

P Sathasivam, J.

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

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

3) Leave granted.

4) "The people of the entire country have a stake in natural gas and its benefit has to be shared by the whole country." — Association of Natural Gas & Others vs Union of India & Others, (2004) 4 SCC 489 (CB).

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

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

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

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

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

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

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

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

(h) In October, 2002, the Consortium (NIKO & RIL) announced discovery of significant result of KG-D6 Block. Sometime in the year 2003, the National Thermal Power Corporation Limited (in short "NTPC") floated a global tender for supply of gas to its power projects. The Gas Sale and Purchase Agreement was annexed with the tender document. NTPC invited international competitive bids for supply of natural gas to its power plants located in the State of Gujarat to meet its fuel requirements. RIL succeeded in its bid to sell, transport and deliver 132 TBTU (means one trillion BTU (British Thermal Unit) or 1000000 MBTU). NTPC, by letter dated 16.06.2004, confirmed RIL's deal.

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

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

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

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

(m) On 11.08.2005, RNRL was acquired by RIL for the purpose of de-merger. The name was changed to Global Fuel Management Services. RIL (de-merged company) moved a petition in the Bombay High Court bearing No. 731/2005 dated 24.10.2005 to obtain a sanction of Scheme of Arrangement (the Scheme) between RIL and four other companies viz., (i) Reliance Energy Ventures Limited, (ii) Global Fuel Management Services Limited, (iii) Reliance Capital Ventures Limited and (iv) Reliance Communication Ventures Limited. By order dated 09.12.2005, the Company Judge, Bombay High Court, has granted sanction to the Scheme and inter alia directed that the shareholders of RIL would hold shares in each of the resulting companies in the ratio of 1:1 in addition to the shares held in the parent company (RIL). The scheme provides that RIL successfully bid for off-shore oil and gas fields; strategic investment in RIL which has engaged in power projects, in order to use part of gas discovered for the generation of power; appropriate gas supply arrangement will be entered into between RIL and Global Fuel Management Services pursuant to which gas will be supplied to RIL; refined gas based energy undertaking; after the record date the Board of the resulting companies shall be re-constituted and shall thereafter be controlled and managed by Anil Ambani. A suitable arrangement would

be entered into in relation to supply of gas for power projects of Reliance Patalganga Power Limited and REL with the gas based energy resulting companies.

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

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

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

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

(iv) Telecommunication Undertakings/Reliance Communication Ventures Limited. The De-merged company Reliance Industries Limited (RIL) is to retain all other businesses including petrochemicals, refining, oil and gas exploration and production, textile and other business. The Scheme became effective from 21.12.2005.

(o) A draft of GSMA (Gas Sale Master Agreement) and GSPA (Gas Sale Purchase Agreement) were e-mailed by an official of RIL to sole nominee of Anil Dhirubhai Ambani Group on the Board of RIL on 11.01.2006, drafts of GSMA and GSPA were approved by the Board of RIL at a time when the Board of RNRL was under the control of Mukesh Ambani. The nominee of Anil Dhirubhai Ambani Group had raised objections but the same were overruled. There was no sufficient time given to RNRL to read the draft. No independent or legal advice could be taken on behalf of RNRL. Basic clauses to the agreements are the bone of contention of the present litigation. Both the agreements alleged to have also been settled and executed on 12.01.2006. On the same day, a letter addressed by Mr JP Chalasani, the nominee of ADAG on the Board of RNRL, to other Directors on the Board of RNRL namely, Mr Sandip Tandon and Mr. L.V. Merchant, who were the nominees of Mukesh Ambani/RIL, stating therein that the proceeding in the Board Meeting held on 11.01.2006 to consider the agreement with RIL in terms of the Scheme were illegal and void. By another letter dated 13.01.2006, a request was made to take the contents of letter dated 12.01.2006 with regard to the agenda-item No.8 (gas supply agreement) and be made part of the minutes of the Board Meeting.

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

(q) On 07.02.2006, the Board of the RNRL was re-constituted in order to hand over the management and control of the resulting companies to Mr. Anil Ambani. On 14.02.2006, a letter addressed by RIL to the RNRL stated that a proforma gas sale and purchase agreement (GSPA) has been annexed to the above GSMA. The proforma contains the terms and conditions as mentioned in the GSPA signed by RIL on 12.12.2005 and forwarded to the NTPC. It was further informed that they agree to carry out the changes to the proforma GSPA annexed to the GSMA so that it reflects the same terms as contained in GSPA between NTPC and RIL as and when any changes are carried out to NTPC GSPA.

