
(2009) 06 BOM CK 0052

In the Bombay High Court

Case No : Appeal No. 844 of 2007 in Company Application No. 1122 of 2006 in Company Petition No. 731 of 2005 and Appeal No. 1 of 2008 in Company Application No. 1122 of 2006 in Company Petition No. 731 of 2005

Reliance Industries Limited

APPELLANT

Vs

Reliance Natural Resources Limited (Formerly Global Fuel Management Services Limited)
 Reliance Natural Resources Limited (Formerly Global Fuel Management Services Limited) Vs Reliance Industries Limited

RESPONDENT

Date of Decision : 15-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144
Companies Act, 1956 — Section 186, 391, 392, 393, 394
Evidence Act, 1872 — Section 17, 18, 20
Income Tax Act, 1961 — Section 2(19AA), 2(41A), 42
Registration Act, 1908 — Section 17(2)
Specific Relief Act, 1963 — Section 6

Citation : (2009) 111 BOMLR 2507 : (2010) 2 MhLj 349

Hon'ble Judges : K.K. Tated, J;J.N. Patel, J

Bench : Division Bench

Advocate : Harish Salve, Milind Sathe, Suresh Gupte, Firdosh Pooniwala, Minakshi Grover and Kamaldeep Dayal, instructed by, Junnarkkar and Associates in Appeal No. 844 of 2007, Ram Jethmalani, Mukul Rohatgi, Mahesh Jethmalani, V.R. Dhond, Mahesh Agarwal, D.J. Kakalia, Manali Singhal, Saurabh Kripal, Bhavna Singh and Janki Thakkar, instructed by Mulla and Mulla in Appeal No. 1 of 2008, Mohan Parasharan, Additional Solicitor General, T.S. Doiabia, Vinod Joshi, Shailendra Sharma, Sandeep Dere and Ratika Mehra, for the Appellant; Harish Salve, Milind Sathe, Suresh Gupte, Firdosh Pooniwala, Minakshi Grover, Kamaldeep Dayal, instructed by y, Junnarkkar and Associates in Appeal No. 1 of 2008, Ram Jethmalani, Mukul Rohatgi, Mahesh Jethmalani, V.R. Dhond, Mahesh Agarwal, D.J. Kakalia, Manali Singhal, Saurabh Kripal, Bhavna Singh and Janki Thakkar, instructed by y, Mulla and Mulla in Appeal No. 844 of 2007, for the Respondent

Judgement

J.N. Patel, J.—Appeal No. 844 of 2007 is filed by Reliance Industries Limited (RIL) against Reliance Natural Resources Limited and Appeal No. 1 of 2008 is filed by Reliance Natural Resources Limited (RNRL) against Reliance Industries Limited, aggrieved by the judgment and order passed by the learned Company Judge on 15th October, 2007 in the matter of Company Application No. 1122 of 2006 filed by Reliance Natural Resources Limited against Reliance Industries Limited. As the two appeals filed by the parties to the application are filed impugning the judgment and order of the learned Company Judge, these two appeals are being disposed of by a common judgment.

Factual Matrix

2. The Company Application No. 1122 of 2006 came to be filed in Company Petition No. 731 of 2005 by Reliance Natural Resources Limited seeking appropriate orders and direction of the Company Judge for effective implementation of the scheme as a result of decision of the Company Judge in Company Petition No. 71 of 2005 dated 24th October, 2005 which was filed to obtain sanction of the Scheme of Arrangement (the Scheme) between RIL i.e. Reliance Industries Limited 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. The said petition came to be disposed of by the learned Company Judge by its order dated 9th December, 2005 sanctioning the scheme and inter alia directing 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). While sanctioning the the Scheme the learned Company Judge took notice of the salient features of the Scheme which reads as follows:

- (i) All the properties of the Demerged Undertaking transferred by the Petitioner Company immediately before the demerger become the properties of the respective Resulting Companies by virtue of the demerger;
- (ii) All the liabilities relatable to the Demerged Undertakings being transferred by the Petitioner Company, immediately before the demerger become the liabilities of the respective Resulting Companies by virtue of the demerger;
- (iii) The properties and the liabilities, if any, relatable to the Demerged Undertakings being transferred by the Petitioner Company are transferred to the respective Resulting Companies at the values appearing in the books of account of the Petitioner Company immediately before the demerger;
- (iv) Each of the Resulting Companies issues shares to the shareholders of the Petitioner Company (except certain Specified Shareholders) in consideration of the demerger on a proportionate basis;
- (v) All shareholders of the Petitioner Company (except certain Specified Shareholders) shall become the shareholders of each of the Resulting Companies by virtue of the demerger; and

(vi) The transfer of the Demerged Undertakings will be on a going concern basis.

Thereafter considering the objections raised by persons interested in the subject matter and examining the scheme, the learned Company Judge considered the same in the light of the decision rendered by the Supreme Court in the case of *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, and was pleased to deal with the objections raised in the matter and found that the various objections raised for sanctioning the scheme are untenable as 98.81% of the shareholders have in their commercial wisdom accepted the Scheme and observed that it is not for the Company Court to decide whether a better Scheme could have been proposed by the Company. The objectors have been unable to indicate as to how the Scheme is unfair or how they are prejudiced by the Scheme of Arrangement and came to the conclusion that the Scheme of Arrangement is fair and reasonable from the point of view of the commercial decision taken by an overwhelming majority of the shareholders. Further, that the Scheme cannot be said to be against public policy. In fact, it found that substantially there is no real objection to the Scheme but they are insisting that there should be a further and better disclosure of material particulars which the learned Company Judge found have been sufficiently disclosed and thereby accorded its sanction to the Scheme after examining the same and directing the Petitioner Company and the resulting Companies to comply with the required provisions of law as pointed out by the Regional Director of Companies for which the Petitioner Company gave an undertaking and the company petition came to be allowed. One important factor of which note is required to be taken while dealing with this appeal is that when the sanction for the Scheme for demerger was sought by the companies, a very important issue was raised as one of the main objections that the Scheme was a family arrangement arrived at to the prejudice of the shareholders and the learned Company Judge held that it was unnecessary to deal with those objections as the objectors have confined themselves only to three contentions. Therefore, there can be no hesitation on the part of this Court to concur with the learned Company Judge while dealing with Company Application No. 1122 of 2006 that the Memorandum of Understanding between the two brothers with the mediation of their mother Mrs. Kokilaben Dhirubhai Ambani was an integral part of the Scheme for the reason that the Scheme for demerger was presented to the Court due to internal disputes between Ambani brothers after the dispute came to be settled through mediation of their mother Mrs. Kokilaben resulting in the Memorandum of Understanding / Family Arrangement dated 18th June, 2005 and this fact was well within the knowledge of the shareholders of Reliance Industries Limited which filed the application for demerger of the Petitioner Reliance Industries Limited into two corporate groups led by Mukesh Ambani and Anil Ambani. We are required to observe this right at the beginning for the reason that one of the grounds raised in the appeal filed by Reliance Industries Limited being Appeal No. 844 of 2007 is that the Memorandum of Understanding recording family arrangement is a private document and could not have been considered by the Company Judge for the purpose of determining the issues

raised in the Company Application No. 1122 of 2006 filed by RNRL and that the terms and conditions of the MOU cannot be considered in a company application as it does not fall in the corporate domain.

3. It is the case of RNRL that they were required to file Company Application No. 1122 of 2006 and to seek intervention of the Court for issuing appropriate orders and necessary directions to ensure smooth implementation of the Scheme in so far as it relates to the demerger of Gas Based Energy Undertaking from the original company RIL to RNRL and in the Scheme approved by the Court the same has been demerged i.e., the "Gas Based Energy Resulting Company" or as the "2nd Transferee Company". The dispute between the two companies relates to proper implementation of the transfer of the Gas Based Energy Undertaking from the original company RIL to the Applicant, earlier known as Global Fuel Management Services Ltd.

4. It is also contended that one of the arrangements between the two companies under the Scheme was that the gas will be supplied by the RIL to RNRL which would then be supplied by RNRL to REL and its affiliates and it related to exploitation of oil and gas reserves which belong to RIL in the KG D6 Basin or elsewhere. According to the RNRL it was agreed between the parties that the gas of 28 MMSCMD which quantum could go to 40 MMSMCD in case the NTPC contract for 12 MMSCMD does not materialize, would be supplied at the same price and on the terms no less favourable to those applied to NTPC where a similar contract of supply of gas was to be executed and that an agreement to this effect came to be executed between RIL and RNRL on 12th January, 2006. It is this agreement dated 12th January, 2006 which is not acceptable to the Applicant RNRL as according to the RNRL this agreement has been drawn by RIL on terms which are unfavourable to the transferee i.e., the Applicant which is evident from the fact that on the date the agreement was executed two out of three directors of the Applicant belonged to RIL group being an executive and consultant of RIL respectively.

5. It is the case of the Applicant that the agreement should have contained similar or same terms applicable to RIL's bid offering supply of 12 MMSMCD gas to NTPC ("NTPC Contract Terms") and as the same does not conform to the same terms the agreement dated 12th January, 2006 is not only unfair and adverse but also commercially unviable for the Applicant.

6. It is the case of the Applicant that under the Scheme the gas to be supplied to the Applicant RNRL is primarily to be used as fuel in power generation plants of REL and its affiliates relying on the gas reserves of RIL and the availability of gas from the said reserves,

7. It is their case that the first of such plant is proposed to be set up at Dadri, U.P., by REL the approximate cost of which is Rs. 20,000 crores but structured in such terms that it is unknown and it is uncertain whether gas would at all be available to the Applicant on setting up this plant after making huge investment

and for how long and in what circumstances and, therefore, due to such uncertainty no prudent businessman can invest such huge sums of money and this defeats the very scheme sanctioned by this Court to demerge the Gas Based Energy Undertaking as this will be completely frustrated and, therefore, the jurisdiction of the Company Court is invoked to ensure the implementation of the scheme and the agreement and arrangement between the parties in true spirit. It is the case of the Applicant that they are required to approach the Company Judge to suitably modify the agreement dated 12th January, 2006 so as to make it commercially viable and in accordance with the NTPC Contract Terms so that the Applicant is secured about supply of gas to them and their associates so that they can proceed with their project at Dadri. In the application, the Applicant has highlighted the background facts leading upto (a) the scheme of arrangement, (b) reorganization and segregation of RIL's business and undertaking, (c) status of implementation of the scheme, (d) directions of the Company Court to make the scheme workable. Thereafter the Applicant has pleaded on what basis the Court can ensure the smooth implementation of the scheme as the parties have failed to arrive at appropriate and suitable arrangement in spite of numerous meetings and voluminous correspondence which is annexed to the application as Exhibit "F". The Applicant has put the blame on RIL having failed to evolve an acceptable, appropriate and suitable arrangement which would give effect to the Scheme and provide the basis for the existence of the Applicant by allowing it to step into the shoes of RIL as the supplier of gas for the Gas Based Power Projects of REL.

8. It is the case of the Applicant that the proposal of RIL to execute an agreement with the Applicant titled as "Gas Supply Master Agreement (GSMA)" to which is annexed a draft of an actual Gas Sale and Purchase Agreement (GSPA) to be entered into by RIL directly with entities engaged in or proposing to engage in generation of gas based power. It is contended that the GSMA was prepared by RIL and finalized and executed by RIL not only on its behalf but also on behalf of the Applicant without the terms thereof having been vetted by or even considered by REL or by Shri Anil Ambani or the nominee of Shri Anil Ambani on the Board of the Applicant and this draft GSMA is not acceptable to the Applicant due to serious differences on critical issues all of which were unilaterally reflected in favour of RIL and that it is patently illegal and in breach of trust which RIL and its representatives had visavis the Applicant and the millions of persons who have become shareholders of the Applicant Company. The Applicant has relied upon various correspondence to support their case which has been highlighted in the application. This application was heard at length by the learned Company Judge and finally came to be decided on 15th October, 2007. The decision of the learned Company Judge thereafter is not only impugned by the Applicant RIL but also by RNRL taking exceptions to certain findings arrived at by the learned Company Judge.

9. In the midst of hearing, the Union of India sought intervention in the matter. Initially the application filed by the Union of India was contested by the parties

on factual and technical grounds and this Court after hearing the learned Counsel for the parties permitted the Union of India to join as intervener in the appeal and not as party respondent but for the limited purpose of assisting this Court in the matter relating to Production Sharing Contract between the Union of India and Reliance Industries Limited with particular emphasis to Article 21 of the said contract as this Court was of the view that the pricing and distribution of gas has far reaching consequences and it is in the larger public interest for the court to seek assistance of the Union of India in this context.

10. We have heard the learned Counsel for the parties and the learned Additional Solicitor General of India for intervener at great length.

11. While dealing with the Company Application No. 1122 of 2006 filed in Company Petition No. 731 of 2005, the learned Company Judge has examined the case in depth till the sanctioning of the Scheme by the Court leading to filing of Company Application No. 1122 of 2006. After referring to the pleadings of the parties and the various interim applications and orders and the documents, the learned Company Judge has come to the conclusion that RIL who is respondent in the said application have been unable to deny and/or to place on record any contra material to oppose the claim of MOU. This conclusion of the learned Company Judge was formulated on the basis of correspondence between the two companies which emerged after the sanctioning of the Scheme for demerger and has been placed on record as Exhibit "F" collectively. It is a fact that the Memorandum of Understanding which is now tendered in appeal by consent of the parties and marked Exhibit1 was not tendered by either of the parties basically on account of a solemn understanding between the two brothers Mukesh Ambani and Anil Ambani and their mother Kokilaben Dhirubhai Ambani that the bunch of correspondence tendered in support of the application Exhibit "F" is in reference to the articulation and finalization of the GSPA which was to be based on the terms and conditions as agreed between the parties in the Memorandum of Understanding. As one of the main grounds of challenge to the order of the learned Company Judge in this appeal is that when the Memorandum of Understanding (MOU) dated 18th June, 2005 between the parties was not produced before the Company Court, but the Company Judge has relied on the same. We may like to mention here that after filing of the Memorandum of Understanding Exhibit - 1, which was by consent of the parties, this Court being an appellate court could have remanded the matter to the Company Judge for fresh consideration of the application filed by RNRL but what we find is that even for want of MOU being filed before the Company Judge, the relevant part of the MOU relating to the terms and conditions of which the parties were supposed to take into consideration while formulating the GSMA and GSPA in keeping with the terms and conditions of the Production Sharing Contract which was entered into between the Reliance Industries Limited and the Union of India for Block KGD6 in the year 2000 is already reflected in the correspondence Exhibit "F" collectively between the two companies.

12. The conclusion arrived at by the learned Company Judge that the MOU / Family Arrangement and this must have a binding effect on the two companies after sanctioning of the Scheme for demerger is assailed on the ground that the Company Judge has taken into consideration decisions rendered by the Supreme Court in the case of Kale and Others Vs. Deputy Director of Consolidation and Others, ; K.K. Modi Vs. K.N. Modi and Others, was not correct as these authorities relate to the Memorandum of Understanding entered between the family members of Late Dhirubhai Ambani. At the most it is only a family arrangement between various members of Ambani family. By placing reliance on the decision rendered by the Supreme Court in the case of V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, and other cases like Spindle Fabrik Sussen v. Sussen Textile Bearings Ltd. 1989 (2) CLA 202; Rolta India Ltd. and another Vs. Venire Industries Ltd. and others, ; IL and FS Trust Co. Ltd. Vs. Birla Perucchini Ltd., in order to demonstrate that the MOU between the family members relating to the family arrangement operates in the private / personal domain and is not binding on a corporate body and as the said MOU Exhibit - 1 does not fall in corporate domain it could not have been considered to be the basis of a "suitable arrangement" to be entered into between the two companies formulating GSPA and GSMA. It has been turned down by the Company Judge on the basis of the correspondence between the two companies which is filed on record as Exhibit "F". It was submitted on behalf of the Applicant that as the correspondence between the officials of the two companies (Exhibit F) is an admission by the parties and can be treated as pleadings which are not disputed and in clear terms refers to the MOU as the basis of finalizing an agreement between the parties as contemplated under Clause 19 of the Scheme to arrive at a suitable arrangement which is incorporated in Part VI of the Scheme of Arrangement for demerger under Sections 391 - 394 of the Companies Act, 1956 - Sanction by the Court - particularly Clause 19 of the Scheme relates to the agreements and specifically mentions that the resulting companies will have the right to use the "Reliance" brand and logo and suitable agreements will be entered into in this regard. Further, suitable agreements would also be entered into in relation to (i) noncompetition in relation to the business of the Demerged Undertakings and the Remaining Undertaking; (ii) supply of gas for power projects of Reliance Patalganga Power Limited and REL with the Gas Based Energy Resulting Company; and (iii) Transfer of leasehold rights of RIL to the relevant Resulting Company with respect to the relevant Demerged Undertaking.

This led the learned Company Judge to hold that when the parties have acted upon the said MOU and principally by moving such Scheme of Arrangement, which has resulted into demerged company like the respondents and transferee company like the applicants and others, they are bound by the basic terms of the MOU subject to arrangement for its actual implementation on such suitable terms and conditions and that the GSMA and GSPA ought to be on the lines of the MOU and that it has to be in consonance with the production sharing contract with the Union of India.

13. In the context of valuation of natural gas, the learned Company Judge has referred to the various Articles which have bearing on the GSMA and GSPA to be signed between the parties and with special emphasis on Article 21.6 which relates to valuation of natural gas under the Production Sharing Contracts. It has held that as per the Production Sharing Contract, the price of natural gas shall be determined as provided in Article 21 and then went on to conclude that as the production sharing contract and its contents were well within the knowledge of the two companies and its officials and in spite of this as recorded in Clause 19 of the Scheme of Demerger could not be finalised, both the companies as well as the shareholders agreed to approve the Scheme and it was accordingly sanctioned by the Court and having once accepted the Scheme in all respects which has been acted upon and has been working smoothly except the issue in question i.e., GSMA and GSPA between the two companies, they cannot deviate from the terms and conditions of the production sharing contract entered with the Union of India and they are bound to enter into a suitable arrangement for sharing the gas by entering into a GSMA/GSPA as per the broad outlines on which they have agreed to translate it into GSMA/GSPA and further held that a suitable arrangement cannot be understood in the context that it can be imposed by one company on the other though the issue of suitability of arrangement cannot be beyond the Scheme and the government policy pertaining to supply of gas as it was clear to both the parties even on the date of sanction of the scheme that the draft agreements and/or arrangement through GSMA/GSPA have been the matter of discussion and deliberation which were based upon the basic terms of the MOU and thereafter it has proceeded to refer that the said suitable arrangement for supply of gas as reflected in Clause 19 of the Scheme as provided by the MOU has to be in accordance with the International Best Practices and bankable in International Financial market. Taking into account the basic ingredients of contents of the MOU i.e., price, tenure, reliability, etc., and that the Applicant RNRL in turn engaged in business of supply of gas to REL and its affiliates for the purposes of generation of power and thus accepted the contention of the Applicant to their entitlement for such an arrangement which the parties could not formulate and enter into such agreement which having not materialized has driven the Applicant to approach the Company Judge for implementation of the Scheme particularly in relation to suitable arrangement as agreed upon in Clause 19 of Part VI of the Scheme. The learned Company Judge has taken pains to refer to various authorities while considering the rights and obligations of the parties under the Scheme based on documents and came to the conclusion that the application for ensuring the smooth implementation of the Scheme was maintainable and the Company Judge has jurisdiction to try the same. As in Company Application No. 1122 of 2006 the Applicants have invoked basically Section 392 of the Companies Act which is an offshoot of the Scheme sanctioned by the Company Court by its order dated 9th December, 2005 for demerger of four undertakings of Reliance Industries Limited (RIL) - Demerged company and their transfer to four transferee companies as on going concerns (resulting companies) and that under the Companies Act there is no provision

under Sections 391 - 394 which deals with the procedure and power of the Company Court to sanction the Scheme which falls 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 contentions raised that the present application u/s 392 of the Companies Act as filed by the applicant is without jurisdiction. The learned Company Judge further observed that the parties cannot be rendered remediless and, therefore, the Company Court considering the Scheme and purpose of Chapter V and basically Sections 391 - 394 has ample power and jurisdiction to supervise the Scheme as sanctioned under the Companies Act. The learned Company Judge has further referred to a decision in *Re : Larsen & Toubro Ltd.* reported in 2004 (121) CompCas 523, relating to the scope of Sections 391 - 394 of the Companies Act while sanctioning the Scheme of Arrangement and the decision rendered by the Supreme Court in the case of *S.K. Gupta and Another Vs. K.P. Jain and Another*, wherein the Supreme Court has elaborated the purpose and object of Section 392 in details. In the case of *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, in which the Supreme Court referred to *S.K. Gupta's* case in paragraph 28 of the reported judgment. In the case of *Indian Hardware Industries Ltd., v. S.K. Gupta and Anr.* 1981 (51) CompCas 51, wherein the Delhi High Court also after referring to *S.K. Gupta's* case, the scope and power of the Court to give directions and if necessary to modify the Scheme with the only limitation that such directions or modifications must be for the proper working of the compromise or arrangement. It also referred to the case of *IndTelesoft Private Limited v. Jawad Ayaz* 2003 (43) SCL 478 wherein the Karnataka High Court had an occasion to deal with the scope of these provisions to the extent that the Scheme can be modified by the Court either at the time of order or after it is sanctioned. The learned Company Judge also placed reliance on the case of *D.S. Venkatraman v. Gujarat Industries Pvt. Ltd.* 1977 (47) CompCas 352 that the party can well approach the Company Court if any difficulty arises in the workingout of its scheme and the Court can modify the same so that its purpose can be achieved for the mutual advantage and benefit of the company and the class of its creditors or members who are parties to it and various other authorities as mentioned in the impugned judgment which need not be reiterated by us and came to the conclusion that the Company Court is vested with the jurisdiction to invoke its power under Sections 391 - 394 for proper implementation of the Scheme.

14. The learned Company Judge has considered the rival contentions of the parties by tabulating the protested points in context to the provisions in the Scheme/NTPC contract, provision in 1212006 GSMA and the proposed revision sought in the matter in detail and after analyzing the same in context with various clauses of the of the production sharing contract and analyzing the terms and conditions in the GSMA dated 12.1.2006 and what is being claimed by the Applicants and found that the MOU in specific terms which is evident from the correspondence relied upon by the parties specified the quantity and terms of

GSMA i.e. The quantum of gas to be supplied, the terms for which it is to be supplied which cannot be curtailed but for frustration of the contract due to force majeure. It has also discussed the identity of buyer and/or meaning of affiliate and use of gas for the power plants of RPPL and REL in the impugned judgment and order. The learned Company Judge in reference to the production sharing contract with the Union of India has also considered to what extent it can regulate and intervene and how it can affect the GSMA and GSPA between the parties and has come to the conclusion that subject to the terms and conditions of the production sharing contract and the government policy, the contractor is the owner of his share of the gas, though the natural resources are within the control and ownership of the Government. The contractor has full right to dispose of the gas to produced according to his commercial wisdom to the third person or parties, but only from his share and that is after the respective profit share to the Government as agreed. The contractor has, therefore, full freedom to market his portion of the gas i.e. RIL and on the aspect of pricing of gas it has discussed Article 21 of the PSC and has come to the conclusion that the price so fixed and agreed by the RIL and RNRL is based on the NTPC contract and it was agreed and determined by following the then procedure and Government policy. Therefore the competitive bidding prices, as followed cannot be overlooked, based upon the then declared policy or decision. Therefore, in so far as clause relating to approval of the Government is concerned it has arrived at a finding that once the parties arrive at a particular settlement which is suitable to both and if it falls within the ambit of Government policy and/or Regulation, there is no reason why even the Government should not grant approval. As observed by the learned Company Judge, the profit share of contractor and/or of Government varies from time to time and/or year to year. There is no fixed profit share of gas. The fixing of price therefore cannot be of permanent nature even by the Government and/or even by the contractor. The fluctuation of the market and based on various factors need to be revised and considering from time to time the commitment of price therefore also throughout particular contract period and/or even for 17 years as prayed by the Applicant in the present case, is also not acceptable. On the issue of supply, it has concluded that the respondents cannot supply the gas unless there is actual production and after deducting the Government's profit share and the balance be reserved subject to the certificate as per PSC the contractor respondent would be in a position to supply to the respective supplier's as agreed based upon valid and binding contract and in context to the present case, 12 MMSCMD to the NTPC and 28 MMSCMD to the applicant, part from the other ratio. Such supply therefore would also depend upon the actual recovery and certification of such gas share of the contractor and has observed that in this background it is difficult for any party to make any confirm commitment without having the actual certified gas for such transfer and/or sale and expressed its inability to to direct the respondents to provide, supply the gas in such fashion without ascertaining the actual market position and actual availability of the gas. The positive direction from the Government to supply fixed quantity of gas out of their share and/or remaining shares to

particular sectors and/or Undertakings just cannot be overlooked and the respondents need to respect and consider the demand or direction made by the Government, occasion comes and, therefore, the learned Company Judge held that the contractor has to first meet the requirements of the Government and it is only thereafter he is entitled to his share of the gas being the share of profit which he can dispose of as per the terms and conditions of the PSC particularly in reference to Articles 15 and 16. After taking into consideration all these factors the learned Company Judge has thereafter come to a finding that the availability of the gas to the contractor would be subject to the Government share and the price at which such gas will be valued is also need to be approved by the Government to ensure all transactions are entered into on "arms length basis" at arms length price, which, according to the learned Company Judge also stands regulated by the Government and upheld the contention of the Respondents as regards the pricing and the Government approval and tenure based upon the terms and conditions of the PSC and the Government Policy in question with a rider that though this may influence the suitable arrangement to be entered into between the parties which has to be based upon the MOU and the Scheme. The learned Company Judge has expressed its doubt as to the entitlement of the applicant to supply and/or sell of 40 (28 + 12) MMSCMD of gas but in so far as the price is concerned, it has observed that the parties must sit and decide together as the price at US D 2.34 per MMBtu has already been rejected by the Government and that the Respondents - RIL cannot be compelled to commit such breaches to face the risk of termination of the PSC itself and, therefore, the provisions of GSMA that RIL would enter into commitment for sale of gas upto 28 MMSCMD as agreed to provide to RNRL to the extent of 28 MMSCMD for 17 years from RIL's entitlement is just and proper and further observed that the Applicants RNRL is entitled, as agreed between the parties RIL and RNRL from RIL's entitlement and share and not otherwise, which, in our opinion, cannot be a issue between the parties. The learned Company Judge has also taken cognizance of the fact that RNRL cannot trade in gas and their entitlement of gas is only in respect of supply of gas mutually for their power plants.

15. In respect of the standing of the RNRL the Court has observed that it is not a shell company. The context in which such observation has been made is a matter of dispute in the appeal. The learned Company Judge has found that the resolution by the RIL Board dated 11.1.2006 and 12.1.2006 and the execution of GSMA/GSPA is against the Scheme for which he has spelt out reasons and has concluded that the agreement has to be a bankable document. The other issues dealt by the learned Company Judge relating to allegations of fraud and interim orders need not detain this Court as it is not necessary to address the issues raised in the application.

16. In our view, the learned Company Judge, ought to have disposed of the application by giving appropriate directions and by resolving the controversy relating to the quantity of gas, the period of supply and the price factor rather than leaving the parties to renegotiate a suitable arrangement which they had

failed to do so in the past in spite of voluminous correspondence and negotiations which was the very basis for which the Applicant approached the Company Court.

17. We are informed by the learned Counsel for the parties that after the decision of the learned Company Judge, the parties did make an attempt to renegotiate the GSMA/GSPA but could not finalize the same which led to filing of the appeal by RIL and thereafter by RNRL taking exception to certain conclusions drawn by the Company Judge which they found to be unfair and not in their interests.

