, public authorities when seeking to give effect to the constitutional scheme as contained in the preamble of the Nationalization Acts of 1972 and 1973 were acting at the behest of the Central Government and not entirely on their own. In *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai and Others* (2005) 7 SCC 627], this Court noticed with approval the decisions in *Commr. of Police v. Gordhandas Bhanji* [1952 SCR 135 : AIR 1952 SC 16] and *Mohinder Singh Gill v. Chief Election Commnr.* (1978) 1 SCC 405] in the following terms :

"In *Commr. of Police v. Gordhandas Bhanji* it is stated:

"We are clear that public orders, publicly made in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Yet again in *Mohinder Singh Gill* this Court observed:

"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*:"

Referring to *Gordhandas Bhanji* it was further observed:

"Orders are not like old wine becoming better as they grow older.""

In relation to fixation of price or other related matters, the Central Government, therefore, had no say. Under the Colliery Control Order 2000, the power of the Central Government is merely to regulate supply and not to regulate price, the price of coal, it will bear to state, having been deregulated.

Supply and/or disposal of coal which would come within the purview of Colliery Control Order, 2000, would, thus, take within its sweep only : to whom the supply would be made, what would be the quantity, the mode, period or the source of supply. Such a power to issue directions would not include fixation of price. E-Auction is not related to policy for supply of coal. It is essentially the price therefor. The Central Government in that view of the matter either directly or indirectly while purportedly exercising its power under clause 6 read with clause 9 of the Colliery Control Order could not have issued any direction in the garb of disposal of coal by way of E-Auction. The Central Government itself says that it allowed the coal companies to fix their own price; if that be so in terms of the statute it could not issue any direction which would have direct or indirect impact on price of coal. It, as indicated hereinbefore, directed that 10 lacs MT coal be sold through E-Auction; but while doing so *stricto sensu*, its power and control to regulate supply of coal could not be exercised in that sense. Apart from the fact that it also does not satisfy the attributes of supply, as noticed hereinbefore, the supply of coal itself has not been brought within the purview thereof. Furthermore no notification has been issued by the Central Government regulating supply of coal.

By allowing E-Auction in respect of 10 lacs MT of coal, it merely quantified the amount of coal which was required to be sold. It did not bring within its sweep taking recourse to the mode of E-Auction so as to enable the companies to obtain a valuable price. Clause 6 of the Colliery Control Order does not envisage the same.

Promissory Estoppel :

We have noticed hereinbefore that smokeless coal operators had set up their units at the behest of the coal companies. Those who had set up their units in the erstwhile State of Bihar and West Bengal evidently did so at the behest of the companies having been encouraged therefor. It was done to share the burden of coal companies to supply soft coke to the small consumers. Doctrine of promissory estoppel would, therefore, be applicable.

The concerned States also intended to grant incentives to such industrial units by way of waiver and/ or deferment of payment of sales tax wherefor Rule 28A in the Sales Tax Rules was introduced. Sales Tax laws enacted by the States contain a provision empowering the State to grant such exemption.

The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject of course to the provisions of the statute

have been framed by several other States.

In *M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others* [(1979) 2 SCC 409] this Court rejected the plea of the State to the effect that in the absence of any notification issued under Section 4-A of the U.P. Sales Tax Act, the State was entitled to enforce the liability to sales tax imposed on the petitioners thereof under the provisions of the Sales Tax Act and there could be no promissory estoppel against the State so as to inhibit it from formulating and implementing its policy in public interest.

The question came up for consideration before this Court in *Pournami Oil Mills and Others v. State of Kerala and Another* [1986 (Supp) SCC 728] wherein it was held:

"Under the order dated April 11, 1979, new small scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialisation, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five-year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of *M.P. Sugar Mills*. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in *Bakul Cashew Co. v. STO*. In *Bakul Cashew Co.* case this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in *M.P. Sugar Mills'* case. In our view, to the facts of the present case, the ratio of *M.P. Sugar Mills'* case directly applies and the plea of estoppel is unanswerable."

Yet again in *Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others v. Dharmendra Trading Company and Others* [(1988) 3 SCC 570], this Court, on the factual situation obtaining therein, rejected the contention of the State that any misuse of the concessions granted was committed by the respondent therein and thus the State cannot go back on its promise.

It was further observed:

"The next submission of learned counsel for the appellants was that the concessions granted by the said order dated 30-6-1969 were of no legal effect as there is no statutory provision under which such concessions could be granted and the order of 30-6-1969 was ultra vires and bad in law. We totally fail to see how an Assistant Commissioner or Deputy Commissioner of Sales Tax who are functionaries of a State can say that a concession granted by the State itself was beyond the powers of the State or how the State can say so either. Moreover, if the said argument of learned counsel is correct, the result would be that even the second order of 12-1-1977 would be equally invalid as it also grants concessions by way of refunds, although in a more limited manner and that is not even the case of the appellants."

Mangalore Chemicals and Fertilisers Limited v. Deputy Commissioner of Commercial Taxes and Others [1992 Supp (1) SCC 21] is a case where this Court had the occasion to consider as to whether subsequent change in the eligibility criteria can undo the eligibility for the condition stipulated in the earlier notification and answered the same in the negative.

This Court reaffirmed the legal position in Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board and Others [(1997) 7 SCC 251] holding:

"As a result of the aforesaid discussion on these points the conclusion becomes inevitable that the appellants are entitled to succeed. It must be held that the impugned notification of 31-7-1986 will have no adverse effect on the right of the appellant-new industries to get the development rebate of 10% for the unexpired period of three years from the respective dates of commencement of electricity supply at their units from the Board with effect from 1-8-1986 onwards till the entire three years' period for each of them got exhausted. This result logically follows for the appellants who have admittedly entered into supply agreements with the Board as new industries prior to 1-8-1986."