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

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

(t) With these details, RNRL on 07.11.2006/08.11.2006, filed a Company application No. 1122 of 2006 under Section 392 of the Companies Act, 1956 (hereinafter referred to as "the Act") before the High Court of Bombay in which the following prayers were made: "(a) Order and Direct RIL to take all necessary steps in order to ensure actual supply of 28 MMSCMD or 40 MMSCMD of gas to RNRL on the NTPC Contract Terms and as per the commercial aspect set out in Para 8.3 hereinabove.

(b) Order and Direct RIL to execute an amendment to the Gas Supply Master Agreement dated January 12, 2006, and to the Form of Gas Sale and Purchase Agreement attached in Schedule 3.2 thereto, to bring them in line with the Gas Supply Master Agreement and Form of Gas Sale and Purchase Agreement as set out in Ex. J to this Application.

(c) restrain RIL from creating any third party interests or rights in respect of i) 28 MMSCMD of Gas to be supplied to the Applicant; (ii) 12 MMSCMD to be supplied to the Applicant on firm basis in case NTPC Contract does not materialize; and/or entering into any contract(s) and/or use or supply to any third party the said gas (28 MMSCMD or 40 MMSCMD, as the case may be) which is required to be supplied to the Applicant under the Scheme.

(d) pending the hearing and final disposal of the application, direct RIL to supply the said 28 MMSCMD or 40 MMSCMD gas, as the case may be, to the applicant on the same terms as per NTPC Contract.

(e) ad-interim reliefs in terms of prayer (c) and (d) above.

(f) Such further orders be passed and/or directions be given as this Hon'ble Court may deem fit and proper."

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

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

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

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

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

(b) Supply period 17 (Seventeen) Years.

(c) ADA Group's Purchase Obligation. On take or pay basis.

(d) Price and Commercial Terms:

The firm quantity of 28 MMSCMD/ 40 MMSCMD at a price not greater than NTPC prices.

Option gas at the market rate

Other commercial terms same as those of NTPC contract.

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

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

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

d) The Scheme also explains:

(i) Gas Based Energy Resulting Company

(ii) Gas Based Energy Undertaking

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

f) In the year 2003, NTPC had floated a global tender for supply of gas to its power projects to be located at Kawas and Gandhar in the State of Gujarat. RIL, who emerged as the successful bidder, had at the time of submission of bids unconditionally accepted all the terms and conditions mentioned in the draft GSPA. In accordance with the agreed position/settlement, the gas was to be supplied by RIL to the RNRL at the price and terms no less favourable than those of NTPC and the gas supply agreement between RIL and the RNRL would be as per the said NTPC contract terms. RIL, by letter dated 14.02.2006, signed by one K. Sethuraman, Authorised Signatory of RIL, communicated that he was directed to confirm that RIL would agree to carry out amending changes to the proforma of GSPA annexed to the Gas Supply Master Agreement (GSMA) so that it reflects the same terms as are contained in the GSPA for 12 MMSCMD between NTPC and RIL as and when changes are carried out to NTPC GSPA.

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

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

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

9) The case of RIL:-

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

(b) Once the Scheme as was placed before and duly approved by the shareholders (99% shareholders approved the Scheme) which suggests that the Scheme had the support not merely of the General Body of shareholders but also the members of the promoters' family, all anterior or underlying agreements become irrelevant. The senior-most member of the family who resolved all the disputes has, at no point, contested the Scheme as being inconsistent with any arrangement that may have been arrived at. The present application is a thinly disguised attempt to reopen the Scheme after it has been fully implemented in a manner that is completely inconsistent not only with the demerger of the businesses but the provisions of Section 392 of the Companies Act, 1956.

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

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

10) After considering the claim of both the parties viz., RNRL and RIL, the "Company Judge has arrived at the following conclusions": "184. The conclusions are:

(1) The present company application under Section 392 of the Companies Act is maintainable.

(2) The Company Court, however, under Section 392 of the Companies Act cannot direct or dictate to maintain or amend or modify and/or insist for a particular clause or clauses of such gas supply agreement or such other commercial agreement/contract.