18. The judgment and order passed by the learned Company Judge has been challenged by Reliance Industries Limited mainly on the ground that the Company Court lacks jurisdiction u/s 392 of the Companies Act, 1956 to entertain such an application and the Company Judge erred in giving a directing / holding that the parties must and/or it would be appropriate for both the parties to renegotiate, reconsider and settle the terms of the GSMA / GSPA and enter into a suitable arrangement in spite of the fact that the RIL has placed a suitable arrangement as agreed between the parties which was finalized in the meeting of the Board of Directors of held on 11.1.2006 and modified on 12.1.2006 and though the same was never challenged. The learned Company Judge further erred in holding that the full majority decision arrived at in the Board of Directors meeting dated 11.1.2006 is not proper on the ground that while taking the decision certain improprieties were committed in the two Board meetings. Therefore, it cannot be said to be bonafide. The second important ground of challenge is that the MOU and its contents are binding on both the parties and holding that Mr. Mukesh Ambani and his Group of Companies have already acted upon the MOU at the pre and post stages of MOU and pre and post stages of the Scheme and, therefore, the Appellants were bound by the MOU. It is the contention of the Appellants that the learned Judge erred in holding that the MOU/ family arrangement is binding on the Appellants without it being on record or its contents being known. On the other hand, the MOU/ family arrangement was not binding on the Appellant company and the conclusion arrived at by the learned Judge based on the correspondence being Exhibit F collectively. It is further contended that the Appellant Company was not a party to the alleged family arrangement / MOU. Therefore, it cannot be held to be bound by what has been the family settlement between the family members of late Dhirubhai Ambani and such MOU/family settlement between the family members or even between the shareholders or even between the promoters without incorporating in the Articles of Association was not binding on the company in view of the decision rendered by the Supreme Court in the case of V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, . One of the important issues raised in the grounds is that the learned Judge has presumed that such a MOU/ family arrangement exists by placing reliance on documents (Exhibit "F" collectively) though the said family arrangement / MOU was not on record or even produced by the respondents in the proceedings and, therefore, it could not

have been inferred that it was not in dispute between the parties as the two parties before the Court were corporate bodies and not individuals and that the suitable arrangement referred to in Clause 19 of the Scheme has no reference whatsoever to the family arrangement/ MOU. Therefore, the learned Company Judge erred in permitting the respondents to rely on the purported document Exhibit "F" without insisting upon proof of the document.

19. Another ground on which the impugned judgment and order of the Company Judge is challenged is that the learned Judge held that there was nontraverse of allegations and, therefore, the family settlement was binding on the Appellants though the Appellants in their affidavit in reply particularly paragraph 6.5 and 6.6 have specifically denied all the pleadings in that context and have reiterated that 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 the two brothers and that 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 of the Board of Directors of the Demerged Company who were not bound by any "arrangement" as between two groups of promoters and that 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 of paramount importance and had taken such decision as in the best judgment of the Board according to their duty as the Board with the shareholders interests being of utmost importance and, therefore, the learned Judge could not have held that the family settlement was binding on the Appellants and, therefore, the finding of the learned Company Judge is erroneous to the extent that he held that by doctrine of nontraverse the MOU/family arrangement was accepted. It is submitted that such an inference could not have been drawn as the said document was in the private domain which is evident from the fact that the said MOU was not produced by the respondents and the contents of the same remained in private domain and that it was never considered to be part of proceedings of the Board of Directors or that it was suggested that the MOU should be brought to corporate domain before the shareholders meeting is held and the Scheme approved. It is, therefore, contended that the major issues between the parties were extensively discussed from June, 2005 till January, 2006 and that there was no agreement on any of the issues till January, 2006 as regards the identity of seller and buyer, quantity, price/Government approvals, tenure, due performance (liquidated damages) and, therefore, the learned Judge ought to have taken note of the fact that the correspondence Exhibit "F" clearly show that the respondents have at that stage also raised the very same issues (protested points) which the learned Judge found justified in inclusion in suitable arrangements and, therefore, the contention of the Respondents on Exhibit "F" were clearly untenable as there was no resolution of these issues and by the proceedings of the Company Application the Respondents were seeking directions from the Company Court that the GSMA dated 12th January, 2006 be substituted by a draft at Exhibit "J" to the

Application. It is submitted that the learned Judge has not taken into account the correspondence between the parties placed before the Court at Exhibit "F" collectively in its proper perspective and has arrived at an erroneous finding that the MOU/family arrangement was binding on the Companies and that the parties ought to have entered into a GSMA and GSPA in terms of the MOU and, therefore, the finding of the learned Judge that the family arrangement was in any event relevant for the interpretation of the Scheme. It is submitted that there is no ambiguity whatsoever. The expression "suitable arrangement" is not at all ambiguous. It posits an arrangement which would be suitable for both and that while relying upon the so called MOU/ family arrangement the learned Company Judge overlooked that the parties to the MOU/family arrangement never intended to bring it within the corporate domain and, therefore, the scheme which was sanctioned by the Court does not refer to the said MOU/family arrangement and for want of evidence, the same could not have been relied upon.

20. Therefore, the learned Company Judge ought to have dismissed the Company Application and vacated the interim orders forthwith.

21. In the appeal filed by Reliance Natural Resources Ltd., i.e. Appeal No. 1 of 2008 is mainly on the ground that once the learned Company Judge having allowed the application filed by RNRL, it erred in refusing the reliefs as prayed for by observing that the Company Court is not expert and has no say in such technical and complicated nature of transaction, business and/or clauses of gas supply agreement or such other agreement having national and international markets policies failed to grant the relief prayed for by the Appellants. It is further contended that the learned Judge ought to have accepted the definition of "Affiliate" as incorporated in the NTPC contract in spite of holding that the NTPC contract and its contents as reflected in the MOU could not have been overlooked and on the other hand observed that the Respondents' requirement of 51% share of RPPL or REL cannot be said to be unjust or bad and, there was force in the submission of the learned Senior Counsel of RIL that the clause relating to "Affiliate" cannot be said to be contrary to the Scheme and that though the learned Company Judge found favour with the application filed by RNRL it failed to grant the relief sought for particularly modifying the GSMA and GSPA to make it suitable arrangement and an agreement as mentioned in the MOU/family arrangement and, therefore, erred in holding that the terms and conditions mentioned in the MOU and GSMA need to be suitable for both the parties subject to the Government's policy and national, international practice in supply of gas or such other products and the Government's approval in view of the NELP & PSC and such related Government policies and ought to have given necessary directions to amend the clauses to make the scheme workable so that the Gas Based Undertaking is in fact transferred to the Appellants RNRL in terms of the Scheme for demerger sanctioned by the Company Court and that aggrieved by the judgment to the extent it refuses to grant reliefs and to the extent it makes observations conflicting with the observations made in favour of

the Appellants and which are inconsistent with the MOU and the Scheme and that this Court be pleased to suitably modify the GSMA/GSPA so as to make the same into a suitable arrangement consistent with the MOU and the Scheme which would be a bankable document and sure that the Gas Based Energy Undertaking is transferred to the Appellants as a result of which the Resulting Company or its Undertakings would be provided with the gas as agreed to achieve the object and purpose of the Scheme.

Points for determination:

22. The points which arise for our determination are as follows:

1. Whether the Company Court has jurisdiction to Companies Act, 1956?

2. What is the suitable arrangement between the two companies in the matter of supply of gas for the power projects of the resulting company and its affiliates?

23. The Company Judge has extensively considered the issue of maintainability of application u/s 392 while dealing with the same and has given a finding that the application is maintainable which was required to be filed to seek intervention of the Court for issuing appropriate orders and necessary directions to ensure smooth implementation of the Scheme in so far as it relates to the demerger of Gas Based Energy Undertaking from the original company RIL to RNRL and in the Scheme approved by the Court the same has been demerged i.e., the "Gas Based Energy Resulting Company" or as the "2nd Transferee Company", particularly when the dispute between the two companies relates to proper implementation of the transfer of the Gas Based Energy Undertaking from the original company RIL to the Applicant, earlier known as Global Fuel Management Services Ltd., and for that purpose has placed reliance and referred to various decisions which have been spelt out in the impugned judgement and order and particularly laid emphasis on the decision rendered by the Supreme Court in the case of S.K. Gupta and Another Vs. K.P. Jain and Another, which has been consistently followed by the Hon"ble Supreme Court as well as various High Courts and by the Delhi High Court in In the case of Indian Hardware Industries Ltd., v. S.K. Gupta and Anr. 1981 (51) CompCas 51 and by the Karnataka High Court in the case case of IndTelesoft Private Limited v. Jawad Ayaz 2003 (43) SCL 478 and so on.

It has arrived at a conclusion that a party cannot be rendered remediless. Therefore, the Company Court considering the scheme and the purpose of Chapter V and basically Sections 391 - 394 has ample power and jurisdiction to supervise the scheme as sanctioned under the Companies Act.

I. Submissions and arguments on maintainability.

24. On behalf of the appellant RIL it has been specifically contended that such an application is not maintainable for the reason that if the applicant RNRL wanted the Court's assistance for implementing the scheme if it is found that the scheme is incomplete and its object is not fulfilled. According to the learned

Counsel appearing for the appellant RIL, the scheme sanctioned by this Court was for the demerger of the four specified undertakings of RIL on a "going concern" basis as on the Effective Date. This is made clear in clause C (vi) of the Preamble to the Scheme and Clause 4 in the operative part of the Scheme providing that the Demerged Undertakings "shall be deemed to be transferred to and vested in respective Resulting Companies on a going concern basis" That being the case the Scheme was not dependent upon "suitable arrangements" postulated in Clause 19 being worked out. According to the learned Counsel appearing for the appellant RIL, even if the arrangement for supply of gas under Clause 19 had not been put in place or for any reason could not be worked out, it would have had no effect on the demerger and transfer of the undertaking envisaged therein or the implementation of the scheme. The Demerger, in so far as the Gas Based Energy Undertaking is concerned, is the demerger of the undertaking as defined in Clause 1.12 and the assets specified in Part A, Schedule II, both of which have been duly transferred and nothing has remained executory as far as the implementation of the Scheme is concerned. Therefore, nothing survives in so far as it relates to implementation of the scheme in the first place and the application ought not to have been entertained. It is the contention of the RIL that the shareholders of the demerged company left it to the Board to put in place "suitable arrangements" for supply of gas to the power plants of RPPL and REL and the Board in its commercial wisdom and collective judgment has approved and put in place the various agreements pursuant to the resolution passed at the Board meeting held on 12th January, 2006 which are as under:

- (i) Trade Mark Management Agreement and Supplemental Agreement.
- (ii) Board and Non Compete Agreement (together with a Supplemental Agreement thereto); and
- (iii) Gas Supply Master Agreement and form of Gas Sale and Purchase Agreement (as amended by the Agreement dated 27th January, 2006).

25. It is, therefore, contended that leaving aside the question whether there is any merit in the contention of the RNRL questioning the GSMA, the fact remains that in terms of Clause 19 requisite suitable arrangements as, in the opinion of the Board of RIL, were the suitable arrangements, were actually and factually entered into and put in place. RNRL has raised an issue about implementation of Clause 19 and suitability of arrangement in relation to "supply of gas for power projects of RPPL and REL". Clause 22 of the Scheme provides for modification of the Scheme and a procedure for that purpose is prescribed. The application made by RNRL seeking modification to the GSMA executed in compliance of the provisions of the Scheme, is in substance, an application seeking modification of the Scheme for which purpose, if at all, procedure under Clause 22 is to be followed or a fresh scheme is required to be submitted. The Board of Directors and the shareholders, in their wisdom formulated and approved the Scheme of Demerger for transfer of Demerged Undertakings (including Gas Based Energy Undertaking) on a "going concern" basis. The Gas Based Energy Undertaking has

been defined in the scheme and there is no dispute that the said Undertaking, as such, stands transferred. An arrangement if it had been stipulated in the Scheme, the shareholders would have had the opportunity to consider and if, in their commercial wisdom, it was necessary to provide such arrangements specifically in the Scheme, they would have accorded their approval thereto. However, no such suggestion was made by any shareholders at any stage and while approving the Scheme, the shareholders and creditors left it to the Board to put such arrangements as were in the opinion of the Board, suitable, to the purpose of supplying gas for the power plants of RPPL and REL.

26. The learned Counsel for RIL submitted that the aforesaid submissions are fortified by the judgment of the Supreme Court in the case of Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others, wherein the Hon''ble Supreme Court has observed as follows:

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 a proper working of the compromise or arrangement, it cannot be understood as a power to make substantial modifications in the Scheme approved by the Members in a meeting called in terms of Section 391 of the Act. 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 of 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 therefore.

Viewed in this context, the Company Application u/s 392 of the Companies Act, for amendment of an Agreement made pursuant to the Scheme is not maintainable. Contentions of RNRL have also to be viewed keeping in view the following factual and regulatory matrix and regime, as set out in greater detail in the following Sections.

27. Per contra it is the contention of the RNRL that RNRL seeks to enforce the terms of the Scheme of Arrangement as sanctioned by this Hon''ble Court vide its order dated 9122005. As per the said Scheme RIL was required to execute a suitable arrangement for the 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. The timing and manner of the impugned agreement as well as several clauses of the same render the same virtually unworkable. It is in this circumstances that RNRL has approached this Hon''ble Court seeking suitable reliefs.

28. It is the further contention of RNRL that the power of the Company Court u/s 392 of the Companies Act is of the widest amplitude. Reference may be had in

this regard to the judgment of the Supreme Court in the case of S.K. Gupta and Another Vs. K.P. Jain and Another, . It is in fact the duty of the Court to ensure that the Scheme is fully implemented. In this case, it would imply that this Hon"ble 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.

29. It further submitted by the learned Counsel appearing for RNRL that Section 392 provides that in case the Scheme is not implemented, then the Court would have the power to wind up the company (RIL in this case). RNRL is not suggesting that RIL should be wound up but contends that this provision only shows the width of the power and the ultimate consequence envisaged under the Companies Act for non implementation of the Scheme. The power of the Court is only limited to extend that it cannot change the basic structure or character or purpose of the Scheme. Subject to this limitation, the power is not limited. During the course of argument, a reference was made to the judgment of the Supreme Court in the case of Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others, . However, the said judgment is not applicable to the present case. Firstly, even this judgment accepts the principle that the Court has wide powers u/s 392 though the same are circumscribed. Secondly, the said judgment does not refer to Gupta's case which was a binding decision of three hon"ble judges. Thirdly, the said judgment is distinguishable on its facts.

30. It is further submitted by the learned Counsel appearing for the RNRL that Mr. Salve's contention that the Court's power u/s 392 has to be exercised within the parameters of the judgment of the Supreme Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., is misplaced. The Mafatlal judgment applies at a time before the sanction of the Scheme while Section 392 applies at a stage after the sanction. The said power extends to all Scheme of Arrangement and does not exclude Arrangements arrived at u/s 394 of the Companies Act. There is no warrant or authority of any Court permitting such a construction of Section 392.

31. Let us first examine the authorities cited at the Bar on this issue by quoting the relevant paragraphs from the reported judgments in order to appreciate the rival contentions of the parties.

31.1. S.K. Gupta and Another Vs. K.P. Jain and Another,

16...The Court has to reach an affirmative conclusion before acting u/s 392(2) that the compromise and/or arrangement cannot be worked satisfactorily with or without modification {see J.K.(Bombay) P. Ltd. Supra}. It follows as a corollary that if the compromise or arrangement can be worked as it is or by making modifications, the Court will have no power to wind up the company u/s 392(2). Now if the arrangement or compromise can be worked with or without modification, the Court must undertake the exercise to find out what

modifications are necessary to make the compromise or arrangement workable and that it can do so on its own motion or on the application of any person interested in the affairs of the company."

26...According to the definition, "modify" and "modification" would include the making of additions and omissions. In the context of Section 392 "modification" would mean addition to the scheme of compromise and/or arrangement or omission therefrom solely for the purpose of making it workable. Reading Section 392 by substituting the definition of the word "modification" in its place, if something can be omitted or something can be added to a scheme of compromise by the Court on its own motion or on the application of a person interested in the affairs of the company for the proper working of the compromise and/or arrangement, we see no justification for cutting down its meaning by a process of interpretation and thereby whittle down the power of the Court to deal with the scheme of a compromise and/or arrangement for the purpose of making it workable in course of its continued supervision as ordained by Section 392(1)....

28. The Court on which a duty is cast by Section 392(1) to exercise continuous supervision over the working of the compromise and/or arrangement must, in order to effectively discharge its duty, examine the bonafides of the person applying to be substituted as sponsor, his capacity, his ability, his interest qua the company and other relevant considerations before substituting one sponsor for another.

31.2. Indian Hardware Industries Ltd. and Ors. v. S.K. Gupta and Anr. 1981 (51) COMP Cas 51 [Del]

Now, Section 392 empowers the court sanctioning a scheme or at any time thereafter to 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. We cannot read any limitation in it so as to exclude the power to call a meeting of the company for the purpose of electing the directors if the court feels that it is necessary for the proper working of the scheme to know who are the real directors of the company. The amplitude of the power u/s 392 is no longer in doubt. Section 392(1) confers powers of the widest amplitude on the High Court to give directions and if necessary to modify the scheme with the only limitation that such directions or modifications must be for the proper working of the compromise or arrangement. In S.K. Gupta and Another Vs. K.P. Jain and Another, , the court further observed.

There is nothing in Section 186 which lays down that a company court which is supervising the scheme u/s 392 cannot call a meeting of the company if it feels that it is necessary to do so for the proper supervision and implementation of the scheme. We cannot accept an interpretation which puts the court in the position of a supplicant before the Company Law Board. Such an interpretation runs

counter to the power of the widest amplitude read into this provision by the above decision of the Supreme Court. So long as the meeting is to be called, because the court feels it necessary for the proper working of the scheme, the power must be found to be implicit in the court by virtue of Section 392(1) and it is not necessary to invoke Section 186 for this purpose.

31.3. *Ind Telesoft (P) Ltd. v. Jawad Ayaz* 2003 (43) SCL 478 [Karnataka High Court]

Therefore, it is clear, Section 392 of the Companies Act deals with power of the High Court to enforce compromises and arrangements. In fact, the said section deals with power of the Court after according sanction for a compromise or an arrangement u/s 391 of the Act. The condition precedent for exercising the power u/s 392 is that the Court should have accorded sanction to a compromise or arrangement u/s 391. The power under the section is of the widest amplitude, but is not unlimited and can be exercised only for the purpose of determination or adjudication of any right or interest claimed. Subsection (1) (a) confers power on the Court to supervise the carrying out of the compromise or arrangement. SubSection (1)(b) confers a discretion on the Court to issue such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary of the proper working of the compromise or arrangement either at the time of making such order or at any time thereafter. Similarly, Subsection (2) expressly gives the Court the power to modify a compromise or arrangement. Parliament has conferred power on the Court not only to make modification at the time of sanctioning the scheme, but at any time thereafter during the period when the scheme is being implemented. The power seems absolute and of widest amplitude. Subsequent developments can also be taken into account for considering desirability of the modification. A scheme can be modified by the Court either at the time of order or after it is sanctioned. Only such modifications to the scheme, which are necessary for the proper, efficient and smooth working of the scheme could be made. Modification can be made at the instance of any person who is interested in the affairs of the company and the Court can also introduce modification suo motu. But the paramount consideration while issuing any such direction by way of modification is that, such direction must be necessary for the proper working of the compromise or arrangement. The power of the court under the Section does not go beyond the implementation of a scheme already sanctioned u/s 391, and, if necessary, its modification. Therefore, the power of the Court to modify the scheme either at the time of according sanction to the scheme or subsequently, at the time of working of the sanctioned scheme is statutorily provided under the aforesaid provision and such power has to be exercised only for the purpose of proper working of the scheme, which is the only limitation which is imposed on the court under this provision.

31.4. *D.S. Venkataraman v. Gujarat Industries Pvt. Ltd.* 1977 (47) SCC 352

Section 392 gives power to enforce compromise and arrangements. SubSection

(1) thereof invests the court with power to supervise the carrying out of the compromise or arrangement and to do other things for the proper working of the compromise or arrangement...

If any difficulties arise in the working out of a scheme, the court can modify the same, so that its purpose can be achieved for the mutual advantage and benefit of the company and the class of its creditors or members who are parties to it.

31.5. K. Meenakshi Amma v. Sreerama Vilas Press and Publications (P).Ltd. and Ors. 1992 (73) CC 285 Kerala High Court [Division Bench]

Section 392 of the Companies Act empowers the court sanctioning a scheme to supervise the implementation of that scheme and to give such direction in regard to any matter or to make such modification, compromises or arrangements as it may consider necessary for the proper working of the revival scheme. It is difficult to read any limitation in that power so as to exclude the power to call a meeting of the company for the purpose of electing the directors if the court feels that it is necessary for the proper working of the scheme to appoint a board of directors of the company. The width and scope of the power u/s 392 of the Companies Act confers power of the widest amplitude on the High Court to give directions and if necessary to modify the scheme and that power implies in itself incidental powers like convening a meeting of the members to elect directors. In S.K. Gupta v. K.P. Jain (1979) 49 Comp Cas 342, the Supreme Court has observed thus (at page 35).

There is nothing in Section 186 which ousts the jurisdiction of the Court by expressly or impliedly saying that the company court which is supervising the scheme u/s 392 of the Companies Act cannot call a meeting of the company, if it feels that such a course is necessary to do justice in the matter and to make the scheme effective. We cannot accept an interpretation which puts the court in the position of a supplicant before the Company Law Board. It will be against the widest amplitude given to the power u/s 392(1) of the Companies Act as interpreted by the Supreme Court.

31.6. In J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, :

Though a scheme prepared by company to pay the creditors is not a mere agreement but has statutory force, it has to be construed as a commercial document that is, in the manner in which businessmen would read it.

31.7. Divya Vasundhara Financiers Ltd. v. K.N. Samant and Ors. Co.Cases (69) Guj 646

It is this admitted property of the company which is allegedly encroached upon by the opponents whose presence has created an obstacle in the smooth functioning of the scheme qua that property and this impediment is sought to be removed by the present proceedings. Such a factual situation is squarely covered by Section 392(1)(b). It falls within the supervisory jurisdiction of the court

through its Court Committee and it calls for a direction for proper working of the scheme of compromise or arrangement. It is easy to visualize that, if this impediment is not removed, years will roll by. The property cannot be sold to Unique Builders, the purchase price cannot be obtained and funds cannot be made available for disbursing to the creditors.

The Court, in its supervisory capacity, has to see to it that any impediment in the smooth running of the scheme, is removed. So far as the power of the court is concerned, it flows from the scheme of Sections 391 - 392 of the Act. This is in no way whittled down by the provisions of Section 6 of the Specific Relief Act. Even assuming that the Court Committee could have filed such suits, it cannot be urged with any emphasis that, instead of taking that course, the Court Committee has illegally followed the procedure as contemplated by Section 392(1)(b). Mr. Bachani would have been subject to the provisions of Section 6 of the Specific Relief Act, but that is not so for obvious reasons. So far as the scheme of compromise and arrangement is concerned, it is to be supervised by the court with a view to seeing that the scheme of compromise and arrangement does not meet with rough weather or get impeded and that it is fully implemented. In that process, if there are any obstructions by persons who have prima facie no right, title or interest in the Company's property, such obstructions can be eradicated by issuing suitable directions. So far as that power is concerned, it is an independent power available to the court in connection with the scheme of compromise and arrangement and such power cannot obviously be fettered by the provisions contained in general law like Section 6 of the Specific Relief Act.

31.8. Mysore Electro Chemical Works Ltd. v. G.K.Parmashiv and Ors. Co. Cases (86) Kar 570

When a scheme has been sanctioned by the court and the company survives because of the scheme, the persons who are entitled to certain benefits or entitled to certain rights under the scheme certainly would approach the court u/s 392 of the Act to seek appropriate direction from the court when the scheme has not been worked out satisfactorily in the manner envisaged touching their rights.

In the instant case, the company did not make the payments as provided for in the scheme. This has affected the rights of the creditors. The scheme is silent as to how the payments could be enforced. No doubt, winding up is one of the modes provided for in the Act. In fact, windingup is one of the modes provided for in the Act. In fact, windingup also is contemplated u/s 392(2) of the Act. The creditors have invoked the said jurisdiction. In such a situation, it cannot be held that the court is without any competence to grant any equitable relief to the creditors who were earlier denied an immediate payment from the company.

31.9. Bank of Baroda Ltd. v. Mahindra UGINE Steel Co. Ltd. Co. Cases (46) Guj 328

A scheme once sanctioned becomes binding on all the parties including the shareholders. Section 392(1)(b) has been couched in very wide language and, as earlier stated, it authorizes the court to give at any stage such directions with regard to the fulfillment of the obligation of the members of one of the two companies amalgamating with each other as it considers necessary in the circumstances of the case. I see no reason, therefore, why an order cannot be made appointing one or more persons to execute the instruments of transfer on behalf of those members of the transferor company who have opted for cash payment under the scheme but have failed to carry out their further obligation in the circumstances of the case.

32. It will be pertinent to note that the scheme of arrangement between RIL the demerged company and the four transferee companies which has been approved by the Company Judge itself provides for such a remedy and in Part VI of the General Terms and Conditions and particularly clauses 22, 23 and 24 provides for the remedies which are available to the aggrieved parties if the scheme is not implemented. Part VI of the General Terms and Conditions begins with Clause 17 which postulates that by virtue of the scheme being approved by the Court there has to be reconstitution of the Board and provides as under:

Clause 17. At any time after the Record Date, RIL shall cause the Board of Directors of each of the Resulting Companies to be reconstituted in such manner as is agreed between each Resulting Company and Anil D. Ambani and thereupon each of the Resulting Companies shall be controlled and managed by Shri Anil D. Ambani. The Demerged Company constituting the Remaining Undertaking shall continue to be controlled and managed by Shri Mukesh D. Ambani.

It is rightly contended by Mr. Ram Jethmalani, the learned Senior Advocate appearing for RNRL that this constitutes an integral part of the scheme and has drawn the attention of this Court as to what "integral part" means by referring to the New International Websters Comprehensive Dictionary and Legal Thesaurus - Regular Edition - William C. Burton and by referring to Text Book by Kim Lewison on the Interpretation of Contracts particularly with emphasis to the interpretation of the rules that the rules should be applied with consistently and uniformity and that rules of construction, however, are not inflexible, their purpose being to reach the intent, or the probable intent, of the parties and to ascertain the meaning of the contract or what actually is and it has been said that principles of technical nicety cannot be applied strictly to the construction of everyday oral contracts made by plain business men in the course of their business dealings, and that the rules for interpretation should not be subtle, being intended, or made, for persons of common understanding.

33. If clauses 17, 19, 20, 21, 22, 23 and 24 are conjointly taken into consideration they clearly provide for the answer, particularly Clause 22 pertains to the modification of the scheme. It vests in the demerged company and each of the Resulting Companies by their respective Boards of Directors or any committee thereof or any director authorised in that behalf. For the purpose of

resolving any doubts or difficulties that may arise for carrying out this scheme, and the Demerged Company and each of the Resulting Companies by their respective Boards of Directors or Delegate are authorised to do, perform and execute all acts, deeds, matters and things necessary for bringing the scheme into effect. Further, sub Clause (b) of Clause 22 also empowers them to settle any question or difficulty arising under this scheme or in regard to and of the meaning or interpretation of this scheme or implementation thereof or in any matter whatsoever connected therewith and so on. Sub Clause 23.2 of Clause 23 reads as under:

Clause 23.2 In the event of this Scheme failing to take effect within 12 months of first filing in High Court or such later date as may be agreed by the respective Boards of Directors of the Demerged Company and the Resulting Companies, this Scheme shall stand revoked, cancelled and be of no effect and become null and void and in that event no rights and liabilities whatsoever shall accrue to or be incurred inter se by the parties or their shareholders or creditors or employees or any other person. In such case, each Company shall bear its own costs, charges and expenses or shall bear costs, charges and expenses as may be mutually agreed.

Further Clause 24 provides for indemnity clause and states:

Clause 24. In the event of non fulfillment of any or all obligations under this Scheme by any party towards any other party, inter se or to third parties, the non performance of which will place any other party under any obligation, then the defaulting party will indemnify all costs and interest to such other affected party.

Therefore, we have no hesitation to hold that the application filed by respondent RNRL was maintainable as the parties to the scheme i.e. RIL Demerged company and the four Resulting Companies in spite of their best efforts could not enter into a "suitable arrangement" in relation to supply of gas for power projects of Reliance Patalganga Power Limited and REL with the Gas Based Energy Resulting Company as contemplated under Clause 19 of the Scheme which provides for agreements.