The question came up for consideration before this Court recently in State of Punjab v. Nestle India Ltd. and Another [(2004) 6 SCC 465] wherein this Court surveyed the growth of the said doctrine and held the doctrine to be applicable to legislative action also.

Legitimate Expectation :

Principle of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. Good administration, however, demands observance of doctrine of reasonableness in other situations also where the citizens may legitimately expect to be treated fairly. Doctrine of legitimate expectation has been developed in the context of principles of natural justice.

Issue arises whether recourse to legitimate expectations can be taken when the expectation is based on unlawful representation (i.e., most often something that is *ultra vires* the power of local authority). In *Stretch v. U. K.* [(2004) 38 EHRR 12] applicant was granted a lease for 22 yrs. by an authority that did not have the power to do so. It was only made known to the applicant at the time of renewal of the lease, when negotiations had already reached an advanced stage. While the court of appeal accepted the argument that the option to renew the lease could not be exercised (as beyond the local authority's power), it noticed that it was unjust that such authorities could take advantage of their own wrong. The European Court of Human Rights however did not accept this argument and awarded damages as it found on facts that this action did not in any way go against public interest, nor did it prejudice the statutory duties of the authority.

We may, however, notice a recent trend where doctrine of balancing has been advocated.

Rowland v. Environmental Agency [(2003) EWCA Civ. 1885] involved a part of the Thames river, known as 'Hedsor Water', which the relevant authorities declared open for exercise of public navigation rights. Initially however, the authorities by regular and consistent practice had accepted that such rights did not exist. The Court of Appeal said that although the expectations were legitimate, the action must fail. According to Peter Gibson L.J., the action failed as legitimate expectations could only be granted against lawful claims. Although May L.J., (like Menace L.J.) came to the same conclusion, they refused to accept legal incapacity as an automatic answer against legitimate expectation (amounting to convention right). They sought a kind of a balance where while allowing the Hedsor water to be open to rights of navigation, such use would not be actively encouraged by the authority.

It was held that, however, there was no need to restrict such 'balancing' to cases where the right was one protected under the convention. It could be extended to all cases where the unlawful action was not adverse to public interest.

Conclusion :

Coal being a scarce commodity, its utility for the purpose for which it is needed is essential. Although, technically, in view of the fact that no price is fixed for coal, there may not be any black marketing in the technical sense of the terms; but this Court cannot also encourage black marketing in general sense. Nobody should be allowed to take undue advantage while dealing with a scarce commodity. The very fact that despite best efforts of the Central Government, the coal companies failed to curb the menace of a section of people and to deal in coal excluding other general people therefrom or the linked consumers misusing their position of obtaining allotment of coal either wholly or in part, it is absolutely necessary that some mechanism should be found out for plugging the loopholes. The Union of India or the coal companies

appear to have lost confidence in the State Governments. They had carried out joint inspection and in that process they must have arrived at a satisfaction about the genuineness of the claims of industrial units for which the linkage system was meant for.

Before us most of the consumers, with a view to obtain supply of coal had filed documents to prove their genuineness. The said documents must be scrutinized by the authorities of the coal companies. In the event, they have any suspicion, inspection should be carried out by officers appointed by the Chairman-cum-Managing Director of the concerned company within whose jurisdiction the unit is situated.

With a view to evolve a viable policy, a committee should be constituted by the Union of India with the Secretary of Coal being the Chairman. In such a committee, a technical expert in coal should also be associated as most of the projects involve consumers of coal, particularly manufacturers of hard coke and smokeless fuel. In our opinion, it may not be difficult to find out, having regard to the technologies used therein as regards the ratio of the input vis-à-vis the output, with a balance and 10% margin. On the basis of such finding alone, apart from the requirements of five years, supply should form the basis of MPQ. We may, however, hasten to add that the Central Government in collaboration with the coal companies would be at liberty to evolve a policy which would meet the requirements of public interest vis-à-vis the interest of consumers of coal. They would be entitled to lay down such norms as may be found fit and proper. They would be entitled to fix appropriate norms therefor. In the event, any industrial unit is found to violate the norms, it should be stringently dealt with.

Hard coke plants are also coal mines within the meaning of Colliery Control Order, 2000. Hard coke is coal within the meaning of the provisions thereof. The Central Government, therefore, may think it fit to widen the definition of coal so as to include the smokeless coal in exercise of its power under the Essential Commodities Act. We may notice in ONGC (supra), this Court has held that slurries are a part of coal and is governed by the provisions of the Mines and Minerals (Regulation and Development) Act. Such being the wider definition of coal, we fail to see any reason as to why proper measure cannot be taken by the Union of India to have a complete control thereover. Any strict mechanism to find out the genuine consumers would go a long way in taking preventive measures and dealing with coal by unscrupulous persons for unauthorized purposes. Those who do so, should be dealt with stringently but the same would not mean that the genuine consumers should suffer for want of coal.

We, in the peculiar facts and circumstances of this case, are of the opinion that it may not be difficult to find out as to who the genuine consumers are. So far as owners of the hard coke ovens are concerned, they are members of the association and their identity can easily be verified.

However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy decision. They evidently can; but therefor there should be a public interest as contra distinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or E-tender would be welcome but then therefor a greater transparency should be maintained.

For the reasons aforementioned, Civil Appeal Nos. 2972 and 2975 of 2005 being devoid of any merits are dismissed. Civil Appeal arising out of S.L.P. (Civil) No. 24034 of 2005 is allowed and the impugned judgment of the Madhya Pradesh High Court is set aside. No separate order is required to be passed on Civil Appeal No.5547 of 2004 arising out of the judgment and order of the Calcutta High Court as the said case would also be governed by this judgment. All other appeals and transferred cases are disposed of with the aforementioned observations and directions