(3) The GSMA as formed and finalized in the Board of Directors Meeting of RIL on 11.01.2007 and modified on 12.01.2007 is in breach of the Scheme.

(4) The MoU (Memorandum of Understanding/Family Arrangement) and its contents are binding to both parties RIL and RNRL and all the concerned. Mr. Mukesh Ambani and his group of Companies and Mr. Anil Ambani and his group of Companies have already acted upon at the pre- and post-stages of the MoU and the pre- and post-stages of the Scheme accordingly.

(5) The term "suitable arrangement" as referred to in the Scheme needs to be read and interpreted by taking into account the terms of the MoU as well as the Scheme as referred to above. It is also necessary for the complete and full working of the Scheme.

(6) The terms as mentioned in the MoU and GSMA need to be suitable for both the parties subject to the Government's policies and national, international practice in supply of gas or such other products.

(7) The contract of such nature is subject to the Government's approval in view of NELP & PSC and such related Government policies, but keeping in view the several factors, including the freedom and right of the contractor/RIL and the limited and restricted scope of interference in such permissible commercial aspects of the contractor, unless it is in breach of any public policy and public interest.

(8) The supply of gas contract/agreement needs to be clear and bankable documents for all the concerned parties." Finally, the Company Judge directed the parties to re-negotiate for a "suitable arrangement".

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

12) The Division Bench framed the following "issues for consideration": (1) Whether the Company Court has jurisdiction to entertain the Application filed by RNRL under the Companies Act, 1956.

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

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

(b) On the second issue, the Division Bench held as follows: (i) The suitable arrangement was required to be made by engrafting the MoU on the GSMA,

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

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

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

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

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

16) Historical background: Up to the early 90's, prior to the NELP and pre-NELP years, natural gas was being produced only from the fields operated by Government companies, namely Oil & Natural Gas Corporation (in short 'ONGC') and Oil India Limited (in short 'OIL'), out of blocks which were given to these companies by the Government on nomination basis. Since these fields were given on nomination basis and only to Government Companies, the Government's power to regulate the Natural Gas Sector was absolute. Later, it was decided to open the sector to Private Sector Investment during the mid 1990s when private investment was sought on competition basis and certain blocks were awarded to Private Sector companies under a Production Sharing Contract (better known as the pre-NELP Production Sharing Contracts). This was done to increase private investment in this sector since the exploration and production of oil and gas is associated with considerable risk and no investment would have been attracted if the APM regime continued. However,

the Contractors who signed the PSC were required to sell all the gas produced and saved to the Gas Authority of India Limited, a PSU, and did not have marketing freedom as regards natural gas.

The pre-NELP regime was replaced by the NELP regime under which the PSC relevant to the present case was entered into between a Joint Venture composed of RIL and NIKO Resources Limited and the Government of India. In the NELP-1 PSC, marketing freedom has been given to the contractor to a limited extent subject to the overall regulation of the Government.

17) Constitutional and other statutory Provisions: "Article 297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union -

(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament."

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

19) This Court, in the case of State of Tamil Nadu vs. L. Abu Kavur Bai, (1984) 1 SCC 515 at 549 held that the expression 'distribute' under Article 39(b) cannot but be given full play as it fulfills the basic purpose of re-structuring the economic order. It embraces the entire material resources of the community. Its goal is so to undertake distribution as best to sub-serve the common good. It re-organizes by such distribution the ownership and control. To distribute, would mean, to allot, to divide into classes or into groups and embraces arrangements, classification, placement, disposition, apportionment, the system of disbursing goods throughout the community.

20) In Salar Jung Sugar Mills Ltd. etc. vs. State of Mysore & Ors., (1972) 1 SCC 23 at page 36 paragraph, this Court held as under: "38.....Delimiting areas for transactions or parties or denoting price for transactions are all within the area of individual freedom of contract with limited choice by reason of ensuring the greatest good for the greatest number by achieving proper supply at standard or fair

price to eliminate the evils of hoarding and scarcity on the one hand and availability on the other."

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

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

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

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

24) In *Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71, this Court observed as follows: "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'."