34. The contention of the appellant RIL cannot be accepted that the Company Court has no jurisdiction to entertain an application for enforcement of Clause 19 if either the demerged company or the resulting companies do not comply with the general terms and conditions which in the present case relate to "suitable arrangements" for supply of gas for power projects of the resulting companies and the company which is aggrieved has every right to approach the Company Court which approved the Scheme to enforce the general terms and conditions incorporated in Part VI of the Scheme.

35. It is a matter of record that after the scheme was approved, the parties i.e., the Demerged company and the Resulting Companies have undertaken the exercise to have "suitable arrangements" for supply of gas for power projects of resulting companies and their affiliates which is reflected from the documents

placed on record by the RNRL, the Applicant Company. Eventually, when the parties failed to have "suitable arrangements" which did create a situation where RNRL was left with no choice than to approach the Company Judge to intervene in the matter as the result of failure of negotiations and, therefore, this Court concurs with the finding of the Company Court that the application was maintainable.

II. On suitable arrangement:

36. At the outset we may like to make it clear that as an Appellate Court we do not want to deal with various issues considered by the learned Company Judge for the very reason that, according to us, in so far as the grievance that the facts and circumstances which persuaded the RNRL to approach the Company Court is restricted to the failure on the part of the Demerged Company i.e. RIL in effectively implementing the scheme by entering into an appropriate agreement i.e., the GSMA along with the proforma GSPA by way of "suitable arrangement" in context to the supply of gas for power projects of Reliance Patalganga Power Limited and REL with the Gas Based Energy Resulting Company which was an integral part of the scheme. The main contention of RNRL is that on failure on the part of RIL to prepare the Gas Sale Master Agreement and Gas Sale Purchase Agreement by way of "suitable arrangement" in spite of the same being negotiated between the parties after the Scheme was approved by the Company Court which could not be settled to the satisfaction of Demerged Company and the Resulting Company particularly with Global Fuel Management Services Limited (the "Gas Based Energy Resulting Company") and that the so called agreement GSMA with the proforma of GSPA on which reliance is placed by RIL as a "suitable arrangement" for the said purpose is concerned cannot be considered to be an agreement entered into between Reliance Industries Limited i.e., the Demerged Company and RNRL to which Global Fuel Management Services Limited was allocated as second transferee company. It is specifically contended that RIL cannot impose upon the Resulting Company the drafts of GSMA and GSPA which were purported to be approved by the Board of RIL at the time when the Board of RNRL were under the control of Mukesh Ambani and that the said agreements which, according to the RIL then settled and executed on 12.1.2006 were objected to by the nominee of ADAG (Anil Dhirubhai Ambani Group) and by letter dated 12.1.2006 addressed by Mr. J.P. Chalasani, the nominee of ADAG on the Board of RNRL to other directors on the Board of RNRL, namely, Mr. Sandip Tandon and Mr. L.V. Merchant who were the nominees of Mukesh Ambani / RIL that the said agreements were contrary to the terms of the scheme and were illegal and void. Though due cognizance of the same was taken but the same could not be finalised which is amply established by the correspondence between the parties which is placed on record along with the application as Exhibit "F" collectively.

IIA. Contentions and submissions on behalf of RIL.

37. Mr. Salve, learned Senior Advocate for RIL submitted that in January 2006 as

far as the gas project was concerned development plans had been submitted for approval and the development process (construction and commissioning of the requisite plant and machinery for production and transportation of gas) was in full swing. As against this there was complete uncertainty as to the implementation of any gas based power projects of REL or Reliance Patalganga Power Ltd. RNRL now alleges that default in providing a "bankable" agreement for supply of gas, has delayed the commencement of implementation of the power plant, although the fact of the matter is that in January 2006, admittedly, even allocation of land for the Dadri plant had not been made. Any argument of delay can only apply post January 2006. The GSMA was drawn up in January 2006. In any event, going by the current trends relating to establishing power plants, no power plant would be in place before five years i.e. 2013/2014. On the other hand, gas production would start any time now. Secondly, the total quantity of gas which according to RNRL it is entitled to get was as high as 40 MMCSMD (28 + 12 MMCSMD if NTPC contract did not materialise) which it was conceived may be required for more than one power plant. (1 MMCSMD of gas, on an annualized basis, translates into production of 250 Mega Watts of power).

38. The learned Counsel for RIL submitted that since there would be a hiatus between the commencement of production of gas and the establishment of power plants (and therefore the coming into effect of the Take or Pay obligation of the Power Plants of REL or RPPL) it was necessary to have a suitable format by which, as and when gas was available, option gas would be offered to RNRL to elect to receive such gas depending on their ability to draw gas for power generation and the tenure and the quantity would be fixed so as to synchronise with production of gas.

39. The learned Counsel for RIL submitted that on the other hand, under a GSPA, the quantity is fixed, the tenure is fixed, the price is fixed and all these provisions are coupled with "Take or Pay" obligation. If a "suitable arrangement" for supply of gas had to be entered into with RNRL, for the power plants of Reliance Patalganga and REL, and if a GSPA had been proposed then the consequence would have been:

- a) A Take or Pay obligation would have arisen for the power plants as soon as production of gas would commence,
- b) Since the supply of gas was only for power plants, RNRL would not have been entitled to draw any gas for trading.
- c) RNRL would have to forego the contract or abide by the Take or Pay obligation, which would have led to a strange situation where gas would have been sold in the market by RIL (acting as a contractor for the production of gas) and RNRL would have had to pay for it anyway without receiving any gas.

40. The learned Counsel for RIL submitted that underlying the case of the RNRL that a GSPA should have been entered into is the fundamental premise that it would be entitled to receive the gas not for any power plant but for any purpose

it considered appropriate once this case is given up before the Company Judge (and rightly so), then the only way out is to have a contract under which RNRL has the option to take the gas offered to it from time to time for its power plants and the structure as was contained in the GSMA was the most appropriate.

41. The learned Counsel for RIL submitted that Clause 19 of the scheme provides that "...suitable arrangements would also be entered into in relation to (ii) supply of gas for power projects of Reliance Patalganga Power Ltd. and REL with gas based energy resulting undertaking...." In other words, it requires an arrangement to be made with the Gas Based Energy Resulting Company (now RNRL) for supply of gas for power projects of Reliance Patalganga Power and REL.

42. The learned Counsel for RIL submitted that it was the contention of RNRL that the clauses of the GSMA are incapable of being understood and (that therefore) these are unreasonable. Apart from the fact that this assertion is plainly incorrect, the clauses are completely comprehensible as set out below:

Clause 3.1 of GSMA provides for determining the Tenure of the GSPA executed pursuant thereto, and reads as under:

3.1 (a)

(b) The tenure over which volumes of Gas will be available for contracting under this Agreement from any Development Plan ("Tenure") shall be the period in Years determined under this Clause (b) but in no event beyond 31 March 2025.

43. The learned Counsel for RIL submitted that this provision was necessary to ensure that although gas would be available from any development plan (not just the one under consideration) and would be for as many years as is calculated in the formula that follows, it could not in any event, go beyond March 2025. This is for the reason that the lease, as at present, is until 2025 as also the development plan envisages that within this period the evacuation of gas would be complete. Accordingly, GSMA provided the following method for calculation of the Tenure.

5.7.1.1 The Tenure of volumes available for RNRL from the Initial Block KGD6 Development Plan shall mean the result (in Years) of the following:

44. The learned Senior Counsel for RIL submitted that simply stated what this formula provides is that the gas would be supplied for a period which is required to exhaust the then available P1 reserves. The tenure, therefore, will be calculated as follows:

a) you would first take the total Certified Proven Reserves (P1 reserves), designated as CPR

b) from (a) the quantity to be supplied to NTPC over the total period of time as claimed by it (17 years) would be deducted this is 2.63 TCF. This would give the net CPR available for supply.

c) The net CPR available for supply would then be divided by the figure of net annual production. In calculating net annual production the supply to NTPC would be deducted from gross annual production.

45. The learned Counsel for RIL submitted that in other words, simply stated, the tenure would be determined by taking the net certified proven reserves and dividing it by the net annual production. There are two numerals - "2.63" representing the total volume of gas in TCF required to be supplied to NTPC if their claim succeeds. Second is the figure of 35.3174 which merely is a factor of conversion of cubic meters to cubic feet.

46. The learned Counsel for RIL submitted that the above methodology would work perfectly properly when viewed in the following circumstances. The exploration efforts in Block KGD6 are still ongoing after the initial discovery in the year 2002. The steps involved from Exploration & Production are as follows:

(a) Acquire 3D seismic data; process and interpret such data to assess the hydrocarbon potential of the area.

(b) Based on such interpretation, geoscientists assess prospectively for further exploration.

(c) The geoscientists then decide a location for drilling to vindicate their scientific judgment. The economics are justified by potential volume of Oil & Gas that may exist subject to a chance factor to actually make the discovery. The global average of chance factor is 15%20%.

(d) Once the well is drilled (costing more than \$ 40 million) 80%85% chance is that there will be no discovery.

(e) In case there is a discovery, based on the drilling results, tests, surface, soil, coring etc, the geoscientists arrive at the "volume" that may be available in place (in the subsurface geological structure under the earth).

(f) This "in place volume" is categorized into three probabilities: 90%, 50% and 10%

(g) Out of such "in place volume" not all that can be recovered on the surface. Various technical reasons, including pressure, permeability and porosity of the rocks etc. prevent 100% recovery. Sometimes it can be even as low as 20%30% in case of oil and 50%60% in case of gas.. Therefore, again three probabilistic numbers (90%, 50% and 10%) are arrived from each category of "in place volume" (90%, 50% and 10%) to assess "Recoverable Reserves" or "Reserves".

(h) fIn place Volume having:

(i) 90% probability of recovery is called "Proved Reserves" or "P1 Reserves",

(ii) 50% probability of recovery is called "Probable Reserves" or "P2 Reserves"

(iii) 10% probability of recovery is called "Possible Reserves" or "P3 Reserves".

(i) Efforts to convert Possible and Probable Reserves to Proved Reserve status by drilling more wells, carrying out more tests and studying the data gathered is always ongoing. However, it takes a long time and effort to upgrade from Possible and Probable to Proved category as per the nature of the business. The drilling of wells is a time consuming process and is impacted by various factors including paucity in the supply of drilling rigs and services in the international petroleum industry. A single well takes about 2 to 3 months to be drilled and many such wells are required to be drilled for the reserve status to be upgraded from Possible and Probable Reserve status to the Proven Reserve status.

(j) The Reserves estimates of Block KGD6 is in a transitional phase as RIL is continuing to explore and appraise the Block with a view to upgrading the existing Reserves and also towards developing and producing from the existing discovery.

(k) If the Buyer demands P1 Reserves, it can only be offered to them to the extent that it is available at that point of time. At the time of NTPC bidding RIL assessed the available reserves and found it be in the range of 4 TCF. NTPC required 2.63 TCF of such P1 reserves for 17 years at the rate of approx. 12 MMSCMD (Million Cubic Meter Per Day) or about 0.15 TCF per year. [The MMSCMD to TCF per year is calculated as: MMSCMD x 365 (days in a year) x 35.3147 (conversion factor from cubic meter to cubic feet)].

47. The learned Counsel for RIL submitted that for determining the net annual production, the production volumes of gas taken in MMSCMD is the basis and therefore to be able to put them on the same unit as the numerator (P1 reserves) it is multiplied by 35.3147 to convert standard cubic meters to standard cubic feet and then multiplied by 365 to come to the annual production.

31. (a)

(b)

(c) The quantity of Gas that is available for contracting under GSPAs for any Year "n" during the Tenure ("Available Quantity") expressed on an average daily basis in MMSCMD, shall be determined for each Development Plan as follows:

48. The learned Counsel for RIL submitted that accordingly, the first part only gives the total tenure for which a particular gas supply agreement can be signed and since in addition to determining the total period or the terms of supply it is also necessary to fix the annual quantity of gas that would be supplied to that power plant. This annual quantity is to be arrived at by reducing, from the total annual production, the following, quantities, viz:

a) Government share;

b) NIKO's share (i.e. 10%) of the net contractor share;

c) The NTPC stipulation; and

d) The estimated internal consumption in transportation downstream - which is taken at a constant of 0.03.

In essence (1) the period is calculated by dividing total availability of gas (P1) determined from time to time by the rate of production per annum; (2) Annual Quantity that can be given to RNRL is calculated by subtracting from the annual production (a) the quantity of government and NIKO's share (b) the quantity to be used internally for production of gas and (c) quantity to be given to NTPC.

The learned Counsel for RIL submitted that RNRL never argued in detail of any deficiency of this simple formula except making a false allegation of "deliberate complication."

49. The learned Counsel for RIL submitted that the GSMA contemplated taking the following steps:

(i) RIL was to use reasonable endeavour to obtain a certificate of CPR within 120 days of the approval of the development plan (including revised development plans from time to time)

(ii) Within 60 days following the certification as above RIL would notify RNRL of the Available Quantity. The stipulation in Clause 3.2 also made it clear that the availability notice in the first instance would be of what is called the Base Volume. Since the notice would have to give the aggregate total quantity per year it would also have to include the overall quantities and therefore indicate the tenure available. All this would depend on the extant Development Plan which would contain the stipulations as to the production schedules.

(iii) Within 120 days of RIL sending an availability notice RNRL was expected to notify RIL whether it is in a position to get a qualified affiliate to execute "one or more base volume GSPAs for all or portion of the base volume available quantity for each year in the tenure...." In other words RNRL was given the option to split the volumes between different affiliates, a choice to take the whole or a part of what was tendered to it including different figures over different periods of time within the deadline. In view of the stipulations in the scheme, while giving a positive notice of election, RNRL was required to include a description of the power plant, designation of the receipt point and other information required. This was to be able to fix the precise supply arrangement that would be required to be entered into. Base volume would require to be revised every time the P1 reserves were revised or a new development plan was filed which increased availability of gas. At each such revision, a fresh availability notice would need to be given. Upon receiving such availability notice RNRL again would have the option to treat the additional availability as a basis for a new GSPA (as long as the start date for their requirement corresponded with the commencement date and the availability notice (so as to make sure that gas does not go waste) or could add the additional quantity to the quantity stipulated in an existing GSPA or extend the term of any expiring GSPA by adding in the contiguous years. For example, if there was a GSPA, based on original quantities and tenure, expiring

in 2018 and a fresh availability notice was given in 2015 for additional production from 2018, RNRL could add these balance years to extend the term of an existing GSPA as long as the years were contiguous. Obviously this would all be subject to the outer limit of 2025 when this agreement itself as well as the lease would run out.

(iv) Within 60 days of RNRL's response RIL would be required to give a "fully termed base volume GSPA" i.e. a fully filled up document corresponding to the model GSPA with the requisite figures of quantity, price and tenure in it. In the event of an adjustment of an existing quantity or term an appropriate document would accordingly have to be given.

(v) Within 30 days of RIL giving such a draft, a GSPA was required to be finally executed by the affiliate failing which it would be taken that RNRL has declined the offer. This broadly was the scheme of the GSMA as to tenure, annual quantity and the offer procedure.

50. The learned Counsel for RIL submitted that as already stated, considering that the lease itself was to expire in 2025 it was unlikely that there would be any revision to the development plan or any reserves would be added beyond 2015.

51. The learned Counsel for RIL submitted that it is for this reason that the date of 2015 was considered as the outer most date for the GSMA - to be clear, this only means that after 2015 there would be no fresh tender of available quantities. It is made clear that nothing in this would affect any of the GSPAs executed prior to determination of this agreement in 2015. So if a GSPA was signed in 2014 for eight years it would continue to run its course. For the GSPA it was clearly provided (clause 3.4 e) that the time would not extend beyond 2025.

52. The learned Counsel for RIL submitted that what is described aforesaid (the tender procedure) was in two parts. The first part related to the tender procedure in relation to the 28 (+ 12 if NTPC GPSA did not materialise) MMSCMD and the second tender procedure, somewhat similar, was in Clause 3.3 for the option volume. The option volume was the balance quantity of gas after excluding 28 (+ 12 if NTPC GPSA did not materialize) MMSCMD, to be supplied to RNRL affiliates/NTPC, and after reducing further a quantity of 16.67 MMSCMD which RIL was entitled to consume for its own requirements.

53. The learned Counsel for RIL submitted that the fact that option volume also was created in this manner suggests that there was no question of their ever being a right to trade in contemplation. If the entire production of gas available to RIL was to be made available for trading to RNRL, then obviously it would not be a "suitable arrangement" for supply of gas for the power plants of REL and/or RPPL, but it would virtually be a transfer of the undertaking of gas for exploration and production itself which however has been expressly reserved for the Demerged Company. Sale of gas is an integral part of the undertaking, the activities of which relate to exploration, development, production and sale of gas. There is nothing in the Scheme which would even remotely suggest that the

entire quantity of gas produced was to be made over to RNRL and that too with the ability to use it for trading purposes.

54. The learned Counsel for RIL submitted that Clause 13.9 of the GSMA reproduced below has been found by the learned Single Judge to have been properly included and the protest to its inclusion has been overruled in the Judgement of the learned Single Judge.

Clause 13.9 of the GSMA reads as under:

13.9 Approvals Under Upstream Arrangements

i. Without prejudice to the Approvals to be obtained under each GSPA, the Parties agree that the obligations of Seller under each Base Volume GSPA and each Option Volume GSPA are subject to the receipt and continued effectiveness of all Approvals under the applicable Upstream Arrangements and Approvals of the gas sales price under the applicable GSPA as the gas sales price to be used for cost recovery, profit sharing, and all other purposes under the applicable Upstream Arrangements.

ii Each Base Volume GSPA and each Option Volume GSPA shall require separate Approvals of the gas sales price, and approval of the gas sales price under any other gas sales agreement shall not constitute Approval of the gas sales price under the applicable GSPA.

iii RIL shall have not be in breach of this Agreement, nor shall Seller be in breach of any GSPA, in the event any Approvals referred to in Clause (a) are not received or become no longer effective.

iv Compliance with such Approvals from time to time shall not result in a breach of this Agreement by RIL or of any GSPA by Seller.

55. The learned Counsel for RIL submitted that the purport of the Clause 13.9 was that RIL would supply the gas to RNRL at the sales price under the applicable GSPA if that price was to be used as the value of gas for computing Cost Recovery, Profit Share and all other purposes inter alia under the PSC.

56. The learned Counsel for RIL submitted that if RIL was to sell the gas at a price which is less than the value thereof as approved by the Government, RIL would be selling gas at a price at which it would incur a loss. This is applicable to all quantities of gas to which RIL is entitled whether as "Cost Gas" or as "Profit Gas".

57. The learned Counsel for RIL submitted that the Scheme of Demerger in Clause 19 thereof, speaks of there being "suitable arrangement" for supply of gas to the power plants of REL and RPPL.

58. The learned Counsel for RIL further submitted that supplying gas to RNRL at a price at which it would incur a huge loss, by any stretch of imagination, cannot be construed to be a "suitable" arrangement for such supply for RIL.

59. The learned Counsel for RIL further submitted that accordingly, the provisions of Clause 13.9 of the GSMA are not only perfectly reasonable but are absolutely necessary.

60. The learned Counsel for RIL further submitted that NTPC GSPA states that approval (by the Government) to the price at which the gas was to be supplied to NTPC was a condition precedent to the NTPC contract becoming effective. It is a matter of record and completely undisputed position that NTPC had agreed to this term in its GSPA. The fact that the price was subject to approval of the Government is not a matter in issue in the proceedings as between NTPC and RIL.

61. The learned Counsel for RIL further submitted that in fact, if RNRL insists on NTPC terms, it has no case whatsoever to argue since approval of the price would then become a condition precedent and the price of US\$2.34 per mmbtu of gas has already been rejected by the Government.

62. The learned Counsel for RIL further submitted that absent Clause 13.9, the GSMA would most certainly be an unconscionable bargain for RIL and its shareholders and would certainly not be a "suitable arrangement" contemplated by Clause 19 of the Scheme.

63. The learned Counsel for RIL further submitted that the Board of Directors of RIL would be acting in dereliction of their duty if they committed to sell gas to RNRL for a period of 17 years irrespective of any Government approval or irrespective of the value which would be ascribed to the gas for the purposes of the PSC as RNRL contends.

64. The learned Counsel for RIL further submitted that the incorporation of Article 13.9 in the GSMA is perfectly justified and reasonable in the light of the provisions of Article 21.6.3 and the interpretation thereof as commonly agreed as between the Government and RIL who are parties to the PSC.

65. The learned Counsel for RIL further submitted that the "entitlement" of the Contractor as referred in Article 15 and 16 of the PSC is calculated as follows:

1. First, determine the expenses incurred and allowed for cost recovery as per the PSC; (For purpose of illustration it may be assumed as Rs. 1000)
2. then apply the Government approved price per unit of Gas for valuing the entire Gas. (Assume price Rs. 25/unit)
3. then divide the cost (Rs. 1000) by this Government approved price (Rs. 25/unit) to get the quantity of "Cost Petroleum" entitlement. (In this case 4 units)..
4. If the actual production (assume as 5 units) of that year is more than the Cost Petroleum (4 units), the balance (1 unit) is called "Profit Petroleum" which is shared by Contractor and the Government as per the given formula where Government's share is on an incremental scale. A chart showing typical working of this has been placed on record.

66. The learned Counsel for RIL further submitted that under the KGD6 PSC, the Contractor's "entitlement" of "Cost Petroleum" is limited to 90% of each year's production. In case there is any unrecovered part of the total costs at the end of any year, the same is carried forward to the next year for the purpose of its recovery.

67. The learned Counsel for RIL further submitted that other Contractor party to have proper control on costs incurred and on the price at which the gas produced and sold is valued for purpose of determining the entitlement of each Party. (For example, on the basis of above assumptions, if Government values the gas at Rs. 25/unit instead of Rs. 20/unit at which gas is actually sold, then the Cost Petroleum entitlement of Contractor of 4 units if sold in the market at Rs. 20, there is a clear loss in recovering the cost (4 x 20 1000)

68. The learned Counsel for RIL further submitted that if the Contractor sells Gas at sub market prices or if the gas is undervalued then the Government's entitlement to Profit Petroleum from the total production will be reduced and the Contractor will off take a greater volume of gas as its Cost Petroleum entitlement.

69. The learned Counsel for RIL further submitted that it is in this context that the amount of expenditure that the Contractor can incur for petroleum operations under the provisions of the PSC is strictly monitored, reviewed and audited from time to time.

70. The learned Counsel for RIL further submitted that similarly, the price at which such gas will be valued is also approved by the Government to ensure that all transactions are entered into on an armslength basis at arms length prices.

71. The learned Counsel for RIL further submitted that it is clear from the above that in case the Contractor decides to sell the gas produced and saved at a price lower than the price acceptable to the Government as the value, it will result in:

(i) Contractor paying a huge subsidy to the buyer as Government will ascribe the market price to the sale; (As illustrated above); and

(ii) RIL committing sale of higher quantity than it is entitled to under the PSC and therefore having to face the consequence of compensating the Buyer for huge "Shortfall Liability" as liquidated damages under the gas sale agreement which liability RNRL wants to be uncapped. (For example, on the basis of the above assumptions, if RIL agrees to sell the gas at \$5/unit and enters into a GSPA for 20 units (leaving aside its profit share for the time being), it will cause for itself a shortfall of 10 units if the Government values the gas at \$10/unit and approves RIL'S Cost Petroleum entitlement of only 10 units. Seller will have to pay Shortfall liability to the Buyer for the 10 units which it is unable to supply).

72. The learned Counsel for RIL further submitted that therefore, RIL cannot unconditionally commit to sell any volume of gas at a price without requiring that the sale would be conditional upon the Government approving the committed price as the value of the gas for working out the Profit Petroleum and Cost

Petroleum entitlements of the Contractor and the Government under the PSC. Therefore, in the GSMA Volume available and Tenure of Supply are provided in a formula dependent upon P1 reserves and the same would be recalculated (in accordance with the formula) stand changed as and when P1 reserves increase.

73. The learned Counsel for RIL further submitted that the PSC has onerous obligations and serious consequences, if the obligations contained therein are not met or the Contractor otherwise commits a breach of the provisions of the PSC.

74. The learned Counsel for RIL further submitted that it is sought to be contended by RNRL that RIL is obligated to sell 28MMSCMD of gas at US\$ 2.34 per mmbtu. According to RNRL, if the Government values the gas at a price higher than US\$ 2.34 per mmbtu, the difference is to be absorbed by RIL. This argument is totally erroneous.

75. The learned Counsel for RIL further submitted that the price of US\$ 2.34 per mmbtu has already been rejected by the Government. Although Clause 19 of the Scheme stipulated that "suitable arrangement" would be put in place for supply of gas to the power plants of RPPL and REL, no provision of the Scheme requires RIL to grant a huge subsidy to RNRL or requires RIL to be exposed to unquantified liability in respect of supply of gas to RNRL.

76. The learned Counsel for RIL further submitted that RNRL's contention that no price approval is required and only the formula has to be approved for "valuation purposes" to find out GOI "share" or "take" of "profit petroleum" is totally erroneous. RNRL has argued that the PSC does not restrict the Seller to sell gas at a price different from the price thereof which has been approved as the value thereof. As explained above Profit Petroleum being the balance after Cost Petroleum it cannot be worked out without first determining the Cost Petroleum entitlement of the Contractor. RNRL has itself, repeatedly requested the Government to accord its approval to the price proves beyond doubt that their contention now sought to be raised are contradiction to their own action.

77. The learned Counsel for RIL further submitted that since price, or the formula to arrive at such price is crucial to its performance of the GSMA, RIL sought approval to the proposed prices (\$2.34/mmbtu) as stipulated in the GSMA itself and as required by PSC. This approval has been refused by the Government vide its letter dated 26th July, 2006.

78. The learned Counsel for RIL further submitted that as set out in these submissions below, the changes sought by RNRL to GSMA are in conflict with the provisions of the PSC. It cannot be suggested that a scheme sanctioned by the Court would sanction provisions which would have the effect of breaching not only contractual commitments but also regulations and Government policies framed from time to time or expose RIL to the risk of termination of the PSC.

79. The learned Counsel for RIL further submitted that RIL cannot commit quantities of gas which are in excess of the P1 reserves in hand. In this case, the

free P1 Reserve is only 1.37 TCF (NTPC volume of 4 TCF minus 2.63 TCF). RNRL's demand for a commitment of P1 Reserves, 28 mmscmd for 17 years from "RIL's entitlement" is unworkable for this reason. It was therefore only justified that the GSMA provided that RIL would enter into commitment for sale of gas upto 28 mmscmd but only as and when P1 Reserves necessary to supply this quantity were proven.

80. The learned Counsel for RIL further submitted that the GSMA also rightly provided that RIL would offer for sale those P1 Reserves which were part of RIL's entitlement of the production from the gas fields and not that of Government of India or Niko.

81. The learned Counsel for RIL further submitted that over the life of the project, RIL's entitlement from the total production is roughly 50% of the production. If RNRL demand of 28 mmscmd has to be met for 17 years, there would be a total P1 reserves requirement of 12 TCF. Further if RNRL demand, that it be offered NTPC volume if NTPC contract does not materialize, is to be met then there will be a total P1 Reserves requirement of 18 TCF. The following table provides a clear picture:

Table 1: Reserves & Cost Required to meet RNRL Supply

RNRL Supply Obligation

No. of Years

Total Obligation

MMSCMD

TCF

28 17 6

RIL Entitlement

P1 Reserves required to meet the Obligation

P1 Reserves as a % of 2P Reserves

P2 Reserves required to meet the Obligation

TCF

TCF

50%

12 39% 32

Table 2: Reserves & Cost Required to meet NTPC & RNRL Supply

NTPC + RNRL Supply Obligation

MMSCMD

40

No. of Years

17

Total Obligation

TCF

9

RIL Entitlement

50%

P1 Reserves required to meet the Obligation

TCF

18

P1 Reserves as a % of 2P Reserves

39%

P2 Reserves required to meet the

TCF

45

Obligation

Current P1: 4.4 TCF and P2 : 11.3 TCF as per the Approved Development Plan.

82. The learned Counsel for RIL further submitted that the GSMA was, therefore, drafted in a manner so that RNRL's demand for P1 Reserves was offered to the extent available and further as and when P1 Reserves were upgraded and Development Plans were filed by RIL from time to time. This provisions assured gas supply to RNRL and also protected RIL's interest by not making an over commitment of the actual reserve available in the fields. The formula for calculating the tenure of any GSPA has been provided on this basis i.e. balance P1 Reserves (after Government, NIKO, NTPC) are divided by the rate of production per year. Reserve and Cost estimates charts placed on record would demonstrate this point.

83. The learned Counsel for RIL further submitted that RNRL in the Company Application, as originally filed, prayed for a direction against RIL to carry out amendments to the GSMA dated 12th January 2006 (to which the draft GSPA was annexed) to bring it in line with the draft GSMA annexed to the Company Application and marked ExhibitJ. In fact, the nature of changes as contained in

ExhibitJ were such as, upon grant of such reliefs, the entire GSMA dated 12th January, 2006 would have to be replaced by a GSMA in terms of the said ExhibitJ.

84. The learned Counsel for RIL further submitted that however ,at the hearing of the Company Application, RNRL restricted its objections to the following six aspects of the GSMA dated 12th January 2006:

- (i) Tenure
- (ii) Identity of buyer and seller
- (iii) Affiliate
- (iv) Price
- (v) Quantity
- (vi) Limitation of liability

85. The learned Counsel for RIL further submitted that by the impugned judgement, the learned Company Judge found all of the objections raised by RNRL on each of the aforesaid points to be unsustainable and came to the conclusion that the provisions relating to each of the protested points as contained in the GSMA were reasonable and completely sustainable.

86. The learned Counsel for RIL further submitted that a chart showing the provisions of the GSMA, objections thereto raised by RNRL and the finding by the learned Single Judge to the above effect, was tendered and is annexed herewith.

87. The learned Counsel for RIL further submitted that findings of the learned Single Judge on "Tenure" and "Quantity" have been dealt with by the learned Single Judge in the judgement dated 15th October, 2007 under a common head and thus incorporated in the chart as "Quantities of Supply".

88. The learned Counsel for RIL further submitted that having come to the conclusion as stated above, the learned Single Judge in the impugned Judgement has held that GSMA/GSPA is "not liable to retain" only on the ground that the process followed by the Board meeting of RNRL on 11th January, 2006 was not proper and the Board of RNRL had not been reconstituted as on that date as contemplated by Clause 17 of the Scheme.

89. The learned Counsel for RIL further submitted that the issue of validity of the Board meeting of RNRL dated 11th January, 2006 has been dealt with separately. However, in the respectful submission of RIL, once it is held that the provisions contained in the GSMA were not objectionable, but in the facts and circumstances were reasonable and properly included in the GSMA, nothing further needs to be done to disturb or displace the arrangement contained in the GSMA dated 12th January, 2006. The present proceedings under the Companies Act, cannot be turned into proceedings invoking the writ jurisdiction of this Hon"ble Court and this Hon"ble Court cannot be invited to examine the validity (or otherwise) of the "decision making process" as in the manner, such process is

examined in case of "State" or "instrumentality of the State".

90. The learned Counsel for RIL further submitted that without prejudice to the foregoing and in any event, as on 12th January, 2006 RIL and RNRL had the same Body of shareholders and directors of these entities were representatives of the same Body of shareholders. RNRL declined to acknowledge that without such agreements, the RNRL listing in Stock Exchange could not have been possible and without which the Scheme could not have been implemented. All allegations of fraud were rejected by the learned Single Judge and have not even been argued in these proceedings by RNRL.

91. The learned Counsel for RIL further submitted that RIL respectfully reiterates that once all objections to the provisions of the GSMA raised by RNRL have been found to be unsustainable, no further enquiry is warranted.

92. The learned Counsel for RIL further submitted that without prejudice to the foregoing, RIL further respectfully submits that in substance, the arguments of RNRL related to the price at which it claimed to be entitled to the supply of gas and particularly in view of the arguments which have been advanced, the mutually acceptable position that has emerged is that Tenure and Quantity of gas necessarily are to be subject to availability. The method and manner for determination of Tenure and Quantity as contained in the GSMA would result in the determined quantity and tenure being included in the GSPA with the relevant power plant. The provisions of the GSMA reflect the terms of Clause 19 of the Scheme in as much as the GSMA is an arrangement between RIL and RNRL (which is Gas Based Energy Undertaking) for supply of gas to the power plants of REL and RPPL with adequate flexibility to include the power plants of defined affiliates of RNRL. In fact, the GSMA is more flexible on this aspect than the provisions of the Scheme. RIL respectfully submits that the provisions of GSMA providing for limitation of liability are completely reasonable when viewed in the context of provisions of Article 14.2 of the draft GSPA attached to the GSMA. On the contrary, RNRL wanted a flexibility which, if carefully examined, entitles it to bring any company as affiliate by owning even one share of that company. This will allow it to trade gas in disguise of an affiliate.

93. The learned Counsel for RIL further submitted that in view of the issues of interpretation of Article 21.6.3 of the PSC raised before this Hon"ble Court and in view of the stand of the Government of India as the Intervener, in the respectful submission of RIL, the provisions of requiring approval of the Government to the price at which the gas was to be sold by RIL to be reckoned as the value thereof as contemplated by Article 21.6.3 were completely fair and reasonable. This Hon"ble Court would have to be satisfied and come to the conclusion that these provisions, as are contained in Clause 13.9 of the GSMA, are unconscionable before it can be argued that the same are to be amended, modified, deleted or set aside by this Hon"ble Court. RIL respectfully submits that RNRL has not made out any case whatsoever to justify its contention that the provisions contained in Clause 13.9 of the GSMA are unreasonable or constitute an unjust or unfair

bargain much less these being an unconscionable provision.

94. The learned Counsel for RIL further submitted that RIL respectfully reiterates that in no circumstances can it be put to the risk of having to act contrary to the provisions of the PSC and thus rendering the huge investments made by it in jeopardy at the cost and prejudice of millions of its shareholders.

95. The learned Counsel for RIL further submitted that in the Company Application filed by RNRL and in particular in paragraph 6.6 thereof, RNRL reproduced what according to the deponent of the Application were the contents of the Memorandum of Understanding stated to have been signed on 18th June 2005 (MoU) amongst the promoters of RIL and it was stated that "the following are the parts of the said Agreement".

96. The learned Counsel for RIL further submitted that it has been the stand of RIL all along that the MOU was not placed before the Board of RIL. In the alternative, RIL contended that even as per the pleaded MOU, the GSMA/GSPA did not require any modification.

97. The learned Counsel for RIL further submitted that the relevant portion of the MOU has since been produced before this Hon"ble Court by RNRL and has been reviewed by this Hon"ble Court. It is submitted that the MOU does not, on various salient issues, support the case of RNRL and if the MOU was within the knowledge of RIL it would significantly helped its case if reference was made to the MOU. In fact, when the provisions of the MOU were specifically pointed out by the counsel for RIL, the response of Mr. Jethmalani was that the MOU itself was not enforceable and it was Clause 19 of the Scheme alone that is relevant. This is a complete reversal of the stand taken by RNRL throughout.

98. The learned Counsel for RIL further submitted that from the reading of the actual MoU it is clear that in the Company Application, RNRL had sought to deliberately mislead this Hon"ble Court by wrongly paraphrasing parts of the MoU in the pleadings. The discrepancies as between the contents of the MoU and the pleadings in the Company Application has been placed before this Hon"ble Court, in tabular form (RIL15) and for ready reference are reproduced below.

PLEADINGS

MOU

1

The following are the part of the said agreement :

(Note: This suggests that what is quoted or set out is a faithful paraphrase of the agreement.)

2

(a) Quantum of Supply and

Source of Supply

? Supply of 28 MMSCMD gas by RIL to Anil Dhirubhai Ambani Group (ADAG). This supply is subject to supply of 12 MMSCMD to NTPC

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

3

? In the event that NTPC contract does not materialise or is cancelled, the entitlement of NTPC to the said extent should go to ADA Group in addition to its entitlement of 28MMSCMD i.e a total of 40 MMSCMD.

In the event that the NTPC contract does not materialize or is cancelled, the entitlement of NTPC to the said extent shall go the Anil Ambani Group in addition to its entitlement of 28 MMSCD in (b) below. ????.

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

Subject to the above, after the 28 MMSCD to REL, the next order of priority would be of RIL for its captive consumption for Mukesh Ambani Group companies to the extent of a maximum of 25 MMSCD. Such 25 MMSCD will be set off against 60% entitlement of the

Mukesh Ambani Group. NOTE: The additional amount of 12 cannot be tagged for the simple reason that while the quantity of 28 MMSCMD was to ??be included in a binding gas supply agreement in favor of REL?? the 12 MMSCMD was to go to the Anil Ambani Group.? It may be that 12 MMSCMD is not to be set off against the ADAG overall entitlement of 40%, but the suggestion that the NTPC terms would apply to this 12 MMSCMD is contrary to the express language of the MOU. Secondly the pleading seeks to club the two quantities to support the fundamental case that the gas was, in its entirety, to be given to RNRL who would in turn give it to REL etc. This case is contrary to the express language of the MOU.

4

ADA Group to have option to buy 40% of all balance and future gas of from the current or future gas fields of MDA group.

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

???? If the P1 reserves are identified at 60 MMSCD, the sequence would be

NTPC ? 12, REL ? 28 and RIL (captive) ? 20. In the case reserves are 100, the sequence would be NTPC 12, REL 28, RIL (captive) 25, Anil Ambani Group (second installment) 16.67 and in so far as the balance 18.33 is concerned, the same would be shared in the ratio of 60:40.

5

Supply to be from the proven P1

reserves of RIL whether from KGD-6 Basin or elsewhere.

6

Supply period 17 (Seventeen) Years

NOTE: This purports to be ??part of the said agreement ..? There is no such mention in the MOU.

7

ADA Group?s Purchase

Obligation

On take or pay basis.

NOTE: This purports to be ??part of the said agreement ..? There is no such mention in the MOU. Obviously this is also the support the case that the entire supply was to the Petitioner.

8

The firm quantity of 28MMSCMD / 40MMSCMD at a price no greater than NTPC prices.

Option gas at the market rate. Other commercial terms ? same as those of NTPC Contract. Shall be in accordance with International Best Practices. Shall be bankable in international financial markets.

No mention of 40 MMSCMD in the MOU.

9

(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.

REL shall have the option to take delivery of gas at Kakinada on the East coast and may construct its own pipeline. However, REL would still have to pay the transportation cost for supply to the West Coast even if the facility is not used, but will have the right to deal with the capacity as it deems fit and to sell or assign the same to another party, on the West coast or otherwise. NOTE: The first sentence deliberately changed REL to Reliance-ADA group. The rest is a quotation from the clause ? the use of REL later in the sentence was overlooked !

1 0

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.

1 1

In relation to applicable governmental and statutory approvals, without in any manner mitigating RIL's responsibility, RIL and Reliance-ADA Group to jointly work towards obtaining such approvals, RIL will, if so required by 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.

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

Note : The place of the words ?jointly work? has been deliberately changed to give a different meaning.

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

The definitive agreements will reflect that the Mukesh Ambani Group will act in utmost good faith and will make best endeavors to work for and obtain such approvals. If there is any action taken in bad faith for not obtaining/scuttling the obtaining of such approvals, Kokilaben reserves her ability to intervene again and the Anil Ambani Group would also have a claim for damages.

99. The learned Counsel for RIL further submitted that the MOU bears the name of M/s. Amarchand and Mangaldas and it is obvious that it was drawn up by Mr. Cyril Shroff who was advising Shri Anil Ambani. The salient features of the MOU are it is submitted as set out hereinafter.

100. The learned Counsel for RIL further submitted that The parties to the MOU expressly are three individuals - RIL is not even shown to be a party to the MOU. Obviously the intent of the three signatories to the MOU was not to make RIL a party eo nomine. Under the heading "manner of business segregation" the MOU

expressly records that the segregation of the main businesses in terms of the MOU would be implemented in terms of a scheme of arrangement. It further provides that such a scheme would "provide for the overall framework for the transaction of all matters in relation to the business segregation (including investments of RIL and its investment companies without any encumbrances or liabilities thereon), reconstitution of the Board of Directors of the listed companies gas supply and such other matters and all matters related and ancillary thereto which would be binding upon and govern the business and operations of the Mukesh Ambani group and the Anil Ambani group upon effectiveness of the scheme of arrangement". A bare reading of the relevant part of the MOU suggests the following:

- a) that the parties would draw up a scheme of arrangement which would be the overall framework of segregation
- b) gas supply is treated as one of the components of such scheme of arrangement
- c) it would be the scheme which would be "binding" upon and govern the business and operation of the Mukesh Ambani group and the Anil Ambani group.

101. The learned Counsel for RIL further submitted that it is therefore clear, in the first instance, that it was the scheme of arrangement which constitutes the complete charter for deciding this case and the MOU is a subsidiary document of no great moment now that the scheme of arrangement has been put in place and sanctioned by this Hon'ble Court.

102. The learned Counsel for RIL further submitted that the MOU provides that the scheme of arrangement would be finalised by the Mukesh Ambani group and the Anil Ambani group. It also provides that effectiveness of the scheme of arrangement "would be conditional upon fulfilment of diverse conditions precedent including necessary approvals from the companies involved and.... the courts and the entering into of the definitive agreements...." From this the following points clearly emerge:

- a) until the Scheme of Demerger is approved by the Board of Directors the MOU would be tentative and no agreement between the promoters could substitute the approval of the Board. It is submitted that this explains as to why in the RIL Board meeting of 18th June 2005 (minutes have been produced by RIL pursuant to a request by RNRL). Press release issued by Kokilaben (Exh.D Vol.II) and Press Release issued by RIL on 18th June 2005 (Vol. 9) the Board of Directors took note of the fact that a settlement had been arrived at between the promoters and that the businesses of the RIL were to be reorganised and that the Corporate Governance Committee would deal with this and a firm of solicitors had been authorised to draw up a scheme of arrangement.
- b) The effectiveness of the scheme would also depend upon entering into "definitive agreements". This agreement was therefore entered into on 12th June

2006 before RNRL shares were issued to the shareholders of RIL and before the listing was applied for (which was done on 25th January 2006). RIL put in place the GSMA and GSPA which are the definitive agreements relating to the supply of gas. Without these agreements this scheme would not be fully effective and worked out. Putting these agreements in place before the reconstitution of the Board of RNRL caused no prejudice for the reason that these agreements merely gave options to RNRL without casting any obligation or responsibility. If no agreements had been entered into RNRL would have been exactly in the same position as it is on account of entering into these agreements. It was always open to RNRL to disclaim these agreements and claim if it could genuinely establish that these agreements do not comply with Clause 19 of the Scheme. However by accepting these agreements the Board of RNRL did not oblige RNRL to incur any expenditure or take on any liability. The submission that they were forcibly imposed upon RNRL has merely to be stated to be rejected; the concept of "imposition" goes with liabilities not with rights and options.

103. The learned Counsel for RIL further submitted that the MOU, to the extent it deals with gas supply is in PartVIII of the MOU, sets out the order of priority in Clause (ii) which makes it clear that the allocation of 28 MMSCMD of gas "would go to REL". It is submitted that where necessary the MOU uses the expression "Anil Ambani group". It also records, in paragraph (i) that in the context of an international expert firm) that "RIL produces gas from which gas could be supplied to Reliance Energy Ltd. ("REL") for all its projects (including without limitation its proposed Dadri power project)....". REL is an existing company which is referred to by name in the MOU. It is clear that when sub Clause (b) of Clause (ii) uses the expression "would go to REL", it contemplates a direct arrangement with REL. This conclusion is further fortified by the following:

(i) the following words in the same sub clause, namely, "a binding gas supply agreement in favour of REL" are categorical and clear words and admit to no ambiguity.

(ii) The binding gas supply agreement in favour of REL "would be at prices no greater than NTPC prices" perhaps to ensure a level playing field between NTPC (competitor of REL) and REL but was subject to all regulatory approvals. (The price of US\$ 2.34 per MMBtu, as aforesaid, has been rejected by the Government). The beneficial price regime i.e. prices no greater than NTPC prices is limited to this specific agreement for gas supply. This also further states that this is a selfcontained arrangement contemplated by the MOU and perhaps to maintain parity between REL and NTPC.

(iii) Sub Clause (c) of Clause (ii) in relation to future balance reserves refers to the "option of the Anil Ambani group (exercised from time to time). It is clear that the MOU uses very different language when it conferred an option on Anil Ambani group and when it contemplates an agreement in favour of REL The difference between these two expressions cannot be blurred as it is sought by RNRL.

(iv) The words immediately follow demarcation of volume in sub Clause (c) of Clause (ii) as follows: "subject to the above after the 28 MMSCMD to REL, the next order of priority would be RIL... thereafter the next order of priority would, at Anil Ambani group's option to Anil Ambani group. All such gas shall be supplied at market rates". The same sentence uses two distinct expressions, namely, "28 MMSCMD to REL", and in relation to the next order of priority (the option volume), it uses the expression at Anil Ambani group's option to "Anil Ambani group". The distinction between the two separate expressions cannot be blurred as is sought to be done by RNRL. Further price for the two separate tranches of allocation is materially different - because supply of gas to REL (subject to Government approvals) was to be at NTPC prices whereas the option volume is at market rates. It is therefore clear that there are two separate kinds of supply which were contemplated by the MOU - 28 MMSCMD was a supply which was not to be to "Anil Ambani Group" but specifically to "REL".

(v) This conclusion is further reinforced by the language of para (iv) which states that "REL shall have the option to set up its own pipeline from the gas field to its plant at its own cost " Similar is the language of para (v) which states "REL shall have the option to take delivery of gas at Kakinada..." The MOU does not use the expression Anil Ambani group but uses the specific name of REL and provides for the pipeline from the gas fields to its plant. It is clear that this reference here is consciously and deliberately to REL.

(vi) Para (vii) refers to "a binding gas supply agreement" and for which "NTPC supply agreement would be a general guidance...." Clause (iii) makes it clear that if at all, it is only for the 28 MMSCMD that the price in commercial terms are to be those applicable to NTPC. This language - "binding gas supply agreement" has to be contrasted with the expression "option" in relation to other terms. The reference to NTPC suggests that this binding gas supply agreement, which is in relation to 28 MMSCMD has to be with REL.

(vii) Para (viii) notices "stable source of gas from RIL is necessary to enable Anil to carry REL to even greater heights". In this context mentions "at the time of finalisation of the binding gas supply agreement...." comfort and stability should be ensured even if that means departure from the NTPC standard". The fact that it is again referring to NTPC confirming that this relates to 28 MMSCMD. This again refers to a binding gas supply agreement and refers to REL. It is clear that the binding gas supply agreement was to be with REL.

(viii) In sharp contrast para (ix) refers to "gas supplies/option agreement". The difference between the expression gas supply/option agreements and "binding supply agreement" are of great significance. It is also obvious that that para (ix) refers to the balance volumes because it does not contain any reference to NTPC terms. Finally, - and this clinches the issue - it provides that "such agreements would not be with REL". Use of this negative expression would suggest that some agreements was to be with Anil Ambani group and unlike the other, are not with REL. Clause (viii) - the immediately previous clause refers to a binding gas

supply agreement on NTPC terms and even better, with REL (it provides that it is to enable Anil to carry REL greater heights and the next clause provides that the gas supply/option agreement would not be with REL. It is obvious that there are therefore two classes of agreements - one with REL (the 28 MMSCMD on NTPC terms) and the other with a company to be formed and demerged, which supply would be at market rates.

(ix) Clause (x), in any event, clinches the issue - it provides that the gas supply to Anil Ambani group shall not be used for trading other than trading within the Anil Ambani group". The idea of supplying gas to REL at terms which were similar to NTPC (or even better) was to strengthen REL (Para (viii) expressly says that it is in order to enable Anil to carry REL to even greater heights". Obviously it was clearly intended that the benefit of the NTPC price should also be offered directly to REL for Dadri and other gas projects. The other gas sold to Anil Ambani group could be used for trading within the Anil group to generate some funds for the group. This clause clinches the issue as to the dichotomy between the gas supplies to Anil Ambani group which could be traded intragroup.

(x) Clause (xii) establishes that when the MOU was signed it was clearly understood that governmental and statutory approvals may be required and that they would be a joint responsibility. Where supply of gas is concerned the only governmental approval would be under the PSC. The concept of statutory approval was possible in view of the fact that there has been, for some time, a proposal to establish a statutory regulator for price and distribution of gas. The MOU was signed in June 2005 and in 2006, in fact, a law was enacted establishing a regulator (Petroleum and Natural Gas Regulatory Board Act, 2006). However, the provision in the Act which deals with distribution of gas has not yet been notified and has therefore not come into force. The Government approval contemplated in Clause (xii) was therefore only referred to price approval under the PSC.

104. The learned Counsel for RIL further submitted that terms of the MoU have been captured in the GSMA and have been given a workable form. In fact, the GSMA contains provisions which are more favourable to RNRL in certain respects even though these are not contained in the MoU.

. No.

MOU

GSMA

(i)

An expert international firm will be appointed to evaluate the nature and extent of gas reserves particularly at KGD6 and all other gas fields from which RIL produces gas from which gas could be supplied to Reliance Energy Limited (REL), for all its projects (including without limitation its proposed Dadri Power Project). The expert shall be appointed by ICICI Bank Limited in consultation with both

groups (who must agree in 72 hours hereof) and if they are unable to agree, an international energy consultancy firm, as may nominated by the energy/E&P department of ICICI Bank Limited will nominate an international expert who will carry out this survey and provide an independent report. Such international consultancy firm shall not have any conflict of interest. The report of such agency could consider the DGH letter as one of the inputs and its decision shall be final as to the quantity and nature of reserve

(including matters such as P1, P2, P3 reserves) and this would be the factual basis for the rest of the decisions. The Mukesh Ambani Group will move expeditiously for facilitating such verification and is to provide all information for this purpose.

Definition of Certified Proved reserves, read with the Definition of Certificate, provides for the appointment of an independent expert.

Clause 3.1 (d) requires RIL to get a Certificate of the applicable Certified Proved Reserves within 120 days.

(ii)

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

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

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

This was for the reason that the firm quantities can be established only after certification of Reserves. The GSMA therefore contemplates that after certification, quantities will be established.

The MOU makes a difference between the allotment of 28 MMSCMD to REL and the allotment of option volumes (including 12 MMSCMD) to Anil Ambani Group. This is reflected in the fixation of the Base Volume under the GSMA (The Pleadings deliberately misstate this issue).

Base Volume Quantity ? Clause 3.2

Flexibility in GSMA ? on

accepting tender notice, would

sign GSPA with Power

company.

Model GSPA attached to GSMA

supply agreement in favor of REL. This would be at prices no greater than NTPC prices. (c) Thereafter, and for the entire future of the balance reserves (including new discoveries of gas from new explorations and/or bids as may be submitted from time to time), the quantity of gas would, at the option of the Anil Ambani Group

(exercised from time to time), be split in the ratio of 60:40 with 60 % to Mukesh Ambani Group and 40% to Anil Ambani Group. Subject to the above, after the 28 MMSCD to REL, the next order of priority would be of RIL for its captive consumption for Mukesh Ambani Group companies to the extent of a maximum of 25 MMSCD. Such 25 MMSCD will be set off against 60% entitlement of the Mukesh Ambani Group. An expert appointed by ICICI Bank Limited will provide guidance, within a period of 45 days from this MOU, on the appropriateness of the amount of 25 MMSCD for captive consumption, and in the event that the amount considered necessary by such expert is materially less than 25 MMSCD, Kokilaben will reconsider this issue.

? on same terms as NTPC (including Price)

This is in contrast to the allotment to REL of 28 MMSCMD. Option volume is also provided for in the GSMA ? as and when certified, offer has to be made of option volumes.

The Pleadings deliberately mis state the quantities to be supplied at NTPC prices ? includes the 12 MMSCMD (NTPC priority) as part of fixed price.

Thereafter, the next order of priority would, at Anil Ambani Group?s option, go to Anil Ambani Group. All such gas shall be supplied at market rates.

By way of examples:

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

? In the case reserves are 100, the sequence would be NTPC 12, REL 28, RIL (captive) 25, Anil Ambani Group (second installment) 16.67 and in so far as the balance 18.33 is concerned, the same would be shared in the ratio of 60:40. This shall be an option but not an obligation.

The Pleadings deliberately misstate this ? suggests that this 28 is also to be made available to the Anil Ambani Group generally and not REL.

(iii)

For the first 28 MMSCD, the price and the commercial terms shall be the same as

those applicable to NTPC.

The Pleadings deliberately mis state the contents of the MOU by suggesting that the NTPC terms would apply to 28 +12 MMSCMD.

(iv)

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

Clause 4 of GSMA

(v)

REL shall have the option to take delivery of gas at Kakinada on the East coast and may construct its own pipeline. However, REL would still have to pay the transportation

As above

cost for supply to the West Coast even if the facility is not used, but will have the right to deal with the capacity as it deems fit and to sell or assign the same to another party, on the West coast or otherwise.

(vi)

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

Not reflected in the Pleadings

(vii)

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

GSMA provides for issuance of notice to ADAG upon certification. Once accepted GSPA's would be signed.

This clause obviously refers to 28 MMSCMD since it links it to NTPC terms ? not market prices.

(viii)

Kokilaben recognizes that a long term, stable source of gas from RIL, which has

the largest find of gas, was absolutely essential for the growth plans of the Anil Ambani Group and in order to enable Anil

to carry REL to even greater heights. Kokilaben has therefore

Significance of REL as beneficiary.

specially stressed and impressed upon Mukesh and Mukesh shall personally ensure that at the time of finalization of the binding gas supply agreement the teams provide the required comfort and stability in these agreements, even if that means some departure from the NTPC standard.

(ix)

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

This is deliberately misstated in the Pleadings ? to suggest that the entire gas had to be given to ADAG group ? whereas 28 MMSCMD was committed to REL.

(x)

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

Not mentioned in the pleadings.

(xi)

Swapping of gas is permitted.

Allowed in GSMA.

(xii)

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

(b) The definitive agreements will reflect that the Mukesh Ambani Group will act in utmost good

Deliberately misquoted in the Pleadings.

Deliberately omitted in pleadings.

faith and will make best endeavors to work for and obtain such approvals. If there is any action taken in bad faith for not obtaining/scuttling the obtaining of such approvals,

Kokilaben reserves her ability to intervene again and the Anil Ambani Group

would also have a claim for damages.

105. The learned Counsel for RIL further submitted that the MoU, read as a whole, does not even purport to bind corporate entity RIL and contains the following specific clause.

The Scheme of Arrangement will be finalized by the Mukesh Ambani Group and the Anil Ambani Group. The effectiveness of the Scheme of Arrangement would be conditional upon the fulfillment of diverse conditions precedent, including necessary approvals from the companies involved and the relevant regulatory authorities and courts and the entering into of the definitive agreements

106. The learned Counsel for RIL further submitted that the MoU in Clause xii(b) provides as follows:

(xii) (b) "The definitive agreement will reflect that the Mukesh Ambani Group will act in utmost good faith and will make best endeavour to work for and obtain such approvals. If there is any action taken in bad faith for not obtaining/ scuttling the obtaining of such approvals, Kokilaben reserves her ability to intervene again and the Anil Ambani Group would also have a claim for damages.

This part of the MoU has been deliberately omitted from the pleadings in the Company Application.

107. The learned Counsel for RIL further submitted that the above submissions are made without prejudice to:

(a) RIL's contention that the MoU amongst the promoters does not bind the corporate entity RIL; (This is supported by the language of the MOU).

(i) it was not open to RNRL to produce documents at the stage of the appeal which were not placed before the learned Single Judge;

(ii) that the MoU was clearly in the private domain and was never placed in the corporate domain even though such a course of action was suggested by Mr Cyril Shroff, the Solicitor appointed to draw up the Scheme of Demerger;

(iii) that the MoU was never placed before the Board of Directors of RIL and contents thereof were not known to the Board much less approved;

(iv) the correspondence contained in ExhibitF of the Company Application, at best, goes to show that MoU was the broad structure on which the demerger was to be worked out.