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

26) Under the Companies Act, there are no provisions except Sections 391 to 394 which deal with the procedure and power of the Company Court to sanction the Scheme which falls within the ambit of requirements as contemplated under these sections. Since the Company Judge as well as the Division Bench of the High Court

proceeded on the basis that it has ample power and jurisdiction to supervise the Scheme as sanctioned under Sections 391 to 394 of the Companies Act, it is but proper to refer those sections which are as under:"391. Power to compromise or make arrangements with creditors and members (1) Where a compromise or arrangement is proposed- (a) between a company and its creditors or any class of them; or(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the Tribunal directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company: Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 351, and the like.

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

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

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

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of. 392. Power of Tribunal to enforce compromise and arrangement : (1)

Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it- (a) shall have power to supervise the carrying out of the compromise or an arrangement; and

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

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

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of the Companies (Amendment) Act, 2001 sanctioning a compromise or an arrangement.

393. Information as to compromises or arrangements with creditors and members -
(1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391,-(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect; and in particular, stating any material interests of the directors, managing director or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests of the compromise or arrangement if, and in so far as, it is different from the effect on the like interests of other persons; and (b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

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

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the

meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

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

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

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

394. Provisions for facilitating reconstruction and amalgamation of companies

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

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

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company"); the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:- (i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under

the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company; (iv) the dissolution, without winding up, of any transferor company; (v) the provision to be made for any persons who, within

such time and in such manner as the Court directs dissent from the compromise or arrangement; and (vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies; shall be sanctioned by the Tribunal unless the Court has received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest: Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

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

(3) Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration. If default is made in complying with this subsection, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(4) In this section- (a) "property" includes property rights and powers of every description; and "liabilities" includes duties of every description; and

(b) "Transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not 394A. Notice to be given to Central Government for applications under sections 391 and 394. The Tribunal shall give notice of every application made to it under section 391 or 394 to

the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."

27) ISSUES ARISING IN THE PRESENT APPEALS:

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

b) Even if the Company Petition was maintainable, whether the challenge raised by RNRL to the GSMA, that it is not a "suitable arrangement" was maintainable particularly in view of the fact that on merits, the Company Judge had found, these objections to be unsustainable?

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

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

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

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

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

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

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

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

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

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

(A) Maintainability of the company petition: i) It has been argued before this Court that the original company application was not maintainable as the Company Judge (single Judge) did not have any jurisdiction. It has been argued that the jurisdiction of the Court can only be found under Section 394 of the Act and Section 392 is completely inapplicable. RIL has argued this because the wording of both the provisions suggests that Section 392 provides much wider power to the Court with respect to making additions in the Scheme. Section 392 (1)(b) states that the Court "may give such directions in regard to any matter or making such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement". On the other hand, Section 394 restricts this power essentially to "incidental, consequential and supplemental matters only". Mr RF Nariman, learned senior counsel appearing for RIL concentrated his argument with reference to Sections 391 to 394 of the Companies Act.

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

[Section 394(1)(vi)]. This power is absent in Section 391, so that companies falling within Section 391, but not within Section 394, would not be amenable to the Company Court's jurisdiction to enforce a compromise or arrangement made under section 391 and to see that they are fully carried out. Hence, the power under Section 392 has to be understood in the above context, and is of the same quality as the power expressly given to the Company Court post-sanction under Section 394.

ii) It is pointed out by Mr Nariman that on the facts of the present case, Section 392 does not apply at all, for the reason, that the sanctioned scheme on record is a scheme to which both Sections 391 and 394 apply. That being the case, in order to

fully and effectively carry out an arrangement which has been sanctioned under Sections 391 to 394, the Company Court enjoys jurisdiction under Sections 394(1)(i) to (vi) itself. He pointed out that this becomes clear beyond doubt from a reading of sub section 3 of Section 392. He also pointed out that Section 153-A of the 1913 Act is conspicuous by its absence in sub section(3) of Section 392. According to him, this makes it clear that where a compromise or arrangement has been sanctioned under Section 153 A of the previous Act, the provisions of Section 392 of 1956 Act will not apply, making it clear that where a scheme is governed by the provisions of Section 394, Section 392 would have no application.