108. The learned Counsel for RIL further submitted that Paragraph 6.6 of the Application pleads that "The Agreement arrived at between Shri Mukesh Dhirubhai Ambani and Shri Anil Dhirubhai Ambani relating to the reorganization of RIL Group envisages the supply of Gas ". Paragraph 6.8 further states that as per the reorganization of the business and undertakings, the different undertakings were hived off. It is clear from the pleadings that the "Agreement" between the brothers therefore is not for supply of gas alone , but relates to the

reorganization of RIL and supply of Gas was only one of the things envisaged as a facet of such reorganisation.

109. The learned Counsel for RIL further submitted that on the pleaded case of RNRL such an agreement could only be in the private domain - for it to be in the corporate domain it would require to comply with a number of formalities. In fact, recognizing this, the pleaded case of RNRL is that the "agreement" was "... between Shri Mukesh Dhirubhai Ambani and Shri Anil Dhirubhai Ambani ..." and not as between RIL (represented by one promoter) and the other promoter. It is significant that Shri Anil Ambani was a joint managing director until the 18th June 2005 - the agreement (MOU) is anterior to this date. In fact the sequence of events is very clear:

- i. MOU is executed between Shri Mukesh Ambani and Shri Anil Ambani on 18th June 2005.
- ii. Shri Anil Ambani tenders resignation as Joint Managing Director of RIL;
- iii. RIL Board meeting is convened on 18th June 2005;
- iv. RIL Board accepts Shri Anil Ambani's resignation and Shri Mukesh Ambani informed the Board of the settlement.

Thus while signing MOU, Shri Mukesh Ambani was Chairman and Managing Director and Shri Anil Ambani was Joint Managing Director of RIL. Therefore, it cannot be said that Shri Anil Ambani was signing in his personal capacity whereas Shri Mukesh Ambani was signing as representative of RIL. Obviously any "agreement" between Shri Mukesh Ambani and Shri Anil Ambani could only be in their personal capacity and acting on their own (or at the best as promoters). The MOU recognizes this position.

110. The learned Counsel for RIL further submitted that agreements for reorganizing corporate affairs may be entered into between promoters (like shareholders agreements). However, the present regime of the Companies Act as applicable to listed companies has checks and safeguards to ensure that any arrangements proposed by a promoter or promoters is duly scrutinized and implemented as long as - and in a manner that - is beneficial to the body of shareholders and is in public interest and interest of the company.

111. The learned Counsel for RIL further submitted that individual shareholders may deal with their own interests in shares held by them by contract in such manner as they may deem fit. But such contracts, whether made by all or only some of the shareholders, would, if at all, create personal obligations, or an exception personalis as against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or nonassenting shareholders. See *Welton v. Saffery* (1897) AC 299.

112. The learned Counsel for RIL further submitted that the Articles of Association are the regulations of a company which are binding as between the

company and its shareholders. Nothing outside the Articles can bind shareholders vis-à-vis company. See V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, . The question before the Supreme Court was as to the enforceability of an agreement which was inconsistent with a private company's articles was considered in the context of transfer of shares, and it was held that the agreement between two groups of shareholders which imposed 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; a sale of shares held by one of the two groups in breach of the agreement could not, therefore, be held to be invalid. The Supreme Court said:

...the private agreement which is relied 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 term imposes two restrictions which are not stipulated in the articles. 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 Article 13. They are, therefore, not binding either on the shareholders or on the company.

113. The learned Counsel for RIL further submitted that it is clear from the reading of the Scheme alongwith the documents annexed as Exhibit F that the procedure followed was to work out the details of the demerger. Once the details were worked out, they were translated into the Scheme and by the time it reaches the stage of being translated into the Scheme, obviously no differences remained between the two promoter groups since the Mr. Cyril Shroff was the Advisor to Shri Anil Dhirubhai Ambani, who became the common lawyer for the scheme. It bears emphasis that the Scheme was passed with a 99% plus affirmative vote, which would include shares held and/or controlled by the promoters.

114. The learned Counsel for RIL further submitted that it Board of RIL and was then placed before the General Body, (in the meetings u/s 391 of the Companies Act) for approval and then was finally approved by the Court. Therefore, any document which reflected the broad understanding between the promoters (acting on their own) loses its relevance once the final contract (as reflected in the Scheme) was arrived at. Any such agreement can only be binding (if at all) between the parties thereto, and on its own terms. It could obviously have no contractual value vis-à-vis RIL.

115. The learned Counsel for RIL further submitted that it is submitted that there was no occasion for the learned Single Judge to permit such a labored manner of establishing the case based on the "agreement" (MOU), when even as per the findings given by the learned Single Judge on the terms of the GSMA, there was no departure from the "agreement" as pleaded. The GSMA reflected the quantity

of 28 MMSCMD (+ 12 MMSCMD) as the quantity to be given to "ADAG Group", it recognized the right to the 40% of the balance Option Volume, it however provided that the supply was to be "from the Proven P1 Reserves of RIL". It is obvious, therefore that the supply had to be related to the Proven P1 Reserves.

116. The learned Counsel for RIL further submitted that the supply period of 17 years allegedly contained in the "agreement" would (on the gist of the pleaded "agreement") have to be adapted with an arrangement that synchronized the production of Gas (based on Development Plans which were later forwarded to REL) with the establishment of power plants (the lack of particulars on record to which email of August 2005 refers). It bears emphasis that there could not be any commitment to supply Gas beyond the productive years nor could ever be suggested that the "agreement" contemplated keeping the Gas in the ground and shutting down the Gas field when not necessary for supplies to ADAG operating it only to the extent necessary to fulfill the demands of ADAG. There is no such "17 year" period in the MOU.

117. The learned Counsel for RIL further submitted that in this context it is relevant to point out that the supply period of 17 years occurs in the draft of the agreement submitted by NTPC. RIL has refused to sign this draft for various reasons. If and when the suit is disposed of and decreed, the court would have to consider the disputed clauses of this draft. Therefore taking up the figure of 17 years which occurs only in the draft GSPA which RIL has refused to sign is, it is submitted, untenable.

118. The learned Counsel for RIL further submitted that as far as price is concerned, it would (on the pleaded terms) be subject to Government approval. The government has admittedly refused to approve the price.

119. The learned Counsel for RIL further submitted that all the important points set out in the gist of the "agreement" are seen to have been captured in the GSMA. Paragraph 6.6 pleads (before setting out the gist) that the Gas supply was "for various projects of Reliance Anil Dhirubhai Ambani Group". The character of these projects is (at more than one place) pleaded as being the gas based power projects. It is clear that the gist of the "agreement" as pleaded, (even if it is held to be admissible and capable of being relied upon) shows that the gas supply was for power projects and the broad headings contemplated by the "agreement" (even if true) were reflected in the GSMA.

120. The learned Counsel for RIL further submitted that this, in fact, also accords with the view expressed by one of the e mails that the "MOU" was for "guidance" as were the NTPC terms. This being so, it is submitted that in any event, the arguments based on the MOU become a nonissue once it is held that the terms and conditions of the GSMA do not suffer from any of the alleged infirmities as alleged by RNRL.

121. The learned Counsel for RIL further submitted that the so called inconsistency (alleged in the Appeal filed by RNRL) between the findings of the

learned Judge as to the merits of the GSMA and its sustainability arose on account of the fact that the learned Judge separately dealt with the following three issues, viz.-

- (a) the binding nature of the MOU,
- (b) the validity of the meeting held on 12th January 2006;
- (c) the validity of the GSMA per se.

While dealing with the first issue, the learned Single Judge held that as a matter of principle the GSMA would have to be MOU compliant and if it were not, it would be noncompliant with the Scheme. On this the learned single Judge did not analyze any of the specific terms of the GSMA to find out whether in fact the GSMA, or any clause thereof, is in deviation of the specific clause of the Scheme or any specific clause of the MOU,

122. The learned Counsel for RIL further submitted that as far as the findings that the GSMA being in deviation of the Scheme is concerned, it is based on the finding on second issue, namely, validity of the meeting held on 12th January 2006. The learned Judge accepted the argument based on Paragraph 27(XVII) of Explanatory Statement of the Scheme which contemplated a reconstitution of Boards of Resulting Companies, and reading this with Clause 19 (of the General Conditions of the Scheme) held that a suitable arrangement could have been arrived at only after reconstitution of Boards - on this basis and on this basis alone the learned Judge held that the GSMA is "not liable to retain".

123. The learned Counsel for RIL further submitted that there is no finding that any specific clause or clauses of the GSMA are deviant from the Scheme.

124. The learned Counsel for RIL further submitted that challenges, the learned Judge came to the conclusion that none of these challenges have any merit. It is submitted that there is no real inconsistency with his findings on the merits of the GSMA and any other finding given against RIL. In fact, the errors, it is submitted that, was committed by the learned Judge in going into other issues as to the validity of the meeting dated 12th January 2006 as well as the MOU and its consequences, despite having come to the conclusion that there was nothing wrong with the GSMA.

125. The learned Counsel for RIL further submitted that thus, the findings of the learned Single Judge

- (a) that the MOU is binding on RIL
- (b) that MOU is proved by doctrine of nontraverse
- (c) that the Scheme of Demerger was based on MOU

are required to be set aside. In any case, all other arguments on MOU also become irrelevant in view of the production of the MOU before the Court and on demonstrating that all points in the MOU having been fully captured in the GSMA.

126. The learned Counsel for RIL further submitted that 11th January 2006 and GSMA dated 12th January 2006 cannot be considered from the perspective of writ jurisdiction and the writ court examining the validity of decision making process of the "State" or "Instrumentality of the State". This aspect has to be considered in Company Jurisdiction. Thus, if the decision is proper (i.e. the GSMA/GSPA are suitable arrangements) then there is no question of challenging the decision making process.

127. The learned Counsel for RIL further submitted that at the outset it is submitted that the arguments based on the allegation of fraud that (i.e. the formal agreements was signed on 12.1.2006 and the resolutions were passed by the boards of both the companies, and the fact that the board of RNRL at that time was still under the control of RIL are sheer arguments of prejudice which overlook the fundamental fact that RIL did not stand to gain by this exercise nor did RNRL lose anything by this exercise. It is RNRL's case that no agreement should have been signed till the Anil Ambani led Board of Directors was put in place. RNRL's position is no worse than it would have been had no agreements been signed. As already stated the GSMA which gave options to RNRL to opt for gas supply as per GSPA merely gives rights but does not cast any obligation on RNRL if RNRL disclaims the GSMA and declines to exercise any option, it is not liable to any financial or other contractual obligations.

128. The learned Counsel for RIL further submitted that arguably, if the GSPA was defective as alleged by RNRL (the learned Single Judge did not accept any of the defects alleged by the RNRL as sustainable) then RNRL could without any obligation or liability disclaim and demand a fresh agreement, failing which, seek recourse to enforcement of Clause 19 of the scheme. This is exactly the same position as would have prevailed had no agreement been put in place. This is for the reason that RIL on its part would have insisted on terms akin to those in the GSMA and if RNRL had not agreed to those terms the parties would be left in a situation where RNRL would have had to move the court for direction to implement the agreement to agree. By entering into GSMA/GSPA RNRL is exactly in the same position in that it can claim as not being scheme compliant and seek an enforcement of an agreement to agree.

129. The learned Counsel for RIL further submitted that was a RIL controlled board is a red herring - the significance of this has to be seen in the light of the fact that the learned Single Judge has not found merit in any of the objections raised by RNRL to the terms of the GSMA/GSPA.

130. The learned Counsel for RIL further submitted that at the same time, the reasons given by RIL have not been appreciated by the learned Single Judge. RIL urged that post demerger definite agreements had to be put in place before shares were listed. These agreements were put in place on 12th January, 2006 and shares were thereafter issued and listing arrangements applied for by 25th January 2006.

131. The learned Counsel for RIL further submitted that the change in the board occurred only in February 2006. The GSMA has a definite bearing on the value of RNRL shares - although, as found by the learned Single Judge, even without a suitable gas agreement RNRL is not a shell company. Anything that affects the value of shares has to be dealt with transparently and therefore it was considered advisable that the broad contours of which RIL considered suitable arrangement be put in place before the shares are issued and listed. If this had not been done it is possible that those acquiring RNRL shares could complain that they did so hoping that a far more viable gas regime would have been put in place by RIL. This was pointed out to the learned Single Judge but he failed to consider the significance of this submission.

132. The learned Counsel for RIL further submitted that the scheme of demerger envisaged the separation of the following four undertakings:

- (a) the gas based energy undertaking
- (b) the coal based energy undertaking,
- (c) the financial services undertaking and
- (d) the telecommunications business undertaking and then to vest in the four separate resulting companies.

The legal consequence of the Scheme is that:

(a) On the date of the grant of approval to the scheme, the right, title and interest in all the assets as well as the benefits of all the contracts etc. would, as a going concern, stood transferred to these resulting companies.

(b) Shares of the predetermined value of each of these resulting companies would be issued directly to the shareholders of RIL. The shareholders who would receive shares of the demerged company were those whose names were on the record on the "record date" i.e. 25th January 2006.

133. The learned Counsel for RIL further submitted that in effect immediately prior to the demerger taking effect, all the assets comprising the four undertakings belonged to a company (RIL) and its body of shareholders. On the effective date (and until the record date) RNRL was a wholly owned subsidiary of RIL . Upon the merger coming into effect, the same body of shareholders (of RIL) continue to have the same interest in those assets albeit now as shareholders of five different companies (RIL plus the four resulting companies). This body of shareholders had exactly the same proportion of interest in the businesses of these four resulting companies after the effective date as they did before the effective date.

134. The learned Counsel for RIL further submitted that it is submitted that it was for these shareholders - and therefore the Board of Directors of RIL as representatives of these shareholders to also decide the precise manner in which the demerger would be affected and the assets that would be transferred, as also

the arrangements that would be put in place for these resulting companies post transfer.

135. The learned Senior Counsel for RIL further submitted that it is submitted that the Learned Single Judge erred in concluding that there was some conflict or adversity of interest between the interests of RIL and RNRL on the shareholders of RIL and RNRL (which could never be the case since it was one common body of shareholders) on 12th January 2006 and for that reason, a decision on the GSMA should not have been taken by the then board of RNRL. This overlooks the fact that it was really for RIL (acting through its Board) to decide what assets are to be transferred to RNRL and what arrangements are to be made in the circumstances in which the vertically integrated structure of RIL was being altered. Specifically, it was for RIL Board to decide the terms on which gas would be supplied to the power plants of the Resulting Company. That being so, the composition of the Board of RNRL at the time of approval of this agreement was not of any real significance.

136. The learned Counsel for RIL further submitted that it is true that the scheme of demerger provided for Mr. Anil Ambani taking over as Chairman and exercising control over the Resulting Companies. However, equally the scheme provided, in Clause 27(xvii), that the reconstitution would be "at any time after the record date...." Significantly it did not posit that it would be immediately as on the record date. What is more important is that Mr. Anil Ambani would also be appointed by and supported by the same body of shareholders as that of RIL since shares in the resulting companies were issued to the shareholders of RIL. It is only over a period of time, after the resulting companies get listed that the body of shareholders would change upon transfers in the normal course on the floor of the stock exchange as take place generally in respect of shares of such companies.

137. The learned Counsel for RIL further submitted that it would clearly be for the Board of Directors of RIL to fix the precise content of the undertaking to be transferred (in respect of such details as are not spelt out in the Scheme) and to formalise, precisely, the arrangement for supply of gas and various other matters such as those dealt with in Clause 19 of the scheme. It is the Board of RIL which propounded the scheme of demerger, placed it before the general body for its approval, steered the scheme of demerger through proceedings in court for the scheme of demerger. If this Board - the author of the Scheme also what it had in mind as the "suitable arrangement" as referred to in the scheme, it can hardly be considered a situation of a conflict.

138. The learned Counsel for RIL further submitted that if the scheme of demerger contemplated in the first instance that control would be handed over to Mr. Anil Ambani and thereafter the contracts contemplated by the scheme be negotiated on an arms length basis, it would have specifically provided so.

139. The learned Counsel for RIL further submitted that the problem has arisen

on account of the fact that learned Single Judge first came to the conclusion that it is the MOU (and not the Scheme) which is the charter for the demerger. This conclusion appears to have influenced the learned Single Judge in coming to the conclusion that there having already been a split even before the Scheme was conceived (the MOU dates back 18th June 2005 whereas the scheme is September 2005) the undertakings had first to be demerged, placed under the control of Mr. Anil Ambani and only thereafter should there be a process of negotiations for formalising the contracts. If the conclusion that the MOU is the basis for this entire arrangement is erroneous (as is contended by the RIL) then it must also necessarily follow that the finding of the Learned Single Judge on the issue of conflict is erroneous. This contention, in any event, is now completely belied by the contents of the MOU.

140. The learned Senior Counsel for RIL further submitted that as to the correspondence in Exhibit F, the learned Single Judge overlooked that:

(a) It was between employees and others working for RIL Group alone (except Mr. Cyril Shroff who at that stage was solicitor for Mr. Anil Ambani who later he piloted the Scheme in the capacity of the common transaction lawyer for RIL and the Resulting Companies. This was only possible if there was no conflict between them.)

(b) All these negotiations were subject to the Board approval of RIL alone - which Board had not merely been advised to act in the best interest of the shareholders (in Smt. Kokilaben D Ambani's press statement so strongly relied upon by RNRL) but were also duty bound to do so.

141. The learned Counsel for RIL further submitted that in the Company Application RNRL contended that::

a. GSMA dated 12th January 2006 is a document which is vitiated inter alia by "fraud" and

b. that approval of the Government is not required to the sale price of gas.

142. The learned Counsel for RIL further submitted that by their letter dated 12th April, 2006 RIL had sought approval from the Government to the price stated in the draft GSPA to be made applicable for the purposes of the PSC. The Government, as stated above, by their letter dated 26th July 2006 did not grant approval to the said price.

143. The learned Counsel for RIL further submitted that prior to such refusal, RNRL by their letter dated 9th May 2006 submitted as follows:

Subject: Letter written by Reliance Industries Limited (RIL) to MoP&NG seeking price and formula approval for sale of Natural Gas to Reliance Natural Resources Limited (RNRL).

In the letter, it is inter alia, mentioned as follows:

1.

2. In this connection we, RNRL, have to submit that the arrangement for sale of 28 MMSCMD of Natural gas by RIL to RNRL is a result of negotiations initiated in early 2004 and commitments of RIL to supply gas to power and other projects of Reliance's Energy business group. It is in this background that the Scheme of Arrangement, which was intended to give effect to the reorganization of the Reliance Groups businesses into two Independent business groups for the benefit of the millions of shareholders of RIL and which had received the approval of the Bombay High Court on December 9, 2005 expressly provided for RIL and RNRL entering into gas supply arrangements.

3.. The Master Gas Supply Agreement entered into between by RIL and RNRL on 12th January, 2006 is an agreement entered into in compliance with the provisions of the scheme of Arrangement approved by the Bombay High Court. Intended for the benefit of over two million shareholders of RIL who have become the shareholder of RNRL. While certain modification are required to the Agreement to fully reflect the Agreed positions and to fully ensure the interests of the shareholders as shareholders of RNRL, the Agreement is in force.

...

7. From the above, it is clear that the price of natural gas determined under Article 21.6.2 for the purpose of calculation of profit petroleum is completely Independent of the price at which gas is actually sold by the contractor under Article 21.6.1. The PSC under Article 21.6.3 envisages approval of the price formula which is to be used for the purpose of determination of natural gas price under Article 21.6.2 (c).

Thus approval is required under the PSC only for formula or basis of pricing of Gas for the Limited purpose of computing profit petroleum and sharing of the same with the Government. It was never the intention to impose restrictions on RIL's freedom to finalize the actual price at which various quantum of the gas are sold. In fact taking, a contrary view is nothing but making the PSC impracticable.

8. The reading of various provisions of the PSC (Article 16.5 read with Appendix C, D, etc.) makes it clear that what is envisaged under the PSC is approval of the formula/basis of pricing of gas for the purpose of determining the floor price of gas for calculating profit petroleum. As will be appreciated, these provisions are basically intended to protect GOI's interests and revenues representing its participating interest in profit petroleum, while fully allowing the Contractor to have complete freedom to market the gas.

9. In fact none of the provisions of the PSC even remotely require the Contractor to obtain approval for the price of each and every sale of gas. So long as the price is comparable to arms length transaction and the value of the participating interest of GOI in profit petroleum is determined at the minimum of the floor

price profit petroleum, GOI's interests are fully protected.

...

12. In the light of the foregoing, we request MoP&NG to accord approval for the formula/basis of pricing of gas for the purpose of calculating profit petroleum as envisaged under Article 21.6.3 of the PSC. This would be in the interest of the more than two million shareholders of RNRL. The gas would generate more than 7000 MW of competitively priced electricity which would substantially alleviate the socioeconomic sufferings of the states in the northern and western region of the country and would help meeting GOI's target of "Power for all by 2012.

144. The learned Counsel for RIL further submitted that the contents of the above letter clearly show that not only was RNRL aware of the provisions of the PSC but were also aware that approval of MoPNG was required under Article 21.6.3 of the PSC to the formula/basis of pricing of gas for the purpose of calculating each of the constituents entitlements.

145. The learned Counsel for RIL further submitted that apart from the foregoing, while the hearing of the Company Application was in progress before this Hon'ble Court, RNRL addressed a letter dated 17th July 2007 to the Ministry of Petroleum and Natural Gas, Government of India, in which it was stated as follows:

Subject: Gas price for sale of gas by RIL to RNRL

? is based on NTPC's transparent competitive bidding process,

? satisfies PSC provisions for competitive arms length sales

? In line with recommendations of Gas Pricing Committee, and

? deserves approval for the purpose of calculation of cost recovery,

? profit petroleum and for all other purposes under the Production Sharing Contract (PSC)

3. In this regards, we wish to bring to your kind notice, another proposal made by RIL to MoPNG on April 14, 2006 seeking approval of price (USD 2.34 per mmbtu) for sale of gas to RNRL.

5. The reason cited by MoPNG is that the price was not derived on the basis of competitive arms length sales in the region for similar sales under similar condition.

Request:

17. On the above grounds and in light of recent submissions of RIL in the Bombay High Court, MoPNG should reconsider its earlier decisions and expeditiously grant approval to the RIL's proposal of the formula for sale of gas to RNRL as the price for the purpose of calculation of cost recovery, profit

petroleum and for all other purposes under the Production Sharing Contract.

146. The learned Counsel for RIL further submitted that from the foregoing it is abundantly clear that RNRL was not only aware of but clearly accepted the position that approval to the pricing of gas was and would be necessary. Apart from the foregoing, in their own pleadings, it has been stated in paragraph 6.6 (at page 20) as follows:

In relation to applicable governmental and statutory approvals, without in any manner mitigating RIL's responsibility, RIL and Reliance - ADA Group to jointly work towards obtaining such approvals, RIL will, if so required by 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.

This paragraph is a deliberate misstatement of para from MOU which is dealt with separately.

147. The learned Counsel for RIL further submitted that RNRL was aware of and must be deemed to have unequivocally accepted that approvals of Government of India to pricing of natural gas would be required and are estopped, at this stage, from contending to the contrary.

148. The learned Counsel for RIL further submitted that in the present proceedings RNRL questions the GSMA on the ground that it could have been approved only by a Board of Directors which was nominated by Anil Ambani which happened only on 7th February 2006. In other words, RNRL questions that the GSMA was not made by free consent or was made under coercion or duress. RNRL also questions the GSMA as sham and fraud as follows:

a) The Respondents have made a hollow and unsubstantiated denial to the Applicant's contention that GSMA was a sham document and a fraud on the shareholders of the resulting company, the shareholders of demerged company and in fact a fraud on this Hon"ble Court".

b) It is submitted that the GSMA was executed in fraudulent manner....

c) The said documents were put in place by RIL while it was in interim control of the Applicant with an intent to thrust upon the Applicants of gas supply contract that is highly prejudicial to the interest of the Applicant, unreasonably and unconscionably loaded in favour of RIL and bears out a name sake and sham Gas supply arrangement

d) The sham Agreement entered into by RIL are not only a fraud on the Applicants' shareholders and RIL's shareholders but a fraud on this Hon"ble Court

e) It is denied that the allegation of fraud have been made irresponsibly (meaning thereby that the allegations of fraud are made responsibly).

149. The learned Counsel for RIL further submitted that these allegations now being made have to be viewed in the context of the earlier conduct of RNRL. By their letter dated 11th May, 2006, 22nd May, 2006, 21st November, 2006 RNRL, in fact, applied to the Ministry of Petroleum and Natural Gas, Government of India, for permission to lay a pipeline from Kakinada to Dadri to carry the gas to be produced in KGD6 block.

150. The learned Counsel for RIL further submitted that in the said application, RNRL stated as follows:

3.2 The gas required for the power plant shall be supplied by Reliance Industries Limited's (RIL) KG Basin field, off the coast of Andhra Pradesh....

3.b RNRL, RIL's parent company, has already entered into an agreement to purchase 28 MMSCMD of natural gas from RIL's gas reserves in KG basin. The quantity of gas available to RNRL could increase to 40 MMSCMD under certain conditions

151. The learned Counsel for RIL further submitted that the present proceedings adopted by RNRL are clearly an attempt to obtain amendment to the GSMA which has been accepted and acted upon by RNRL. RIL respectfully submits that it is not open to RNRL to approbate and reprobate the GSMA or the provisions thereof as it suits its convenience.

152. The learned Counsel for RIL further submitted that RNRL has acted upon and in furtherance of the GSMA at various stages from January 2006 till filing of the Company Application in November, 2006.

153. The learned Counsel for RIL further submitted that RNRL issued shares to RIL shareholders and listed them for trading on the Stock Exchange on the basis that there is a gas supply arrangement in place.

154. The learned Counsel for RIL further submitted that the shareholding of RNRL has materially changed and the original RIL shareholders who became RNRL shareholders, have transferred their shareholding on that basis and the new persons acquired such shares on that basis.

155. The learned Counsel for RIL further submitted that RNRL urged MOPNG in May 2006 and in July 2007 (during the course of hearing of the Petition) to approve the price under GSMA.

156. The learned Counsel for RIL further submitted that RNRL applied to Government of India for permission to lay pipeline for transportation of Gas from Kakinada (landfall point of KGD6 gas project) to Dadri. This application was premised on the gas supply arrangement being in place.

157. The learned Counsel for RIL further submitted that in the circumstances it is not open for RNRL to question the validity of the Board decision dated 11th January 2006 or GSMA dated 12th January, 2006. In any case, even otherwise there is nothing wrong with GSMA even on merits and hence RNRL's challenge

has no substance.

158. The learned Counsel for RIL further submitted that as already submitted earlier, the argument that delay in establishing Dadri project being on account of absence of a "bankable" agreement was not expressly pleaded before the learned Single Judge. For the first time these pleadings surfaced in reply to a notice of motion in June 2007 in the appeal court (Appeal against interim orders). The case was thereafter argued in August 2007 before the learned Single Judge but no amendment was made to the pleadings to incorporate these allegations. RIL has repeatedly challenged in submissions and in affidavit the assertion that the delay in Dadri has been on account of absence of a "bankable" gas supply agreement. The suggestion that it is on account of absence of a "bankable" document that the Dadri plant has been delayed, proceeds on the premise that RNRL needed a gas supply agreement on the basis of which finances could have been raised and closure achieved. RIL has repeatedly pointed out that there is not a single specific averment of fact to contend that any bank has declined to finance the Dadri project or that it had done so solely on account of the fact that there was no firmed up gas supply agreement with RIL. In the affidavit filed on 13 January 2009 (page 1738) in the course of the hearing of the appeal, responding to a board resolution of RNRL which sought to suggest that the gas plant would be put in place in three years, RIL relied on a report of an expert in whose opinion, a plant of the size of Dadri could not in any reasonable contemplation, be put in place in such a short period of time. More significantly he analysed on the basis of independent research that neither a power purchase agreement nor the EPC contract negotiation nor the final environmental clearance had been obtained and these are the critical factors which have to be put in place apart from a gas supply agreement.

159. The learned Counsel for RIL further submitted that in the course of hearing of the appeal it also came to notice of RIL that some companies of the Anil Ambani group had raised External Commercial Borrowings (ECBs) for Dadri project and invested them in mutual funds after bringing them to India instead such ECBs can only be putting them to the endues for which they are raised - and for that reason RBI sought an explanation as to why they had brought funds to India. In their response REL had stated that the funds were brought to India inter alia because the Dadri project was at a critical stage of implementation and funds were required. This explanation runs directly contrary to the case set up so far, namely, that funds for Dadri could not be raised on account of the absence of an agreement. RIL put these facts on affidavit filed on 13th January, 2009 and sought production of the documents relating to the RBI order and other related documents. It is submitted that it is clear that the Anil Ambani group applied to RBI for compounding this offence of moving the funds to India, investing them in mutual funds and remitting them, on the premise that the funds were brought for investment inter alia in Dadri but on account of the fact that they could not be so used, had been invested in mutual funds and then remitted back and that Dadri was at a critical stage of implementation. It is either this explanation that

is false or the reasons stated in court for which Dadri has been delayed (for whatever reason) is false - the two explanations cannot stand together.

160. The learned Counsel for RIL further submitted that in the production of these documents. A clear and candid admission has now been made that REL did not require a bankable gas agreement to raise funds for the Dadri project. As stated in the RIL affidavit dated 13th January 2009 (page 1738 - 1803) and in July 2007 (page 11081215, Vol.8) and from the MOU produced by RNRL it is now apparent that the Dadri project was to be promoted by REL. REL is a group company of Anil Ambani group. It is incomprehensible as to how, if funds are readily available with REL, without a gas supply agreement, it can now contend that Dadri was delayed due to absence of a bankable gas supply agreement. It is submitted, even if the implementation of the project had been taken up in all earnest, the project would have taken a few years to come on stream by which time the gas supply issues could have been resolved. Besides if the Dadri project had been implemented and a demand had been made, consistent with the MOU (if the MOU was found to be binding on the corporate entity RIL) that RIL enter into an agreement to supply gas up to 28 MMSCMD to the Dadri project on the NTPC terms, RIL would have signed a GSPA on NTPC terms and NTPC price (subject to Government approval) with the Dadri plant. Therefore this entire story of there being delay in the absence of a gas supply agreement for Dadri is false. As has been now admitted, there was no want of funds for implementing the Dadri project. It is obvious that for other reasons the project could not have been implemented or that implementation thereof had been delayed. Besides instead of seeking supply of gas as per GSMA/GSPA, RNRL termed the arrangement to be a fraud and approached the Court.

161. The learned Counsel for RIL further submitted that RNRL has produced letters from equipment suppliers (no banks or financial institutions) to support the theory that they were unsure to go ahead with the project in the absence of firm gas supply.

162. The learned Counsel for RIL further submitted that it is important to note that these letters are all dated 2006. The first development plan (after the certification of P1 reserves) was filed in October 2006 and was approved in December 2006 - till a development plan is approved there is no question of gas being available to sign gas supply agreement. If after the first development plan was approved, if instead of coming to court RNRL gave a notice to enter into a GSPA with REL or the establishes the Dadri project RIL, would have under the terms of the GSMA been obliged to do so. There is no letter after the development plan of RIL had been approved (and it has been in a position to enter into a gas supply agreement).

163. The learned Counsel for RIL further submitted that in fact it is submitted that it is clear that it is the conduct of RNRL itself, if at all, which has led to this difficulty. The MOU contemplated signing a gas supply agreement with REL and also contemplated that gas would be supplied to the Dadri project on NTPC

terms. RNRL's case has been in the teeth of the MOU that it is entitled to buy gas at NTPC prices and sell the same at market prices to the Dadri project. In order to secure this private profit for RNRL it has been litigating in court and has not demanded a gas supply agreement in favour of the Dadri project. Therefore assuming (without accepting) that want of a gas supply agreement was delaying the Dadri project the delay is due to RNRL's desire to profit from the gas meant for Dadri.

164. The learned Counsel for RIL further submitted that the foregoing facts have also to be viewed in light of the clear and unambiguous submission of Mr. Rohatgi appearing on behalf of RNRL made on 29 January 2009 that the cost economics of the Dadri project is based on a \$ 2.34 per MMBTU of gas. It is RIL's case that this statement is untrue. The entire case on this basis is untrue for the reason that cost of gas is a passthrough cost. In other words, if the gas is acquired by the Dadri or any other power project at government approved prices the regulator will accept that price as a passthrough cost in determining the tariff of electricity. If RNRL acquires gas at US\$ 2.34 per MMBTU and sells it at a higher price it is obvious that in the tariff fixation of electricity the consumer of the electricity cannot be burdened with the profit of RNRL and the regulator will never accept the mark up of RNRL over the purchase price of gas as a passthrough cost in determining price of electricity.

165. The learned Counsel for RIL further submitted that however, if Mr. Rohatgi's assertion is true i.e. that the feasibility of the Dadri plant is based on receiving cost at \$ 2.34 per MMBTU then it is obvious that RNRL's case based on gas being for the Dadri plant is also incorrect. RNRL contends that it is entitled to purchase gas at \$ 2.34 MMBTU and to sell the gas at market price. If this is so then if RNRL is granted the relief prayed for, it must necessarily result in destroying the Dadri project altogether. In other words what RNRL now seeks is that this Hon'ble Court may be pleased to direct that gas be supplied to RNRL at the price of \$2.34 per MMBTU and that RNRL have the right to sell it at market prices and that Dadri would not be feasible at a higher price of gas resulting in a complete stalemate. RNRL would then approach court for permission to trade in the gas and seek a regime under which they can trade in the gas make profits and act in a manner not only inconsistent with the Scheme but in contravention of the clause which prohibits competition under Clause 19 itself.

II- B Contentions and submissions on behalf of RNRL.

166. Mr. Jethmalani, the learned Senior Advocate assisted by Mr. Mukul Rohatgi, Senior Advocate on these issues submitted that the very foundation on the basis of which the scheme of arrangement for demerger under Sections 391 - 394 of the Companies Act, 1956 came to be filed on the basis of a Memorandum of Understanding entered between the members of the Ambani Family on 18.6.2005 which is not a matter of dispute. Although in pleadings before the Company Court, RIL did not specifically deny the existence of Family Settlement, it gave a vague response that it was not aware of its existence and its binding

nature. In the arguments before the learned Single Judge, RIL contended that RIL as a company was not aware of the "details of the settlement between Shri Mukesh Ambani and Shri Anil Ambani". However, the learned Single Judge after considering the facts and circumstances of the case, gave a positive finding that the MOU exists and was binding on RIL. Much of RIL's arguments before the learned Single Judge have finally been proven to be false by the production of the relevant extracts of MOU before the Appellate Court pursuant to the direction of this Hon'ble Court. The contents of the relevant extracts of the MOU have been accepted and acknowledged by RIL. Much of the arguments made by the parties before the Appeal Court with regard to the existence of the MOU are thus unnecessary. The relevant extracts of the MOU have since been produced before the Appellate Court. The same has been marked as an Exhibit and both sides have referred to the relevant parts of the MOU and made submissions therein in the appeal. The question of existence of MOU is thus not relevant. The only relevance now relates to its sanctity and the binding nature thereof on the individuals as also the respective group companies headed by the individuals.

2. The existence, effect, sanctity and the binding nature of the MOU is demonstrated by the points mentioned below

MOU dated 18.6.05:

- i) Existence of MOU;
- ii) Knowledge & terms of the MOU;
- iii) Sanctity of MOU;
- iv) Its binding nature on RIL and other companies of the RIL group;
- v) Compatibility of GSMA/GSPA with MOU.
- vi) MOU is an aid to construction/interpretation of the Scheme

i) Existence of MOU: The existence of the MOU was pleaded in the Company Petition at paragraph 6.6. The salient terms were also set out. The reply by RIL to this paragraph was entirely vague and evasive. The learned single Judge held that the MOU existed and that the terms of the MOU had to be implemented. This despite RIL arguing before the single judge that there was no MOU and/or that the terms thereof were not known to the company (RIL) and that the same was not binding.

The existence of MOU is now no longer in doubt. The relevant parts of the MOU concerning the gas business have already been placed before this Hon'ble Court in appeal with the consent of parties and the same is now an Exhibit. The relevant terms relating to price tenure, volume, etc. are admitted between parties and it is only the interpretation thereof which is the subject matter of discussion in appeal.

ii) Knowledge & terms of the MOU: The terms of the MOU were pleaded in para

6.6 of the Company application. There was no specific denial but only a vague and evasive denial. RIL was in a total denial mode at that time. They feigned ignorance about the MOU, about its terms and its knowledge qua RIL including its MD. The learned Judge adversely commented upon the same. Today the terms are not in issue since the MOU has been read by this Hon`ble Court.

iii) Sanctity of MOU: It has always been accepted in law that in India, in our present social set up of joint families and/or extended families running businesses, joint living and common mess that family arrangements/family agreements have utmost sanctity and are in fact respected by courts more than a mere commercial agreement between two parties. The idea is that the said type of agreements would result in avoidance of litigation and also keep the social fabric together.

One celebrated case in this regard is Kale and Others Vs. Deputy Director of Consolidation and Others, . At page 813 of the reported judgement it was observed by the court as follows:

(3) The family arrangement may be even oral in which case no registration is necessary(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable

iv) The MOU's binding nature on RIL and other companies of the RIL group: There are many factors to prove this point. Firstly, 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. It is incredulous or innocent to think that they were only meant for three individuals that is the mother and two sons. Secondly, the implementation of the MOU resulted in the legal framework of a scheme u/s 391 of the Companies Act, 1956 before the company Court. Obviously the companies were also aware of the same.

Thirdly, the Board of RIL made a public announcement on 18th June 2005, i.e., soon after execution of the MOU on the same day publicly acknowledging, with gratitude to the mother, Smt. Kokilaben, that a settlement of disputes has been reached between members of the family which had been festering for some time.

Fourthly, Exhibit "F" reflects knowledge of the terms of the MOU even with senior officials of both sides wherein efforts were being made to work out a mutually negotiated GSMA/GSPA which would be in line with the MOU.

Fifthly, Mr. Mukesh Ambani being the MD had briefed the Board of RIL with the broad details of the family arrangement to which he was a party. The doctrine of identification explained and submitted by Mr. Ram Jethmalani, Senior Advocate, on behalf of RNRL is on this issue. This point is expanded hereinbelow.

Doctrine of Identification: The Family Arrangement was arrived at and signed by Smt Kokilaben Ambani, Shri Mukesh Ambani and Shri Anil Ambani. Shri Mukesh Ambani was and is the Chairman and Managing Director with a controlling interest of RIL and was thus the controlling mind and will of the company. As per the doctrine of identification a company is "identified" with such of its key personnel through whom it works. Such personnel are the very alter ego of the company and their actions are deemed to be the actions of the company itself. This is not a doctrine of vicarious liability but a doctrine whereby there is an identity of the company and its key personnel. This doctrine has been accepted by the Supreme Court. Hence the Company RIL is deemed to be aware of and fully bound by the actions of its Managing Director.

That Shri Mukesh Ambani is the directing mind and will of RIL is demonstrated from:

(a) Clause 20 of the Explanatory Statement to the Scheme which states that:

Shri Mukesh D. Ambani, the Chairman and Managing Director of the Applicant Company, will continue to lead the other businesses, including petrochemicals, oil and gas exploration and production, refining and textiles and other businesses comprising the Remaining Undertaking.

(b) RNRL being a resulting company was a wholly owned subsidiary of RIL and was also therefore under the control of Shri Mukesh Ambani.

(c) Clause 27 (xvii) page 10 and Clause B(b) page 14 also state that RIL would continue to be controlled and managed by Shri Mukesh Ambani

(d) Shri Mukesh Ambani was a Managing Director and also had a controlling interest in the management of RIL;

(e) The Minutes of the Board meeting of RIL dated 27.7.2004, tendered before the Court on 21.8.2008, also records that Shri Mukesh Ambani was the overall incharge of the businesses and affairs of the company and was accountable and responsible to the Board. The functions and powers of Shri Anil Ambani were subject to the overall authority of Shri Mukesh Ambani.

Judgments cited on the Doctrine of identification are as follows:

Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others, :

10. There is a wellknown principle in the law of torts called the "doctrine of identification" or "imputation". It is to the effect that the defendant can plead the contributory negligence of the plaintiff or of an employee of the plaintiff where the employee is acting in the course of employment.

The Assistant Commissioner, Assessment-II, Bangalore and Others Vs. Velliappa Textiles Ltd. and Others, :

16. The question of criminal liability of a juristic person has troubled Legislatures and Judges for long. Though, initially, it was supposed that a Corporation could not be held liable criminally for offences where mens rea was requisite, the current judicial thinking appears to be that the mens rea of the person incharge of the affairs of the Corporation, the alter ego, is liable to be extrapolated to the Corporation, enabling even an artificial person to be prosecuted for such an offence. I am fully in agreement with the view expressed on this aspect of the matter in the judgment of brother Mathur, J. What troubles me is the question whether a Corporation can be prosecuted for an offence even when the punishment is a mandatory sentence of imprisonment.

(1966) 1 All. E.R. 193 (R. v. Mc Donnell):

...The fourth, and the principal point really here, in my opinion, is the submission that the conspiracy charges cannot stand since in the particular circumstances here the defendant and the company were in effect one and the same person with one and the same mind, and that a conspiracy in law requires the agreement of at least two persons and two minds....

I am satisfied here that the learned author of the book which has been shown to me is correctly expressing the law as it is, and the true position is that a company and a director cannot be convicted of conspiracy when the only human being who is said to have broken the law or intended to do so is the one director, and that is the defendant in this case.

J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, :

44. As already noticed, where the company owns a factory it is the company which is the occupier, but, since company is a legal abstraction without a real mind of its own, it is those who in fact control and determine the management of the company, who are held vicariously liable for commission of statutory offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company. Dealing with the question of vicarious liability of the directors for offences committed by a company, the following observations of Lord Diplock in *Tesco Supermarkets Ltd. v. Nattrass* are useful:

In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the

company. This test is in conformity with the classic statement of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*

The passage of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* referred to by Lord Diplock, is as follows:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority coordinate with the board of directors given to him under the articles of association....

45. We are in complete agreement with the above view propounded by Lord Diplock and Viscount Haldane, Lord Chancellor and hold that under the Act only one of the directors, the directing mind and will of the company, its alter ego, can be nominated as an occupier for the purposes of the Act.

1972 App Cas 153 (*Tesco Supermarkets Ltd. v. Nattrass*):

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.

v) Compatibility of GSMA/GSPA with MOU: It is obvious that the guiding light for the two groups is the MOU. This was the start of the division. This was reflected in the scheme approved by this Hon`ble Court. Thus the GSMA and GSPA had to be compatible with the terms of MOU. RNRL has always maintained that the salient terms relating to price, volume, tenure, identity of buyer (including definition of affiliate) and cap on liability, being the broad major heads, are not compatible with the terms of the MOU and/or the NTPC draft to which a reference was made in the MOU as a contemporaneous document at that time.

It is the further submission of RNRL that Mukesh Ambani and his group have

deliberately acted in breach and violation of the terms of the MOU and the scheme, the result of which is that RNRL is left without the business of supply of gas..

Interestingly it was argued by counsel for RIL towards the fag end of the hearing that in fact the terms of the GSMA/GSPA are compliant with the MOU though in fact they are not. It is, therefore, recognized by both parties that the MOU is all pervasive and binding on all concerned including individuals and group companies.

(vi) MOU is an aid to construction/interpretation of the scheme.

Clause 19 of the Scheme provides that (Scheme/page 25) suitable arrangements would be entered into in relation to supply of gas. The expression "suitable arrangements" would clearly mean an arrangement which would give effect to the scheme and fully implement the Scheme i.e. effectively transfer the gas based energy undertaking to RNRL. In order to interpret and construe the expression "suitable arrangements", the surrounding circumstances are relevant and would aid in the construction/interpretation of the Scheme. The MOU and its terms assist in construing the expression "suitable arrangements" and the suitable arrangements would be one which contain the terms of gas supply as agreed to by the parties in the Scheme. The Scheme has been propounded to give effect to the MOU. In this connection, RNRL has relied upon certain passages from the following texts:

The Interpretation of Contractors (Second Edition) by Kim Lewison, Q.C. at page 57, 58:

It has always been the case that the court must construe a written agreement (even under seal) in the light of the circumstances surrounding its making.

Accordingly, evidence of the surrounding circumstances is admissible in all cases to place the contract in its correct setting, even where there is no ambiguity apparent on the face of the document....

Corpus Juris Secundum 2 94295 at page 45, 46:

Contracts - 147.

The fundamental, basic, primary, ultimate, or paramount question to be determined in the legal construction of all contracts is what the real intention of the parties was. So, it has been said that the purpose, aim, or object of the construction or interpretation of a contract is to ascertain or arrive at, and effectuate, the intention of the parties.

In this connection, intent has been said to be the purpose formed in man's mind, or what was in the contemplation of the parties; the intention of the parties may be gathered from all the pertinent facts and circumstances.

The Supreme Court has in the case of Tarapore and Company Vs. Cochin

Shipyard Ltd., Cochin and Another, held:

35. In order to ascertain whether the claim for compensation for increase in the price of pile driving equipment and technical knowhow fees would be covered by the arbitration clause, it is necessary briefly to refer to the negotiations and discussions leading to the formation of the contract for construction of the Repair Dock and the Building Dock Undoubtedly, if in the final written contract, there is something contrary to the basic understanding during the formative stage of the contract, the written contract would prevail. But if the contract does not indicate to the contrary and the assumptions appeared to be the foundation of the contract, obviously that aspect cannot be overlooked while determining what were the obligations undertaken under the formal contract....

167. The learned Counsel appearing for RNRL, have assailed the Board Resolution dated 12.1.2006 that the meeting of 11.1.2006 and the GSMA dated 12.1.2006 between Shri Mukesh Ambani and Shri Anil Ambani. He has drawn the attention of the Court to the fact that an email containing the draft GSMA was sent late at night on 10th January 2006 by RIL to the Board of Directors of RNRL. The Board of Directors of RNRL had three Directors with two directors being from the Mukesh Ambani Group and one director Mr. J.P. Chalsani, being from the Anil Ambani Group. Mr. Chalasani representing the Anil Ambani Group objected to the proposed GSMA inter alia stating that he had not even had enough time to examine the same. However, on the next day viz. 11th January 2006 the other two Board members overruled the objections of Mr. Chalasani and by 2:1 majority imposed the impugned GSMA on RNRL at a time when RIL was still in control of RNRL. The meeting to consider the GSMA commenced at 7.30 P.M. and concluded at 7.35 P.M, in five minutes.

168. The learned Counsel appearing for RNRL submitted that this was clearly a stratagem to defeat the valid business interests of RNRL. Effectively RIL under the leadership of Shri Mukesh Ambani was sitting on both sides of the negotiating table and thrusting the unsuitable, unfair and one sided contract upon RNRL. It is clear that a document executed between two parties where they are controlled by the same entity would hardly be a suitable agreement especially when negotiations to reach a suitable agreement between the two groups were still on.

169. The learned Counsel appearing for RNRL submitted that the document was suitable only to RIL and not to RNRL and hence the same is in violation of Clause 19 of the Scheme.

170. The learned Counsel appearing for RNRL submitted that the documents referred to in Exhibit - "F" show that the parties were under negotiations for the execution of the GSMA. There were disagreements between the Anil Ambani Group and RIL. At this point of time RNRL was still controlled by RIL as the shares in RNRL had not been transferred to Shri Anil Ambani. Further the Board of Directors was also under the control of RIL i.e. Shri Mukesh Ambani. The shares in RNRL were allotted/transferred to Shri Anil Ambani only on 27th

January 2006 and the Board was reconstituted in accordance with Clause 17 of the Scheme of Arrangement only on 7th February, 2006. The rationale of the Scheme was the separation of ownership and control of the businesses/ understandings amongst Shri Anil Ambani and Shri Mukesh Ambani. Clause 6 of the Scheme stated expressly that RIL would continue to manage the resulting companies till the effective date in the capacity of a trustee. It was understood and was as well an obligation in law that this fiduciary position would continue till the transfer of control of the resulting companies to Shri Anil Ambani. Otherwise it was possible for RIL to frustrate the Scheme by imposing onerous obligations on the resulting companies before transfer of control thereby transferring only shell companies. This is exactly what has happened in the present case viz. the business of supply of gas to REL and Reliance Patalganga has not been transferred to RNRL and is retained by RIL by RIL insisting that the GSPA will be between RIL and the Power Company.

171. The learned Counsel appearing for RNRL submitted that therefore, the Scheme of Arrangement clearly required that the agreement between RIL and RNRL should have been executed after 7th February, 2006.

172. The learned Counsel appearing for RNRL submitted that Shri Mukesh Ambani was the directing mind and will of both RIL and RNRL on 12th January, 2006. As per the doctrine of identification, discussed above, he was fully identified with RIL and RNRL. Hence, in law, the agreement of 12.1.2006 is between Shri Mukesh Ambani and Shri Mukesh Ambani.

173. The learned Counsel appearing for RNRL submitted that the meeting held on 11.12.2006 was vitiated for two reasons. First, there was no complete demerger as on that date. Consequently, there was no "resulting company" which had come into existence with which RIL could have entered into a contract. The demerger qua the resulting company, at the earliest was complete only on 27.1.2006 i.e. when the shares of RNRL were issued to the shareholders of RIL. Secondly, the contract could have been executed only on the transfer of management and control of RNRL to Shri Anil Ambani, which happened on 7.2.2006. This was a requirement of the Scheme of Arrangement.

174. The learned Counsel appearing for RNRL submitted that the documents referred to in Exhibit "F" show that the parties were under negotiations for the execution of the GSMA. There were disagreements between Anil Ambani Group and RIL. At this point of time RNRL was still controlled by RIL as the shares in RNRL had not been transferred to Shri Anil Ambani. Further the Board of Directors was also under the control of RIL i.e. Shri Mukesh Ambani. The shares in RNRL were allotted/transferred to the shareholders of RIL, including Shri Anil Ambani, on 27th January 2006 and the Board was reconstituted in accordance with Clause 17 of the Scheme of Arrangement on 7th February 2006.

175. The learned Counsel appearing for RNRL submitted that as per Clause 19 of the Scheme of Arrangement, "suitable arrangement" would be entered into in

relation to the supply of gas for power projects with Gas Based Energy Resulting Company". RNRL had not become a resulting company within the meaning of the Scheme on that date (i.e. 11/12012006). It became so long after, certainly not up to 2712006.

176. The learned Counsel appearing for RNRL submitted that the Scheme was one for a demerger. Clause C of the Preamble and subclause (d) (i) is relevant and is set out below for ready reference:

(d) The demerger of Coal Based Energy Undertaking, Gas Based Energy Undertaking, Financial Services Undertaking and Telecommunication Undertaking of RIL under the Scheme of Arrangement will be effected under the provisions of Sections 391 - 394 of the Companies Act, 1956. The demerger complies with the provisions of Section 2(19AA) of the Income Tax Act, 1961 such that

(i) All properties of the Demerged Undertaking (as defined hereinafter) being transferred by RIL immediately before the demerger become the properties of the respective Resulting Companies by virtue of the demerger.

Perusal of Clause C (d) (i) reveals that the properties of the Demerged Undertakings (in the present case the Gas Based Energy Undertaking) become the properties of the respective Resulting Companies by virtue of the demerger. In the circumstances, the Business of supply of gas to REL and Reliance Patalganga Pvt. Ltd. stands transferred to and vested in RNRL.

Demerger is not defined in the Companies Act, but is defined in the Income Tax Act, 1961 ("the Income Tax Act"). Section 2(19AA) of the Income Tax Act reads as under

(1 9AA) "demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under Sections 391 - 394 of the Companies Act, 1956, by a demerged company of its one or more undertakings to any resulting company in such a manner that-

(i) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of demerger;

(ii) all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;

(iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;

(iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis;

177. The learned Counsel appearing for RNRL submitted that in the

circumstances suitable Arrangement has not only to be bankable has also to give effect to the Scheme so that RNRL becomes entitled to the Business of Supply of Gas to REL and Reliance Patalganga Power Pvt. Ltd. which before the demerger RIL was entitled to/ The present GSMA with a draft GSPA attached to be entered into between RIL and the Power Company is a cleaver and mischievous device which has the effect of RIL retaining the Business of Supply of Gas to REL and Reliance Patalganga Pvt. Ltd. This is in complete breach of the Scheme and the Order of the Court sanctioning the Scheme.

178. The learned Counsel appearing for RNRL submitted that Condition (iv) of the definition makes it clear that the issuance of shares by a resulting company to the shareholders of the demerged company is a condition precedent to the demerger. Assuming no such transfer happens, the demerger would not be complete for want of consideration as well as noncompliance of the statutory conditions mentioned in Section 2(19AA). Only after the issuance of share can the demerger be complete.

179. The learned Counsel appearing for RNRL submitted that similarly, the definition of "Resulting Company" in Section 2(41A) of the Income Tax Act reads as under:

(41A) "resulting company" means one or more companies (including a wholly owned subsidiary thereof) to which the undertaking of the demerged company is transferred in a demerger and, the resulting company in consideration of such transfer of undertaking, issues shares to the shareholders of the demerged company and includes any authority or body or local authority or public sector company or a company established, constituted or formed as a result of demerger;

180. The learned Counsel appearing for RNRL submitted shares to the shareholders of the demerged undertaking (RIL) on 27106, no demerger in the eyes of law was complete before that date. Hence there was no occasion for the execution of a contract between RIL and RNRL as on that date because no real "resulting company" was present as on that date.

181. The learned Counsel appearing for RNRL submitted that it is the contention of RIL that the Gas Supply Agreement (GSPA) should be with the Power Company and the GSMA will be with Global Fuel Management Services (now RNRL, the Applicant) so that whenever gas is required, RIL will enter into a GSPA with the Power Company and that the timing of the meeting was irrelevant. This arrangement has the effect of RIL retaining the business of supply of gas to REL and Reliance Patalganga which business in fact should be carried on by RNRL. The written submissions of the Appellant, RIL expressly states that the shareholders, while approving the Scheme "left it to the Board of Directors of the Demerged Company to put arrangements for supply of gas to the power plants of RPPL and REL which, in the opinion of the Board were "suitable" keeping all facts and circumstances and shareholder interest in view." This appears to suggest

that it was left to the RIL Board to impose the agreement and that it was the sole arbiter of the suitability of any agreement.

182. The learned Counsel appearing for RNRL submitted that however, this is a misinterpretation of the Scheme. The words used in the Scheme are "Gas Based Energy Resulting Company". There is only one gas based energy resulting company (RNRL) which became a resulting company within the meaning and context of a demerger upon the transfer of shares on 27106. However, there is at best a potential ambiguity as to the timing of the agreement with such a company. In such cases, by virtue of application of otherwise clear words of a document to extrinsic facts some ambiguity has been raised. In such a circumstance, reference can be had to extrinsic evidence to clear the ambiguity.

183. The learned Counsel appearing for RNRL submitted that in this regard, the judgment of the Calcutta High Court, *Chairman, Serajganj Municipality v. Chittagong* AIR 1923 Cal 32 can be referred to. This has been reiterated in Field's Law of Evidence, 10th Edn. Volume 4, Page 39033904

184. The learned Counsel appearing for RNRL submitted that in the present cases, the entire gamut of correspondence between the parties, as contained in Exhibit F (Volume 3, Compilation of Documents submitted by the Respondents) is between RIL and its executives on the one hand and the executives of the Anil Ambani Group on the other hand. Parties were conducting detailed and complex negotiations with the clear understanding that the agreement had to be entered into between RIL, as controlled and managed by Mukesh Ambani and with the company controlled and managed by Anil Ambani. This aspect is dealt with in greater detail below. Hence it is clear that the ambiguity about the meaning of the term "resulting company" in the context of Clause 19 has to be resolved by adopting the meaning which envisages a transfer of control of the Applicant Company to Shri Anil Ambani. This happened only on 722006. Therefore the term "resulting company" cannot be RNRL with RIL as the controlling entity.