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

iv) It is the claim of the RIL that the power to enforce the compromise or arrangement includes the power to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise or arrangement. However, Mr Nariman further pointed out that the power to make modifications does not extend obviously to make substantial or substantivemodifications to the scheme itself which has been passed by at least 75% of the shareholders in exercise of their right of Corporate Democracy. In the present case, the Scheme was passed by an overwhelming majority of more than 99% of the equity shareholders of RIL. He further pointed out that apart from the language of Section 392 the power under Section 392 cannot possibly be a greater power than the power under Section 391 to sanction the original scheme. In *Miheer H. Mafatlal vs. Mafatlal Industries Limited* (1997) 1 SCC 579, this Court delineated the extent of power of the Company Court under section 391 in para 29 thus: "29. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep

into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act which reads as under.....

...Of course this section deals with post-sanctions supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement..."

v) Again in *S.K. Gupta & Anr. Vs. K.P. Jain & Anr.* (1979) 3 SCC 54, this Court dealt with the creditors' scheme propounded under Section 391 to get a particular Company out of winding up. Observations made in paragraphs 13 and 15 of this judgment, if read out of context, would make it clear that this Court has extended the power under section 392 to make modifications which would include additions and omissions to the scheme at will. This is not the correct purport of the observations in para 13 and 15. In fact, the judgment very clearly states that the limit on the Court's power is always to see that the modifications are done for the proper working of the scheme and not for any other purpose.

A very important paragraph of the judgment is para 27 where this Court ultimately observed "strictly speaking, omission of the original sponsor and substituting another one would not change the 'basic fabric' of the scheme". This judgment therefore, must be understood as construing Section 392 in a manner that would not permit the Company Court to so modify a scheme as to change its basic fabric.

vi) Another judgment of this Court is in *Meghal homes (P) Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors.* (2007) 7 SCC 753 which squarely raises the issue as to whether in the guise of modifying a scheme, the Company Court can substitute a portion of the original scheme. This Court said an emphatic no:-"53. But before that, we think that another step has to be taken in this case. What has now been accepted by the

Division Bench, is not the scheme as modified by the General Meeting as contemplated by Section 391 of the Act. At least two of the modifications having ramifications are based on undertakings or statements made on behalf of LBPL and there appears to be difference of opinion on that modification even among the Somanis. There is also the question whether the proposals of a person who is not one of those recognised by Section 391 of the Act, could be accepted by the Company Court while approving a scheme. We are of the view that the scheme with the modifications as now proposed or accepted, has to go back to the General Meeting of the members of the Company, called in accordance with Section 391 of the Act and the requisite majority obtained.

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

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

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

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

vii) Mr. Nariman has submitted that the Company Judge in the present case referred to S K Gupta's (supra) case and finally held that since Sections 391 to 394 are interconnected it would be able to grant relief asked for in a Company Application filed under Section 392. It is the claim of Mr. Nariman that it is not only incorrect but it would not be possible in exercise of power under Sections 392 or 394 to modify the terms of clause 19 of the Scheme. Insofar as the Division Bench, according to him, goes into various clauses of the Scheme to say that the subsequent power of modification of the Scheme itself is contained in these clauses, more particularly, clause 22. He contended that even if it is to be applied, no modification can be made under it without the consent of the parties to the Scheme. According to him, if the conclusion of the Division Bench is accepted, the resultant order of the Division Bench is contrary to Clause 22 in that it would not be possible to read the MoU dated 18.06.2005 into Clause 19 of the Scheme without the consent of the Shareholders and the Board of Directors of RIL. He insisted that the Division Bench of the High Court was bound by the judgment in Meghal Homes where the jurisdiction of the Company Court under Section 392 was clearly spelt out.

viii) Learned senior counsel for RNRL submitted that RNRL seeks to enforce the terms of the Scheme of Arrangement as sanctioned by the Bombay High Court vide its order dated 09.12.2005. As per the said Scheme, RIL was required to execute a suitable arrangement for supply of gas to RNRL.