185. The learned Counsel appearing for RNRL submitted that the GSMA and GSPA of 11/1212006 is not an arrangement within the meaning of Clause 19 of the Scheme. An arrangement in the context of Clause 19 is synonymous with an agreement. An agreement, in turn, requires negotiations between two (or more) independent parties each having the freedom and autonomy not to agree. Such was not the position of RIL and RNRL on 11th or 12th January, 2006. The latter was a wholly owned subsidiary of the former with two directors representing the Mukesh Ambani group and one belonging to the Anil Ambani group.

186. The learned Counsel appearing for RNRL submitted that there was not even a pretence of negotiations and the decision was taken by a majority despite the legitimate objections and protests by the minority director. Ordinary decencies of corporate governance and principles of fairness were completely ignored. The minority director was only allowed to record his dissent. It is on record in the shape of the director, Mr. Chalasani's letter dated 1212006 which is part of

Exhibit F and is also to be found at page 474 of Volume 3 of the Memo of Appeal.

187. The learned Counsel appearing for RNRL submitted that the rationale of the Scheme was the separation of ownership and control of the companies amongst Shri Anil Ambani and Shri Mukesh Ambani.

Preamble, Clause B(b): ...RIL also intends to reorganize the management of various businesses and undertakings to provide focused management attention and leadership required by the businesses which are to be segregated and demerged. In particular, Shri Anil D Ambani, the erstwhile Vice Chairman and Managing Director of RIL would take responsibility for providing such focused management and leadership to the segregated and demerged businesses while Shri Mukesh D Ambani, Chairman and Managing Director of RIL would continue to lead the businesses retained by RIL including, in particular petrochemicals, refining, oil and gas exploration and production, textiles and other businesses (see page 14 Volume VI of Compilation of Documents)

Preamble, Clause C (a): ...RIL will continue its interests in the business of Petrochemicals, refining, oil and gas exploration and production and textiles and develop new areas in the economic development of the country (i.e. Remaining Undertaking).

Clause 1.33 Part 1 of the Scheme defines Remaining Undertakings, businesses, activities and operations of the Demerged Company (RIL) other than those comprised in the Demerged Undertakings. In the circumstances, what remained with RIL was gas exploration and production and not supply of gas to REL and Reliance Patalganga Power Pvt. Ltd.

Clause 17: At any time after the Record Date, RIL shall cause the Board of Directors of each of the Resulting Companies to be reconstituted in such manner as is agreed between each Resulting Company and Shri Anil D Ambani and thereupon each of the Resulting Companies shall be controlled and managed by Shri Anil D Ambani. The Demerged Company constituting the Remaining Undertaking shall continue to be controlled and managed by Shri Mukesh D Ambani

188. The learned Counsel appearing for RNRL submitted that these clauses clearly establish that the very purpose and rationale for the demerger was inter alia to transfer the management of RNRL to the Anil Ambani group. This was an integral part of the scheme. The word integral has been judicially defined in a judgment of the Supreme court in the case of Raghunathrao Ganpatrao Vs. Union of India (UOI), hence: "Ordinarily speaking, "integral" means "of a whole or necessary to the completeness of a whole" and as "forming a whole" (Concise Oxford Dictionary)."

189. The learned Counsel appearing for RNRL submitted that these clauses, as well as the correspondence contained in Exhibit F further establish that Shri Mukesh Ambani controlled and managed RIL and that secondly the very raison

detere of the demerger was the segregation of the businesses so as to hand over management control of the resulting companies to Shri Anil Ambani. The gas supply business and the consequent gas supply agreement formed the very substratum of the business of RNRL which was to be demerged and thereafter controlled by Shri Anil Ambani. It is inconceivable that in the face of this mandate the agreement could 190 be executed before the transfer of management control.

190. The learned Counsel appearing for RNRL submitted that the net effect of these clauses is that there can be no agreement as envisaged in Clause 19 before the compliance of the prior conditions mentioned in the Scheme, namely the transfer of management to the Anil Ambani group. There is a rebuttable presumption that in case of arrangement of clauses of section, the prior clauses have to be complied with first as the maker of the document is deemed to know the earlier clauses when drafting a deed.

191. The learned Counsel appearing for RNRL submitted that further, Clause 6 of the Scheme states expressly that RIL would continue to manage the resulting companies till the effective date in the capacity of a trustee. This is in addition to the general common law duty as well as the duty under the Indian Trusts Act for RIL to act as a trustee till the transfer of control of the resulting companies to Shri Anil Ambani. Otherwise it was possible for RIL to frustrate the scheme by imposing onerous obligations on the resulting companies before transfer of control leaving them as merely shell companies which in fact it has achieved.

192. The learned Counsel appearing for RNRL submitted that therefore the Scheme of Arrangement clearly required that the agreement between RIL and RNRL should have been executed after the 7th February 2006.

193. The learned Counsel appearing for RNRL submitted that however, RIL hurriedly imposed the impugned GSMA on 12th January 2006. An email containing the draft GSMA was sent late at night on 10th January 2006 to the Board of Directors of RNRL while the meeting of the Board of Directors was scheduled on 11.01.2006. The Board of Directors of RNRL had three Directors with two directors being from the Mukesh Ambani Group and one director Mr. J.P. Chalsani, being from the Anil Ambani Group. Mr. Chalsani objected to the proposed GSMA inter alia stating that he had not even had enough time to examine the same. However, the other two Board members of the Mukesh Ambani Group overruled the objections of Mr. Chalsani and by 2:1 majority imposed the impugned GSMA on RNRL at a time when RIL was having control of RNRL.

194. The learned Counsel appearing for RNRL submitted that the Scheme containing the terms "suitable arrangement" and "resulting company" is an ambiguous document capable of different interpretations as to the nature of the agreement to be entered into. Though, as stated above, the various clauses of the Scheme read with the relevant provisions of the Income Tax Act make it clear

that the agreement has to be signed after 27106 or 7206, the principles of interpretation of documents in case of ambiguity make the position clearer. Similarly, the same principles enable the Court to refer to the surrounding, attendant circumstances so as to elicit the true intention of the parties. The Court will refer to prior agreements between parties as well as the discussions and negotiations immediately prior and subsequent to the ambiguous agreement so as to decipher the parties' true intention.

195. The learned Counsel appearing for RNRL submitted that some reference can be had to the following decisions of the Court as well as extracts from academic treatises to this effect. *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, where the Court held as under:

It is thus unquestionably established that the appellant whose tender was accepted after negotiations and scrutiny by the Tender Committee was expected to invest Rs 2 crores in importing pile driving equipment and technical knowhow fees. The tender was accepted and a formal contract was entered into on this basis. In works contract of such magnitude, the value whereof was over Rs 24 crores, and which was being undertaken by an Indian contractor for the first time negotiations prior to the finalisation of the contract and the correspondence leading to the formation of contract supply the basis on which contract was finally entered into. Undoubtedly, if in the final written contract, there is something contrary to the basic understanding during the formative stage of the contract, the written contract would prevail. But if the contract does not indicate to the contrary and the assumptions appeared to be the foundation of the contract, obviously that aspect cannot be overlooked while determining what were the obligations undertaken under the formal contract. (para 36)

In our opinion, this oversimplification of the clauses of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties. (para 38)

196. According to RNRL the Learned Single judge has also accepted the above contention. In paragraph 165, page 1588 (Volume 10, memo of Appeal) he held as under

...The intention therefore throughout was even under the Scheme to reorganise and segregate the business and undertakings to provide focussed management attention. In this background, it was necessary that RIL should have given full and proper opportunity to the applicants before passing such resolution hurriedly on 11.1.2006 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 11.1.2006, 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 applicants on 10.1.2006 was of RIL, as

control over had not been handed over to Anil Ambani. On 26.1.2006 final copy of GSPA was made available by nominee of RIL to nominee of Ambani Group. The drafts of GSMA and GSPA were only circulated on late night of 10.1.2006 through mail. It is to be noted that shares of RNRL were allotted/transferred to Anil Ambani only on 27.1.2006 to themselves admittedly after the Board meeting dated 27.1.2006 as referred above. The New Board was reconstituted in accordance with Clause 17 of the Scheme on 7.2.2006. As per Clause 6 RIL continued to manage the resulting companies till the effective date in the capacity of trustees. Therefore, the Board of the Meeting and the Resolution and/or execution of the said GSMA on 11.1.2006/12.1.2006 before the actual transfer of control of the resulting companies to Anil Ambani and before reconstitution of the Board as per Clause 17 of each resulting companies was against clauses 17 and 19 and the basic purpose of the Scheme in so far as the supply of gas is concerned.

197. The learned single Judge has held that the agreement of 12.1.06 was hurriedly executed by the nominees of Mukesh Ambani. There was no representation except one director in minority in the said meeting of Anil Ambani Group. The manner in which the agreement was executed on 12.1.2006 is glaring and that it does not reflect the will of both sides and there was no mutually negotiated document. RNRL submits that this finding be affirmed by the Division Bench.

198. The learned Counsel appearing for RNRL submitted that the Scheme sanctioned by the Court became effective on 21.12.2005 and is deemed to be retrospectively effective from 1st September, 2005 (appointed date under the Scheme). On the principle that equity regards as done what ought to have been done, Shri Anil Ambani was deemed to be in management and control of RNRL from 1st September, 2005 and hence, an agreement with RNRL ought to have been with RNRL being under actual management and control of Shri Anil Ambani. RNRL has relied upon the following passage from Equity Doctrines and Remedies by R.P. Meagher, W.M.C. Gummow, JRF Leane (Third Edition) at page 339, 340:

Equity looks on that as done which ought to be done

...The fifth instance is equity's attitude to contracts, where the maxim means that often equity treats a contract to do a thing as if the thing were already done. Thus, often equity will treat a person who, for valuable consideration, has agreed to take a lease as if he were a lessee: this is the doctrine of *Walsh v. Lonsdale* (1882) 21 Ch D 9 discussed in the previous chapter....

...Again, a contract for valuable consideration immediately to assign future property can have, at law or in equity, no effect other than that of a contract to assign the property if and when it comes into existence; but, at the moment the property does come into existence, equity treats as done that which ought to be done, fastens onto the property, and as a consequence a contract to assign becomes in equity a completed assignment....

1. Clause 20 of the Explanatory Statement to the Scheme provides that:

Further, an integral part of the demerger under the Scheme of Arrangement, the Applicant Company shall cause the Boards of Directors of each of the Resulting Companies to be reconstituted in such manner as is agreed between each Resulting Company and Shri Anil D. Ambani .

Legal Thesaurus by William C. Burton defines integral as:

INTEGRAL, adjective

basic, cardinal, central, component, constituent, elemental, essential, essential to completeness, fundamental, indispensable, integrant, irreplaceable necessities, necessary, needed, needful, prerequisite primary, required, requisite, vital

ASSOCIATED CONCEPTS: integral part of a case

2. Further, clauses 11 and 12 of the Scheme provide for Reorganisation of Share Capital and issue of shares by each Resulting Company which took place on 27th January, 2006. The Board reconstitution as provided for in Clause 17 of the Scheme took place on 7.2.2006 when the management and control of RNRL was handed over to Shri Anil Ambani. The reconstitution of the Board and transfer of management to Shri Anil Ambani was an integral part of the Scheme and ought to have taken place prior to execution of agreements between RIL and RNRL. Similarly, the sequence of the terms in the Scheme i.e. the placement of terms relating to issuance of shares and Board constitution prior to Clause 19 relating to execution of suitable arrangements also shows that the GSMA ought to have been executed only after issuance of shares and transfer and management of control to Shri Anil Ambani which was an integral part of the Scheme.

The learned Counsel appearing for RNRL submitted that it is submitted that the GSMA executed on 12.1.06 is not a Bankable Agreement and a power plant involving an investment of over Rs. 25000 Crores cannot be setup on the strength of such an agreement.

199. The learned Counsel appearing for RNRL submitted that the entire issue of Bankability can be explained by answer to 3 questions which are discussed hereinafter i.e. What is the meaning of a "Bankable Agreement"?; Did the parties agree to have a "Bankable Agreement"?; Is the GSMA dated 12.1.2006 a "Bankable Agreement"?

200. In the aforesaid background, it is submitted by the learned Counsel appearing for the RNRL that the GSMA executed on 12.1.2006 is not a bankable agreement. According to the learned Counsel a bankable agreement would be one on the strength of which a bank would lend finances for a project on project recourse basis. The agreement in question, required to be entered into between RIL and RNRL pursuant to the Demerger Scheme, was in respect of supply of gas by RIL. In this context, the learned Counsel submitted that a bankable

Agreement would be an agreement which contains firm commitment for supply of gas. The commercial terms under the agreement for supply of gas i.e. Term, Quantity, Price, and other terms should be certain without any ambiguity. Based on such an agreement (having a firm and enforceable commitment), lenders to a Power Project can be convinced about the uninterrupted operation of the plant and, therefore, revenues for repayment of principle and interest on loan. Natural Gas is the main raw material for a gas based power project and is in short supply. Until and unless there is a firm assurance for supply of gas at clear and precise preagreed terms (Term, Quantity, Price, penalty for nonsupply to act as a major deterrent) no bank would lend for setting up a (gas based) Power project. According to the learned Counsel a bankable agreement would thus mean an enforceable agreement with firm and unambiguous terms, based on which a bank would lend finances to the Project.

201. It is further submitted by the learned Counsel appearing for the RNRL that Clause 19 of the Scheme provides for the "suitable Agreement" for supply of gas. A suitable Agreement would, therefore, be one which effectively demerges the business of supply of gas. This can only be achieved by way of an Agreement containing firm commitments for supply of gas on certain terms with regard to Term, Quantity, and Price etc. The Agreement would be suitable only if RNRL and / or its associate companies could raise finances for setting up a power project. Hence a suitable Agreement would necessarily have to be a bankable Agreement. According to the learned Counsel the MOU dated 18.6.05 provided that gas supply Agreement shall be bankable in international financial markets. This term of the MOU is set out at para 6.6 page 19 of the Application and is not disputed by RIL in its reply at page 661.

Hence it is admitted that the GSMA has to be bankable. The same is also contained in the relevant extracts of MOU produced before this Hon'ble Court. (see clause vii and page 11 of Affidavit dated 8.10.2005). According to the learned Counsel for the RNRL the MOU dated 18.06.05 provide that a long term, stable source of gas from RIL, which has the largest find of gas, was absolutely essential for the growth plans of Anil Ambani Group and envisaged that the terms of the gas supply agreement to provide required comfort and stability even if that means some departure from the NTPC terms. According to the learned Counsel RIL has never pleaded, argued or submitted that the GSMA was not required to be bankable. The learned Counsel further submitted that there are various letters exchanged between the parties and set out in Exh. "F" which also clearly indicate that the parties agreed to have a bankable Agreement. Relevant extracts of the said letters are set out hereinbelow:

v. Letter dated 20th July, 2005 from RIL (Harish Shah) to Mr. Venkatrao Ponanda. (Ex. F / 12)

1. You are requested to forward the paper your team had to provide on the proposed aggregator structure with explanation about its working and bankability.

vi. Letter dated 30.7.2005 from RIL (Harish Shah) to Mr. Venkatrao Ponanda.

In fact, as we have clarified, several times, our endeavour is to have bankable agreements, both from REL and from RIL point of view. We have shown our willingness to go to the extra distance to achieve this. However, we are concerned about the fact that REL's position continues to be inflexible such that we cannot achieve an agreement that is in accordance with international best practices and bankable in international financial markets, as contemplated by the MOU. I think we both accept that the MOU has to be given a shape to produce a technically feasible and commercially workable longterm GSPA.

vii. Letter dated 9th August, 2005 from Mr. Venkatrao Ponanda. to Mr. Harish Shah. (Ex F / 29)

We do not agree with your contention that your proposed GSPA dated July 4, 2005 uses the NTPC GSPA as the base or it is a bankable agreement from both RIL and REL's point of view.

viii. Letter dated 16.8.2005 written on behalf of Cyril Shroff to both the parties (p. 37 at p. 39).

Further, ADA Group should convey (within the terms of the MOU) if they require any further provisions of a reasonable nature. The Third party expert including financing expert to give opinion in relation to critical features required for bankability of this agreement.

ix. Letter dated 30.11.2005 from REL to RIL at p. 68 para 7.

7. The basic terms and conditions on which the firm quantity gas as well as option quantity gas will be supplied by RIL having been agreed upon the only area left for discussion is the changes to be made to the NTPC GSPA to customize it to suit GFMS and to make the agreements bankable in international financial markets.

Thus, the MOU, the Scheme, the correspondence, pleadings and arguments in courts establish that it was agreed between the parties that the Agreement for Gas Supply should be Bankable.

202. The learned Counsel further submitted that the main elements in order to make an Agreement bankable are missing in the GSMA as explained hereinafter.

(a) Price : The price of US\$ 2.34 per MMSCMD has been wrongly subjected to Government approval and hence the price becomes uncertain for the power projects.

(b) Term : In respect of period for supply of gas, the GSMA contains a formula (clause 3b) which admittedly would result in a supply for a period of only 1 to 5 years instead of the required and agreed supply of 17 years. A power plant having an investment of over Rs. 25,000/ crores cannot be set up with the uncertain supply term ranging from 1 to 5 years as power plants require bank

loans to be amortized over a very long period (thus requiring longer term supply assurance). The NTPC contract contains a clear period for supply of 17 years.

(c) Quantity : In respect of quantity also, there is a formula provided for in Clause 3.1 (c) of the GSMA. The working of the formula as accepted by RIL before this Hon''ble Court shows that in stead of 28 MMSCMD of gas, RNRL would receive only upto 6 MMSCMD even if the total production is 38 MMSCMD. Thus there is no commitment to supply a certain quantity of gas to ensure uninterrupted operation of the power project..

(d) Capping of liability : Finally, there is no assurance for supply of gas at all because RIL has introduced a clause limiting it's liability. Clause 14.3.1 provides that in no event, the seller's liability for supply deficiency would exceed a maximum period of 6 months value of gas. Thus, if RIL stops gas supply it would be liable for insignificant liability.

(e) With regard to Bankability, the learned Single Judge has in para 169 (at page 1594 of the Judgement)found:

The learned senior counsel for the applicants therefore is right in contending that in GSMA or GSPA various important clauses in reference to price, tenure, cap liability, supply of quantity and clauses of damages are very complicated and difficult to understand and / or explain to lay man or third person.

Therefore, once we talk about the Bankable document for finance, then though parties or one of the entities may be expert in drafting such agreement based upon the alleged international practice, still, unless such formula or such clauses made explainable and / or understandable to the lay man or consumer who is not expert in the field, just cannot be ruled out.

The GSMA dated 12.1.2006 does not provide for a commitment to supply gas, in as much, as neither the Price nor the Term nor the Quantity are certain and fixed and, therefore, it does not give security that is necessary for a bank to lend finances. Hence it is not a Bankable Agreement.

203. It is, therefore, submitted that the 6 terms are required to be modified as under:

I. PRICE APPROVAL

(c) TRUE INTERPRETATION OF THE PSC

1. While the GSPA clearly contains the figure of US\$ 2.34 per mmbtu as being the base commodity price, the same has been made subject to the government approval under the GSMA executed unilaterally.

2. Clauses 13.8 and 13.9 of the GSPA (which require to be deleted) are set out hereinbelow for ready reference:

13.8 Severability

The provisions of this Agreement are severable. Without prejudice to Section 13.9, if any portion of this Agreement is deemed legally invalid or unenforceable, the remainder of this Agreement shall survive and remain in full force and effect; provided however that if a provision is held to be invalid or unenforceable, the parties shall negotiate in good faith to adopt a replacement provision to carry out, in effect, the parties original intention to the extent permitted by laws.

13.9 Approvals under Upstream Arrangements

(a) Without prejudice to the Approvals to be obtained under each GSPA, the parties agree that the obligations of Seller under each Base Volume GSPA and each Option Volume GSPA are subject to the receipt and continued effectiveness of all Approvals under the applicable Upstream Arrangements and Approvals of the gas sales price under the applicable GSPA as the gas sales price to be used for cost recovery, profit sharing, and all other purposes under the applicable Upstream Arrangements.

(b) Each Base Volume GSPA and each Option Volume GSPA shall require separate Approvals of the gas sales price, and approval of the gas sales price under any other gas sales agreement shall not constitute Approval of the gas sales price under the applicable GSPA.

(c) RIL shall have not be in breach of this Agreement, nor shall Seller be in breach of any GSPA, in the event any Approvals referred to in Clause (a) are not received or become no longer effective.

Compliance with such Approvals from time to time shall not result in a breach of this Agreement by RIL or of any GSPA by Seller.

3. Further Clause 13.8 states that Clause 13.9 is not severable. Thus the result of these clauses is that in case price is not accepted by the Government as the basis for determination of the Government's share in Profit Petroleum under the PSC, the entire GSMA would stand annulled.

4. The approval contemplated in Article 21.6 of the PSC, as set out hereinafter is for the purposes of the PSC only and not for the purposes of approving the "price" at which RIL has to sell Gas to third parties. The Govt has the power to approve the price for the purpose of "valuation" of Gas to determine the Govt share in the production of share.

5. Clause 21.6 of the PSC reads as under:

21.6 Valuation of Natural Gas:

21.6.1 The Contractor shall endeavour to sell all Natural Gas produced and saved from the Contract Area at armslength prices to the benefits of Parties to the Contract.

21.6.2 Notwithstanding the provision of Article 21.6.1, Natural Gas produced from the Contract Area shall be valued for the purposes of this Contract as

follows:

(a) Gas which is used as per Article 21.2 or flared with the approval of the Government or reinjected or sold to the Government pursuant to Article 21.4.5 shall be ascribed a zero value;

(b) Gas which is sold to the Government or any other Government nominee shall be valued at the prices actually obtained: and

(c) Gas which is sold or disposed of otherwise than in accordance with paragraph (a) or (b) shall be valued on the basis of competitive arms length sales in the region for similar sales under similar conditions.

21.6.3 The formula or basis on which the prices shall be determined pursuant to Article 21.6.2(b) or (c) shall be approved by the Government prior to the sale of Natural Gas to the consumers/buyers. For granting this approval Government shall take into account the prevailing policy, if any, on pricing of Natural Gas including any linkages with traded liquid fuels, and it may delegate or assign this function to a regulatory authority as and when such an authority is in existence.

6. The main issue that has been raised for consideration before this Hon`ble Court is as to whether under the Production Sharing Contract (PSC) the Government has the power to fix the price for sale of gas or merely the formula or the basis on which the price is required to be determined for valuation for quantifying the Government take. For this purpose, the object and purpose of the PSC has to be considered in the light of other provisions. The main purpose of the PSC is to determine the respective shares of the Government and the Contractor in the gas that would be produced. The concepts that are required to be considered are that of cost petroleum, profit petroleum and royalty. The definitions of these three terms under the PSC are as follows:

i) Cost petroleum,

ii) Profit petroleum

iii) Royalty.

7. The provisions relating to Cost Petroleum are provided for in Article 15. The Contractor is entitled to recover its entire investment in the project through the sale of natural gas. For this purpose a certain quantity of gas produced from the field is to be sold so as to enable the Contractor to recover its costs. This is done by converting the actual costs incurred by the Contractor into units of gas, i.e., converting a monetary value into the physical equivalent of gas. This is done by dividing the total costs by the value ascribed to each unit of gas.

8. The Contractor is entitled to 90% of the total value of the petroleum produced in order to recover its costs. The balance of the petroleum is shared between the Contractor and the Government from the Profit Petroleum.

9. The Profit Petroleum is determined under Article 16 of the PSC. In this case

too the Profit Petroleum is determined by ascribing a value to the total gas produced. The amount calculated by this process is shared between the Government and the Contractor. Similarly, the royalty is calculated by converting physical units of gas into their monetary equivalents. In order to determine the Cost Petroleum, Profit Petroleum and Royalty, the PSC refers to Article 19 which provides for valuation of petroleum and Article 21 which provides for the procedure to determine the valuation of natural gas. The whole purpose of the valuation of natural gas is only to determine the Government share of the Profit Petroleum, the total quantity of Cost Petroleum and Royalty. Article 21.6 has to be construed in this context. In this regard reference may also be had to Articles 15.9, 16.5, 17.2.5, 17.4, 19.1 and 19.8 of the PSC. In fact Article 19 of the PSC gives the Government explicit power to determine the price (see Article 19.5) This power is conspicuously absent from the terminology of Article 21.

10. Article 21.6.3 provides that the formula or basis on which the prices shall be determined shall be approved prior to sale of natural gas to the consumers/buyers. This approval is not of the sale price but only of the formula to determine Government take. The Government is only concerned with the price for the limited purpose of determining its share and not to fix the actual price of sale of gas by RIL. Therefore, the price for the purposes of valuation can be entirely different from the actual sale price.

11. For this purpose reference may also be had to Article 21.3 of the PSC. This Article gives marketing freedom to the Contractor. Articles 21.3 and 21.6.3 have to be construed harmoniously. In case the contention of the Appellant that the Government has the power to fix the price is accepted, Article 21.3 would be rendered nugatory. Further price determined by International Competitive Bidding would be an empty formality if Government was to approve the sale price. It would enable the successful bidder to get a higher price than he had bid. Hence the interpretation placed in Article 21.6.3 by the Appellant cannot be accepted. In fact, Article 21.6 is titled "Valuation of Natural Gas". This is different from price. Throughout this Article the terms valuation and price are used distinctly and separately and hence different meanings have to be given to them.

12. Clause 21.3 and 21.6 operate in different fields. In case Clause 21.6 is interpreted to mean that approval of the Government is required for determining the price as well, then Clause 21.3 would become otiose. The Court, while interpreting contracts must construe the same harmoniously and give each provision full force and effect. In this light, Clause 21.3 relates to the freedom of the Contractor to determine the price while Clause 21.6 refers to the power of the Government to safeguard its share through the process of valuation of the gas. In this regard reference may be had to the judgment of the Supreme Court in the case of K.M. Nanavati Vs. The State of Bombay, .

13. In fact, Articles 21.6.2 and 21.6.3 have to be read together. Article 21.6.2 starts with a nonobstante clause. Article 21.6.3 does not start similarly. Hence, Article 21.6.3 does not prevail over Article 21.6.2 but is required to be read as

part thereof. This interpretation is buttressed by the fact that Article 2 1.6.3 makes an explicit reference to Article 21.6.2(b) and (c). The very purpose of Article 21.6.3 is to determine prices pursuant to Article 21.6.2 (b) and (c). In case valuation and price are identical concepts, and prior approval of price is necessary for each sale, there is no difference between clauses (b) and (c) of Article 21.6.2. In each case the Government would be required to approve the valuation/price. In fact, if the interpretation put upon the clauses by the Appellant is to be accepted virtually the entire Article 21.6 is otiose. In that case the said Article should simply have said that the Government would approve the sale price of gas prior to any sale of natural gas to consumers/buyers.

This interpretation has also been accepted by the Supreme Court of India in the case of Commissioner of Income Tax, Dehradun and Another Vs. Enron Oil and Gas India Ltd., .

14 It is also well settled that in case of any ambiguity in a contract, the conduct and the understanding placed upon the contract by the parties subsequent to entering into the contract is to be looked at. This conduct and understanding can provide meaning to any clause. Reference may be had to the case of The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, . Hence, reference may be had to the understanding of both the Government and RIL as to the position of valuation and price approval.

15. This interpretation of the PSC i.e. the Government does not fix the sale price is fully supported by Government's own interpretation as pronounced in the answers to questions raised in the Parliament, the Pricing Guidelines, the letter of the Director General, Hydrocarbons (Annexure D), and the letter dated 2672006 rejecting the request for approval of valuation of natural gas and also the minutes of the EGOM dated 1292007.