However, RIL has wrongfully caused the execution of a document the effect of which would be that the business of supply of gas, as contemplated in the Scheme of Arrangement, would not be transferred to RNRL. He further argued that the timing and manner of the impugned agreement as well as several clauses of the Scheme render the same virtually unworkable. In these circumstances, it is pointed out that RNRL has approached the Company Court seeking suitable reliefs under Section 392 of the Companies Act.

ix) In the earlier part, the judgment of this Court in SK Gupta (supra) has been discussed. It is the duty of the Court to ensure that the Scheme is fully implemented. Learned senior counsel for the RNRL pointed out that in this case it would imply that this Court must ensure that the gas based energy undertaking is, in fact, transferred to RNRL as contemplated under the Scheme. For this purpose, the Court has the jurisdiction and power to direct modification of the GSMA which was required to be executed pursuant to clause 19 of the Scheme. Learned senior counsel further contented that Section 392 shows the width of the power and the ultimate consequence envisaged under the Companies Act for non implementation of the Scheme. The only limitation on the power of the Court is that it cannot change the basic structure or character or purpose of the Scheme. It was further pointed out that subject to this, the power is of widest amplitude and unlimited. On behalf of the RNRL it was pointed out that the decision of this Court in Meghal Homes (supra) is not applicable to the present case, firstly, this judgment accepts the principle that the Court has wide power under Section 392 though the same are circumscribed, secondly, the said judgment does not refer to Gupta's case which was a binding decision of a three-Judge Bench. Further, in Meghal Homes (supra) the challenge was the power of the Court to sanction the Scheme and not power to direct modification to an already sanctioned Scheme.

x) In the light of the stand taken by both parties, this Court analyzed the relief sought for in the Company Application and the relevant materials placed before the Company Judge.

Section 392 creates a duty to supervise the carrying out of the compromise or arrangement. This power and duty was created to enable the Court to take steps from time to time to remove all obstacles in the way of enforcement of a sanctioned scheme. While sanctioning, it shall anticipate some hitches and difficulties which it can remove by the order of the sanction itself but clause 1(b) makes it clear that this power can also be exercised after the scheme has once been sanctioned. So long as the basic nature of the arrangement remains the same the power of modification is unlimited, the only limit being that the modification should be necessary for the working arrangement.

xi) In view of the above discussion, this Court holds that Section 392 is applicable to the Company Application filed by RNRL. This is more so because the Company Court

has originally sanctioned the scheme under both Sections 391 and 394. Further, the position derived from Gupta (supra) the power of the Court under Section 392 is wide enough to make any changes necessary for the working of the Scheme.

Therefore, Court does have jurisdiction over the present matter. However, it is made clear that the power of the Court does not extend to re-writing the Scheme in any manner.

xii) Furthermore, in the Companies Act, there is no provision except Section 391 to Section 394 which deal with the procedure and power of the Company Court to sanction the Scheme which fall within the ambit of the requirements as contemplated under these sections. In the absence of any other provisions except Section 392, it is difficult to accept the contention as raised that the present application under Section 392 of the Companies Act is without jurisdiction. On the other hand, Section 391 to Section 394 has ample power and jurisdiction to supervise the scheme as sanctioned under the Companies Act. As rightly observed by the Company Judge, the exigencies, facts and circumstances, play dominant role in passing appropriate order under Sections 391 to 394 after sanctioning of the Scheme. The Company Court is not powerless and can never become functus officio. Sections 391 to 394 are interconnected and it can pass appropriate order for sanctioning of any Scheme including of arrangement, demerger, merger and amalgamation. Therefore, the application filed by RNRL under Section 392 is maintainable.

Nevertheless, as observed earlier, the power of the Court does not extend to re-writing the Scheme in any manner.

(B) Memorandum of Understanding (MoU)

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

"STRICTLY CONFIDENTIAL

MEMORANDUM OF UNDERSTANDING

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

WHEREAS

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

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

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

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

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

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

1. Kale & Ors. vs. Deputy Director of Consolidation & Ors., (1976) 3 SCC 119 (Paragraphs 9, 17, 19, & 42) which states as under:" 9.....A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of

fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.....

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

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

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

2. *K.K. Modi vs. K.N. Modi & Ors.*, (1998) 3 SCC 573 (Paragraphs 33 & 52) which states as under:"33. In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement....

52. Group A contends that there is no merit in the challenge to the decision of the Chairman of IFCI which has been made binding under the Memorandum of Understanding. The entire Memorandum of Understanding including clause 9 has to be looked upon as a family settlement between various members of the Modi family. Under the memorandum of Understanding, all pending disputes in respect of the rights of various members of the Modi family forming part of either Group A or Group B have been finally settled and adjusted. Where it has become necessary to split any of the existing companies, this has also been provided for in the

Memorandum of Understanding. It is a complete settlement, providing how assets are to be valued, how they are to be divided, how a scheme for dividing some of the specified companies has to be prepared and who has to do this work. In order to obviate any dispute, the parties have agreed that the entire working out of this agreement will be subject to such directions as the Chairman, IFCI may give pertaining to the implementation of the Memorandum of Understanding. He is also empowered to give clarifications and decide any differences relating to the implementation of the Memorandum of Understanding. Such a family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of Understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. The respondents may make appropriate submissions in this connection before the High Court. We are sure that they will be considered as and when the High Court is required to do so whether in interlocutory proceedings or at the final hearing."

iv) However, Mr. Harish N. Salve, learned senior counsel for the RIL while drawing our attention to Section 36 of the Companies Act, 1956, submitted that the Memorandum and Articles shall bind the company and its members. According to him, the Articles of Association are the regulations of a company which are binding on the company and its shareholders. He, therefore, pointed out that nothing outside the Articles can bind a shareholder vis-à-vis the company. In support of the above stand, he heavily relied on paragraph 9 of the judgment of this Court in V.B. Rangaraj vs. V.B. Gopalkrishnan & Ors. , AIR 1992 SC 453 which reads as under:"9.the private agreement which is acted upon by the plaintiffs whereunder there is a restriction on a living member to transfer his shareholding only to the branch of family to which he belongs in terms imposes two restrictions which are not stipulated in the Article. Firstly, it imposes a restriction on a living member to transfer the shares only to the existing members and secondly the transfer has to be only to a member belonging to the same branch of family.

The agreement obviously, therefore, imposes additional restrictions on the member's right to transfer his shares which are contrary to the provisions of the Art.13. They are, therefore, not binding either on the shareholders or on the company..."

29) It is seen from the above decision that the agreement between the two groups of shareholders which impose certain restrictions on the transferability of the shares held by them was not binding either on the company or its shareholders because the restrictions so imposed by the agreement were contrary to the provisions of the

Articles, sale of shares held by one of the two groups in breach of the agreement could not, therefore, be held to be valid. He also pointed out that the agreement between the shareholders is not binding on the company unless the company adopts it and it is incorporated in the Articles of Association. Based on the above principles, he pointed out that the de-merger Scheme was based on the MoU and be treated as guidance to the term suitable arrangement. He also pointed out that a family arrangement or the MoU has not been referred to at any stage in the Scheme or in any representation made to the Stock Exchange and the same is contrary to the RNRL's own pleading and their case. Mr. Harish Salve also relied on various exerts from some of the letters/e-mails from Exhibit "F" filed by RNRL. Some of the letters/e-mail dated 30.07.2005 from Mr. Harish Shah (RIL) to Mr. Venkat Rao (REL); e-mail dated 06.10.2005 from Mr. Cyril Shroff to Mr. Sandeep Tandon/RIL; e-mail dated 29.11.2005 from Mr. Cyril Shroff to Mr. Anil Ambani; e-mail dated 14.12.2005 from RIL to Mr. J.P. Chalasani and e-mail dated 27.12.2005 from Mr. Sandeep Tandon (RIL) to Mr.Venkat Ponanda etc. but not disputed the contents of the letters or correspondences and e-mails referred therein. The existence of letters/correspondence and e-mails remain unchallenged.

30) In the light of the stand taken by both sides, this Court analysed the contents of MoU and the subsequent arrangement after exchange of various letters/e-mails as well as deliberations among the officials of both the entities. It is clear that both parties acted upon the said family arrangement/MoU dated 18.06.2005. The above referred letters and e-mails, further confirmed that there is an arrangement made and agreed between the RIL and ADAG (RNRL), it is also clear and show that the discussion between the group of officials was intended to expedite the implementation of the MoU by producing a "suitable arrangement". Though copy of the MoU was not part of the record before the Company Judge, by consent, the above extracted portion was placed before the Division Bench at the time of hearing of the appeal. It cannot be accepted that neither RIL nor its Board Members were aware of the contents of the MOU. In fact, the Company Judge has pointed out that a specific reference was made in the Company Application No.1122 of 2006 and there is no specific denial by the RIL. The Press Release at the instance of their mother Smt. Kokilaben Ambani (Exh. "D") about the family arrangement/MOU cannot be over-looked. It is clear that because of the efforts of Smt. Kokilaben Ambani, the mother of Mukesh Ambani & Anil Ambani, the family settlement has been arrived at and followed by the Scheme of De-merger. It is also clear from the materials i.e. exchange of letters and e-mails and the deliberations by the officials of both entities and their Board of Directors as well as the shareholders have agreed for the Scheme. Further it was demonstrated that after execution ofMOU, both the parties have been entering into contracts and agreements as an independent entity. As pointed out that except the gas supply agreement all other companies as foundare working and running their affairs smoothly.

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

32) On the other hand, learned senior counsel appearing for the RNRL demonstrated the existence, effect, sanctity and the binding nature of MoU. It is their definite case that the existence of MoU was specifically pleaded in para 6.6 of the Company Petition. Learned Company Judge found that the MoU existed and that the terms of MoU had to be implemented. Inasmuch as the relevant part of MoU concerning the gas business have already been placed before the Division Bench in appeal with the consent of the parties and the relevant terms relating to price, tenure, volume etc. are admitted between the parties, it is only the interpretation thereof which is to be considered. Further, the MoU itself seeks to divide the business into two groups i.e. Anil Ambani Group and Mukesh Ambani Group wherein both individuals would control and supervise various businesses through various corporate entities. The implementation of the MoU resulted in the scheme under Section 391 of the Act before the Company Court. Apart from this, it was pointed out that the Board of RIL made a public announcement on 18.06.2005 i.e. soon after the execution of MoU on the same day publicly acknowledging, with gratitude to their mother, Smt. Kokilaben that a settlement of disputes has been reached between the members of the family. Further, Exhibit F reflects the knowledge of the terms of MoU with the senior officials of both sides wherein efforts were being made to work out mutually negotiated GSMA/GSPA which would be in line with MoU.

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

Ltd. & Ors, AIR 2004 SC 86 para 16, R. vs. Mc Donnell, (1966) 1 All. E.R. 193 at page 196 & 202,

J.K. Industries Ltd. & Ors. vs. Chief Inspector of Factories and Boilers & Ors. (1996) 6 SCC 665 paragraphs 44 & 45.

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

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

36) Secondly, in the light of the conduct of Mukesh Ambani, Chairman of RIL, MoU was definitely the instrument which was the basis of the scheme. Therefore, it can be used as an external aid for the interpretation of "suitable agreement" under the scheme. To put it clear, the MoU is one of the ways in which the intention of the parties can be made clear with regard to what was considered suitable. Nevertheless, there is no specific requirement that the GSMA must confirm completely with the MoU.

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

38) Subsequent to the formation of the Scheme, the Board of Directors of RIL framed the GSMA and GSPA. As per the Scheme clause VIII and sub-clause (xvii), the Board of Directors of each of the resulting companies to be re-constituted in such manner as is agreed between each resulting companies and Anil Ambani and thereupon each of the resulting companies shall be controlled and managed by Anil Ambani. The demerged company constituting the remaining Undertakings shall continue to be controlled and managed by Mukesh D. Ambani. As per the preamble of the Scheme and even otherwise the RIL being contractor in pursuance to the PSC, remained under the control of Mukesh D. Ambani having object to commence the production and sale of gas and further as REL has announced setting up of Gas Based Power

Generation of India. RIL proposed to use part of its gas discovered for the generation of power for which purpose an appropriate gas supply arrangement agreed to be entered into between RIL and Global Fuel Management Services Limited (now RNRL) pursuant to which gas agreed to be supplied to REL for their power projects including Reliance Patalganga Power Limited, for the generation of power. This business of supply of gas to REL for their power projects is an integrated and/or constitute the Gas Based Energy

Undertaking of RIL. The intention, therefore, throughout was even under the Scheme to reorganize and segregate the business and undertakings to provide focused management attention. In this background it was contended by learned senior counsel appearing for RNRL that it was necessary that RIL should have given full and proper opportunity to the RNRL before passing such resolution hurriedly on 11.01.2006 and before executing such GSMA and GSPA in question. As per clause 19 as recorded the suitable arrangement should be suitable to both the parties in all respects. In this aspect, the decision as taken hurriedly on 11.01.2006, therefore, was one sided, specifically taking into consideration the background and/or events followed upto the sanctioning of the Scheme.

As noted, the control over the Board of the RNRL on 10.01.2006 was of RIL, as control over has not been handed over to Anil Ambani. On 26.01.2006, final copy of GSPA.