16. Similarly, RIL also understood price and valuation to be distinct concepts and had made a representation to that effect to the committee for the formulation of Guidelines for valuing natural gas. Regard may be had to the affidavit of Mr. Surendra Khot dated 4122008 in the notice of motion No. 3418 of 2008. At page 1974 of the said affidavit RIL made a presentation to the Government stating, "The PSC clearly differentiate between valuation of gas and sale of gas as reflected in Article 21.6.2(c) and Article 21.7 [identical to Article 21.6.3]. For the purposes of valuation of gas under Article 21.6.2 (c), gas has to be valued at, "competitive arms length sale". Similarly, in the letter seeking approval of valuation of natural gas, RIL vide its letter dated 1442006 brought out the difference between price and valuation.

17. In the facts of the case the price of US\$ 2.34 per MMBTU is a just and fair price which was competitively discovered pursuant to an international tender which is proximate in time to the agreement between the members of the promoters family of RIL and is in fact the only similar contract available for reference at that point of time. This price was quoted when the prices of crude oil

were higher than exist currently. In fact, prices of crude are 15% lower than at that stage. In case if the price of US\$ 4.2 per MMBTU is accepted the Government may on the one hand gain a small amount by way of Profit Petroleum but in the longer term end up losing a lot more by way of subsidy payments for the fertilizer and power industry. Further, because of the price formula being denominated in US\$ the consumers stand to lose significantly due to depreciation of the rupee qua the domestic commodity.

18. The aforesaid interpretation that Govt. does not fix the price is supported by the following evidence on record:

(d) GOVT STAND BEFORE THIS COURT:

1. All the affidavits of the Government filed in this Court stood withdrawn as recorded by order dated 11.12.2008. Pursuant to the court's order dated 22.10.08 making the Union of India as an intervener only for the limited purpose of assisting the court in the matter of the PSC, written submissions were filed by Shri Mohan Parasran, Additional Solicitor General of India on 12.1.2009. A reading of the same shows that the stand taken therein is that the Government of India under the PSC has the power to approve/disapprove any individual sale by RIL to any party. In other words, Government's approval is required for the price at which the gas is to be sold and even as to the identity of the purchaser.

2. It is submitted that the Government of India has been taking different stands at different times. First, the Government filed an application to be added as a party to the appeal and for vacation of the interim order. Subsequently, the said application was withdrawn. Thereafter the Court joined them as interveners with consent of parties for the limited purpose of interpretation of the terms of the PSC. At one point the Government stated that whatever this Court may decide about the price and price approval the same would be respected by the Government insofar as the present dispute is concerned notwithstanding their stand that price approval is necessary in case of every agreement for sale of gas. Subsequently, it was stated that even NTPC would be bound by the price approval and that the price had been determined at USD 4.2 even though it may add to the detriment of the case filed by NTPC. These were the oral submissions before this Hon`ble Court. The facts however reveal otherwise.

3. It is respectfully submitted that this stand is not borne out by the PSC. Reference has been made earlier to the provisions of the PSC viz., regarding valuation of gas for Government take which is entirely separate and distinct from the price of gas sold to the individual purchaser.

4. Furthermore, a reference to the EGOM minutes of 12.9.07, 28.5.08, 23.10.08 and 8.1.09 do not show that the price of gas as between RIL and RNRL requires Government approval. In fact, for this specific case and the case of NTPC pending on the Original Side of this Hon`ble Court there are specific exceptions and exemptions. The EGOM is conscious of the fact that these matters are subjudice and therefore they are not within the pail of the jurisdiction of the

EGOM. It was specifically submitted that the view expressed by this Hon'ble Court would be honoured and not that the view of this Hon'ble Court would again be subject to the so-called appellate jurisdiction of EGOM to finally grant or give the green signal. In other words, according to RNRL no price approval is required from the Government of India for its gas supply agreement under the PSC and in any case, the same is not covered in the price fixation and the concept of approval for purchaser in various EGOM decisions.

(c) PARLIAMENT QUESTION DATED 30.9.07

1. The above view, i.e. that the Government is not required to approve the price of the gas has been expressly accepted by the Government itself. On 30.9.2007, i.e. after the hearing of the present case was over and the matter was reserved for judgment before the Learned Single Judge, a member of Parliament, Mr. Mondal posed a question to the Minister of Petroleum and Natural Gas as to whether the Government was following a competitive bidding process in the matter of fixing the price of natural gas. In response to that question, the minister expressly stated as under

As per the Production Sharing Contract (PSC) signed by the Government under the New Exploration Licensing Policy (NELP), the operators have the freedom to market the gas in the domestic market on arms length basis. Government does not fix price of gas. The role of the Government is to approve the valuation of gas for the purpose of determining Government take.

(d) PARLIAMENT QUESTION DATED 22.4.08

1. On 22nd April, 2008 certain questions were asked in the Parliament with regard to gas pricing and a copy of the question and answer is annexed hereto as Annexure "C". The Minister of State in the Ministry of Petroleum and Natural Gas answered that:

(b) As per provisions of the Model Production Sharing Contract signed under New Exploration Licensing Policy, the Contractor has the freedom to sell the gas in the domestic market on arms length basis.

2. It is well settled that statements made by the Minister in Parliament is binding on the AIR 1943 75 (Federal Court) :

It is not disputed that the answers were given by the Home Minister in the Legislative Assembly in his capacity and in the discharge of his duties as such Minister. He was the person to whom the duty of answering questions on the subject had been allocated by the Governor under the rules of business. The answers relate to matters which were put in issue before the High Court. In our opinion they were admissible under Sections 17, 18 and 20, Evidence Act.

Relevant Questions asked and Answers given in Parliament are annexed as Annexure "C"

(e) EGOM MINUTES DATED 12.9.07

formula submitted by RIL on 18.5.2007 to supply gas to certain parties with whom RIL has entered into termsheets for supply of gas. These term sheets are subject to final judgment in this case. A press release has been made on 12.9.2007 intimating the Government approval to the gas price basis/formula for the purpose of valuation. The said decision of the EGOM as published clearly records:

The decision taken in today's EGoM meeting will be without prejudice to the NTPC v. RIL and RNRL v. RIL Court cases, which are at present sub judice.

The decision of the EGoM will dispose the application submitted by M/s. RILNRL regarding approval of their gas price basis/formula."

(f) REPORT OF THE COMMITTEE TO FORMULATE TRANSPARENT GUIDELINES FOR APPROVAL OF GAS PRICE/FORMULA

. 1 .The Committee was constituted by the Ministry of Petroleum and Natural gas and explicitly records that its mandate is not to determine the principles of pricing of natural gas, but merely to suggest transparent guidelines for valuation of natural gas. The said report further states that in case some sales have taken place then the Government should get its share at the value approved by it. In case of any additional burden in case of a difference between this value and the actual sale price of the gas how the resultant burden is to be shared between the contractor and the buyer is left for them to mutually determine.

(g) MINUTES OF EGOM MEETING DATED 08.01.09

1 .Even the minutes of the meeting of the Empowered Group of Ministers dated 8109 lend credence to the argument of RNRL. As per the said minutes, the gas supply for the Dadri project was expressly excluded from the applicability of the gas utilisation policy. The said minuted (at paragraph 6) went on to note that "this will be without prejudice to the decisions of the Court cases."

(h) GOVERNMENT NOT REQUIRED TO APPROVE PRICE/PRICE OF U.S.\$ 2.34 PER MMBTU RESULT OF INTERNATIONAL COMPETITIVE BIDDING

1. In the present case, RIL without even informing RNRL approached the Government requesting for approval for the GSMA stated price as the price to be used for cost recovery, profit sharing and all other purposes under the PSC and the Government has already declined to accept the price as the basis for valuation of gas under PSC. A letter dated 2672006, at p. 183 of Exhibit F records the Government's refusal. Even the said letter records that the approval is required only for the purposes of valuation of natural gas under the PSC for determining the Government take.

2. The price of USD 2.34 per mmbtu was the result of an international competitive bidding for a 17 year contract with a take or pay commitment in the year 2005.

3. Prices discovered through international competitive bidding process cannot be

subject to Government approval as that would destroy the sanctity of the tender process itself. If the Government approves a price that is higher or lower than the price discovered through a tender process then the same would be totally vitiated.

4. The entire attempt of RIL is to engineer refusal by the Government to approve the price so as to escape its obligations under the scheme.

5. There is no occasion for any price approval by the Government of India either under the MOU or under a normal gas supply contract. This price approval requirement has been unilaterally incorporated in the gas supply agreement entered into between RIL and RNRL. The requirement for Government approval makes the contract uncertain and contingent upon approval by a third party.

6. The Government is not required to approve the price. The only role of the Government is to value the gas for the purposes of determining Government take, i.e. to determine the extent of the Government's share of the gas. Thus the view of the Government is in accord with the submissions of the Applicant.

204. It is submitted that the global tender floated by NTPC did not state that any price approval would be required from the Government of India before a firm contract is entered into. It is incongruous that the price approval would be required from Government of India if a foreign party had agreed to supply gas and had become a successful bidder. The bidding process would have no sanctity if the approval was to be required.

205. Furthermore, the bid made by RIL was also not cognizant of any such price approval. This was a voluntary bid and the price was submitted subject to market forces and was thus an arms length transaction. Parties considered themselves bound by the NIT and the tender made in response thereto. Merely because the price approval clause was inserted in the draft of 12.5.05 does not mean that in law any such price approval is required. Furthermore, it is possible that the same was put because NTPC is a Government PSU and it is quite likely that price approval was inserted because it was not known as to whether the entire or a part of 12 MMSCMD bid by RIL to NTPC would come from which share, i.e., the Contractor's share or the Government's share. It is further submitted that even as per the 12505 NTPC draft Schedule 3.2 (as agreed to on 09.05.2005) merely states "Approval of the relevant Governmental Instrumentality of the relevant element of the price, pursuant to the Production sharing Contract¹This is different from the price approval and is merely a reiteration of the position of Clause 21.6.3 in the manner being urged by RNRL in the present proceedings.

206. The true facts relating to the NTPC tender and contract are as follows:

21.4.2003

NTPC issued the RFP / bid document to the qualified bidders which contained the draft Gas Supply Agreement. Admittedly the said Gas Supply Agreement did not contain any clause requiring Government approval. Relevant article 3.2 was

blank.

19.5.2005

A letter was addressed by NTPC to RIL stating that during a meeting of 9.5.05, the GSPA along with its schedule was finalised. However, they have not received draft of GSPA so far.

Some time thereafter RIL sent the GSPA as finalised on 9.5.2005 along with the agreed schedule 3.2. Clause 1(d) of the said Agreement reads as under:

3.2 (d) The approval of the relevant Governmental

instrumentality of the relevant element of the price pursuant to the production sharing contract.

3.2(e) Approval of the relevant Governmental

instrumentality pursuant to the production sharing contract of the relevant element of the price for its share of natural gas produced from block KGDWN983. (This clause is set out in the draft RILNTPC GSPA annexed to the NTPC v. RIL pleadings which has been submitted before this Hon''ble Court at Vol.3 / page 12831284.)

207. It is, therefore, submitted that, assuming without admitting that the NTPC clause relating to approval was to be followed in the RNRL GSMA, it is the above referred NTPC clause that is relevant. The above clause neither states that the Government is required to approve the price for sale of natural gas nor that the effectiveness of the contract is subject to Government approving the NTPC bid price as the basis for purposes of valuation under PSC. The aforesaid clause merely states that Government approval is required as per the provisions of the PSC. Under the PSC, approval is required for formula or basis prior to sale of natural gas to consumers/buyers only for valuation purposes to determine Government share and not actual sale price under a specific gas supply contract . Further, the effectiveness of the contract for supply of gas to the Government of India has not been subjected to the approval of the Government. The aforesaid clause in the NTPC contract merely reiterates the provision in Article 21.6.3 of the PSC. As stated above, the said requirement is for approving the valuation and not the price. Therefore, the argument made by RIL that even NTPC had agreed to the price approval clause, similar to the Clause 13.9 of the RIL RNRL GSMA dated 12.1.2006 (impugned herein) is thus false, dishonest and misleading.

208. In this context, it is also important to note that immediately after the hearing, in view of the interim order passed by this Court, the Government is finalising the allocations: Newspapers have reported that RIL has strongly protested the Government's proposed directive to supply gas to NTPC. RIL is arguing with the Government, (contrary to what was argued in this Court) that it has absolute marketing freedom under Article 21.3 of the PSC. This conduct of

RIL shows that the whole objective was to mislead this Hon''ble Court. RIL's intention was clearly not to subject itself to Government directions for marketing or price.

209. It is submitted that the GSMA does not contain any obligation to supply a fixed certain minimum quantity of natural gas. While the MOU clearly stipulated the Quantity of gas supply to be 28 MMSCMD plus a potential 12 MMSCMD of NTPC gas and 40% of future gas generated by RIL, the GSMA contained yet another complex formula with several imponderables.

210. It is submitted that there are variables that serve the interests only of RIL and are entirely in their control which make the extent and quantity of supply to RNRL uncertain. However, the parties clearly agreed to in the MOU that the supply would be 28 +/- 12 MMSCMD. This is also evidenced in the impugned GSMA. Clause 3.2 of the said GSMA states "The Available Quantity as to any year as notified by RIL ... does not exceed 28 MMSCMD ..." This figure of 28 MMSCMD, which is a fixed figure so to say, is derived only from the MOU and can have no other source. This clinches the argument that RIL was aware of, and considered itself bound by, the terms of the MOU. The statement in the reply affidavit that the RIL board was not aware of the details of the MOU / Settlement is clearly false as is demonstrated by this clause.

211. It is submitted that in the GSMA, the gas contracted to be supplied is defined in a formula in Clause 3.1 (c) which (page 350, Volume 2, Memo of Appeal) reads as under:

(c) The quantity of Gas that is available for contracting under GSPAs for any Year "n" during the Tenure ("Available Quantity"), expressed on an average daily basis in MMSCMD, shall be determined for each Development Plan as follows:

$$AQ_n = [(GP_n GS_n) \times RP] - [0.03 \times GP_n] N_n$$

AQ: Available Quantity for any year "n" during the tenure

GP: Gross Production for year "n"

GS: GOI share for year "n"

0.03: stipulated allowance for internal consumption

RP: RIL's participating interest ... in the case of Block KG D6 ... is 90%

N: ... the volume of gas required to meet the NTPC GSPA in that year

212. It is submitted that as per RIL this formula is mandated with it. However, this is mischievous and misleading. As stated in the submissions relating to calculation of tenure, this purpose could have been more simply been met with a provision excusing performance in case of exhaustion of natural gas supplies, something that is already contained in the force majeure clause. This formula does not take into account or linked to the availability of gas but to some preliminary assesses certified proven reserve. Also this formula is confined to gas

available from one field while RNRL's entitlement extends to all the fields in KGD 6 basin as well as other basins.

213. As per the formula the contracted quantity is made dependant on a number of variables and hence there is no guarantee that a fixed quantity of gas would be supplied in any year. This is all the more acute once reference is had to provisions in Clause 3.1 (f) wherein RIL expressly states that it does not warrant that quantities are actually available (page 351, Volume 2, Memo of Appeal. Further Clause 6.2 stipulates that in case RIL's share of production of gas on any day under the PSC is less than the quantity agreed to be supplied under the relevant GSPA, RIL will be under no obligation to supply the shortfall (page 357, Volume 2, memo of Appeal).

214. A chart showing the calculation of actual quantities to be supplied to RNRL is set out hereinbelow: Assumption being that N (NTPC Volume) is 12 MSCMD and GS_n (Government share) for a year is 45% of GP_n

S. No .

Total Production (i.e. GP_n) in MMSC MD

Quantity for each year In MMSCMD

1

38

6

2

54

13

3

60

16

4

74

22

5

80

25

6

The quantity therefore varies each year.

215. A perusal of above chart shows that quantity of vary from 6 MMSCD in year 1 to 25 MMSCMD in year 5. Therefore, on these assumptions, even the commitment of 28 MMSCMD cannot be complied with let alone any promised option volume.

216. Therefore, the quantity clause is designed by RIL to make the Agreement completely unworkable. The quantity contracted is 28 MMSCMD for 17 years. However on the basis of the formula what will actually be supplied, is a fraction of the same and in any event, would not exceed 25 MMSCMD. RIL has not been able to demonstrate any international GSPA which has a similar uncertain clause.

217. In fact, the NTPC contract which has been accepted by RIL for submission of the bid, provides for a fixed quantity of gas. Relevant Clause 7.1 of the NTPC Contract is set out hereinbelow (page 253, Volume 2, Memo of Appeal):

ARTICLE 7 QUANTITIES

Article 7.1 Annual Contract Quantity

Annual Contract Quantity ("ACQ") is the quantity of Natural Gas required by Buyer in any Contract Year and shall be expressed in TBtu in respect of each Contract Year. During BuildUp Period, ACQ shall be as specified under Article 6.1(a). ACQ for the remaining Contract Years shall, subject to any upward revisions made in accordance with the subsequent provisions of this Article 7.1 be 132 TBtu.

During Contract Term, Buyer may by notice request Seller for an increase in ACQ for any specified period or the remaining period of Contract Term. Buyer and Seller may thereafter reasonably discuss and agree on any upward revision to ACQ, provided however that such increase in ACQ shall be on the same terms and conditions as contained in this Agreement.

In the case of any Contract Year that is less than 12 months, ACQ shall be adjusted by the same proportion as the number of Days in such Contract Year to 365.

218. It is, therefore, submitted that the NTPC contract which is prepared by the Government of India, must be followed for the purposes of assuring the agreed quantity and to make the Scheme workable.

219. It now appears that RIL has sought to hoodwink not merely RNRL and its shareholders and NTPC but also the Government of India.

220. It is submitted that RIL had initially estimated the gas quantity in the KGD6 basin at 40 MMSCMD with a capital expenditure of USD 2.5 Billion, i.e.

approximately Rs. 10,000 crores. As per this, the share of the Government was around 13.5 MMSCMD, i.e. about 45% of the total gas. However, RIL increased the total estimate of available gas to 80 MMSCMD while simultaneously increasing the capital expenditure to USD 5 Billion, i.e. Rs. 20,000 crores. RIL then indulged in the greatest flip flop. It immediately proposed an increase in the total capital expenditure to USD 9 Billion, i.e. Rs. 36,000 crores. With this revised estimate, total share of the Government in the petroleum is merely 17 MMSCMD, i.e. 30% of the total gas. Therefore, while the total estimated quantity of gas has doubled from 40 MMSCMD to 80 MMSCMD, the total share of the Government has gone up only from 13.5 MMSCMD to 17 MMSCMD. This is a fraud on the public exchequer. A table showing the prices and the impact of the increase is given below. (Page 1168, Volume 8, memo of Appeal)

Submission of Capex

Original

Revision 1

Revision 2

Difference

Gas Quantity (MMSCMD)

40

80

80

Capital Expenditure (Rs.

Crores)

10,000 (USD Bn)

2.5

20,000 (USD Bn)

2.5

36,000 (USD Bn)

2.5

16,000 (USD Bn)

4

Increase (%)

200%

360%

Governments share as a % of the total available gas

45%

45%

30%

15%

Government's share in gas quantities (MMSCMD)

13.5

27

17

10

ESTIMATED LOSS TO GOVERNMENT: Rs. 33,000 crores

221. It is submitted that as a consequence, the formula in relation to the calculation of volume has to be reworked taking into account the increased share of RIL. The results, as expected, are eye opening. RIL will be able to supply gas upto 28 MMSCMD. However, this volume of gas will vary from year to year. In other words while theoretically it may comply with the MOU, it will not do so in practice. Further, a variable amount of gas depending on that years production would not be bankable.

S. No.

Total Production (i.e. GPn) in MMSCMD

Quantity for each year assuming Government Share to be 30%

1

38

11

2

54

20

3

60

24

4

74

32

5

80

36

6

120

60

222. It is submitted that the Learned Single judge, while noting the argument of RNRL did not return any finding on this issue.

223. It is submitted that Clause 3.1 (b) of the GSMA dated 12/1/06 provides for the period for which gas would be made available by RIL to RNRL (Volume 2, Memo of Appeal, page 349). The said clause reads as under:

(b) The tenure over which volumes of Gas will be available for contracting under this Agreement from any Development Plan ("Tenure") shall be the period in Years determined under this Clause (b) but in no event beyond 31 March 2025.

(i) The Tenure of volumes available for RNRL from the Initial Block KGD6, Development Plan shall mean the result (in years) of the following:

Tenure = [(CPR2.63) x 106] + [(APVN) x 35.3147x365]

CPR: Certified Proved Reserves Attributable to the Initial Block KG D6 Development plan in TCF

2.63: stipulation of the volume of gas in TCF required to meet the supply obligations under the NTPC GSPA over the term thereof at the ACQ thereunder

APV: annual gas production volumes (expressed on a daily average basis in MMSCMD) under the initial block KG D6 Development Plan.

N: the volume of gas (expressed on a daily average basis in MMSCMD)required to meet the supply obligations under the NTPC GSPA

35.3417: factor to convert from cubic meters to cubic feet

224. It is submitted that clearly the tenure agreed to between the parties in the MOU was commercial terms same as those applicable to NTPC which was 17 years (which is not disputed), but the aforesaid provision of the GSMA does not clearly state that the gas will supplied for a period of 17 years but instead gives a complex formula which is uncertain as to its exact duration. It is pertinent to note that the term of 17 years finds reference not merely in the MOU, but also in the NTPC contract (as stated below) as well as the impugned GSPA. In the clause

relating to liquidated damages, as discussed hereinbelow, there is intrinsic evidence to establish that the tenure of the contract was envisaged to be 17 years. On the basis of the formula, the term would vary depending on a number of RIL serving and controlled variables. Therefore RNRL is not guaranteed of receiving gas for 17 years at all.

225. It is submitted that the following calculation would establish that the clause has been artificially designed by RIL to defeat the rights of the Applicant. The tenure is so short or so variable that it is virtually unusable. The direct and inevitable effect of this is that the business of supply of gas will not be transferred to the applicant. On the assumption that N (NTPC Volume) is 12 MMSCMD, the tenure of supply works out as under

Annual Gas Production Volume (in MMSCMD)

Tenure of the GSPA With CPR as per the Initial Development Plan (4.4 TCF)

40

4.9 years

60

2.86 years

80

2.02 years

120

1.27 years

It is pertinent to note that the tenure of the GSPA will vary from year to year depending on annual production volume.

226. It is submitted that as per the above calculation, assuming a daily supply of 80 MMSCMD the term of the contract would only be 2 years rather than the contemplated 17 years. This assumes that the Initial Development Plan for the KGD6 Basin has proved reserves of 4.4 TCF. Therefore the adoption of the formula is merely a mechanism to defeat the rights of RNRL.

227. It is submitted that the aforesaid chart has been admitted by RIL during the course of its argument. It is thus admitted by RIL that as per the GSMA as it stands RNRL is not assured of supply for 17 years.

228. It is submitted that the argument of RIL that this is based on some international formula or basis, is also not correct and no GSMA has been produced by RIL to substantiate its argument. On the contrary, the NTPC contract framed by the Government of India and which formed part of international bidding, clearly provided for a period of 17 years. It is on the basis of this Clause (which is still not disputed by RIL in its proceedings with NTPC)

that the period is 17 years is to be provided. For ready reference the tenure clause in NTPC contract is set out hereinbelow:

4.1 NTPC Terms

This Agreement shall, subject to Article 3, come into force for all purposes and intents on the date of its execution and shall continue to be in full force and effect for 17 years from Start Date unless terminated earlier pursuant to the provisions of this Agreement. (Vol.2, Memo of Appeal/ Pg 247

229. It is submitted that it is also pertinent to note that the new term sheets executed between RIL and certain bidders are for periods of three years which is well above the possible tenure of 2 years. In case the maximum period of 2 years is determined by the availability of the reserves, the period of 3 years for other contracts falsifies this claim. This in itself shows that the formula is misconceived and employed solely to defeat the legitimate rights of the applicant under the scheme.

230. It is submitted that the other argument of RIL that it does not want to commit a period of 17 years since it is possible that after 2 years no gas is available, is also misleading and incorrect in as much as the period of 17 years would obviously be subject to gas being available and a suitable provision can be made in the clause stating that RIL would supply gas for a period of 17 years subject to availability.

231. It is submitted that the plea of RIL that the tenure of the contract is based on the total supply of gas is also false and misleading. A simple analysis of the formula would demonstrate that the term of the contract has nothing to do with actual quantity of gas available but depends on artificial factors that can be manipulated by RIL to its own advantage. The main area of manipulation is the definition of CPR.

232. It is submitted that CPR has been defined (see p. 345, Volume 2, Memo of Appeal) as "Certified Proved Reserves attributable to the Initial Block KGD6 Development Plan, in TCF". There are several mischievous aspects to this definition. First, the reserves have been restricted to the KG D6 basin. However, the entitlement of the applicant is not merely from the KG D6 basin but from any gas fields of RIL. This artificial restriction limits the CPR and reduces the tenure of the gas supply agreements.

233. Secondly, the definition is restricted to the Initial Development Plan. This is distinct from the Development Plan. The difference is that the Initial Development Plan contains only the preliminary assessment of the quantity of gas which would have been made.

234. Thirdly, the definition of Certified Proved Reserves for the purposes of the formula is different from the definition of Certified Proved Reserves in the main definition clause.. The main definition of Certified Proved Reserves at p. 345 refers to the Development Plan of any field of RIL. This is different from the

Initial Development Plan, of the KG D6 basin. This distinction makes clear the mala fide intent of RIL. RIL could simply have used the definition of Certified Proved Reserves given in the main definition section. However, by giving a separate definition exclusively for the purposes of the tenure calculation, the effort to artificially diminish the applicant's entitlement has been laid bare.

235. In fact, in case the artificial definition is not used and the actual reserves of the KG D6 basin are taken, the tenure of the GSMA would be as under.

Annual Gas Production Volume (in MMSCMD)

Tenure of the GSPA With CPR as per the Initial Development Plan (4.4 TCF)

Tenure of the GSPA assuming the CPR is 11 TCF

Tenure of the GSPA assuming the CPR is 35.4 TCF as per Niko Resources Press Release

40

4.9 years

23.3 years

90.7 years

60

2.86 years

13.5 years

52.95 years

80

2.02 years

9.6 years

37.4 years

The current CPR is 11 TCF since only 1/3rd of the field has been explored and developed.

236. This demonstrates that the sole intention of RIL is to defeat the legitimate claim of RNRL. RIL certainly has sufficient gas to supply the same for 17 years but is attempting to shirk its responsibility to do so.

237. Fourthly, the linking of the tenure to proved reserves is artificial. What is relevant in the gas field is the actual production of the gas and not the proved reserves certification done years before the commencement of production of gas. The proved reserves are merely, and often conservative, estimates of the gas available. The total reserves are in fact a mixture of three components, namely

Proved, Probable and Possible reserves. Proved Reserves are only a small fraction of the actual reserves stated in the Development Plan. The calculation of tenure, assuming that it should be based on a formula at all, should have been based on actual production or at least on all three reserves.

238. Finally, Clause 3.1 (f) at p. 351 of Volume 2, Memo of Appeal make it clear that that "RIL does not warrant the Certified Proved Reserves in any certificate". Therefore the absence of a warranty makes the calculation of the term of the contract even more uncertain and completely contingent on RIL and its experts' actions. RNRL will have no control or certainty even about the extent of the CPR. This is completely commercially unacceptable.

239. It is, therefore, submitted that the tenure clause in the GSMA has been designed by RIL to deliberately make the Scheme completely unworkable. It is impossible for any company to set up a power project with an investment of several thousand crores without even an assured supply at least for 17 years. In order to make the Scheme workable, it is necessary to amend the tenure clause so that it provides for a supply of 17 years.

240. Further It is submitted that the GSMA requires individual GSPA's to be signed. However, as per Clause 3.1 (b) read with Clause 3.4 (e), gas will not be supplied after 31/3/2025 (p. 355, Volume 2, Memo of Appeal). Therefore, for each GSPA signed after 31/3/2008, the gas will be supplied from the date of commencement of supply of gas under the GSPA upto 31/12/2025. The effect of this would be that the period of supply of gas would hence be necessarily for a period less than 17 years. The alleged reason for this clause is that the lease expires on 31/3/2025.

241. Before the last date of hearing the Appellant produced two letters communicating grant of lease in respect of specified areas covered by KG D6 block. These two leases relate to fields so far developed by RIL within KG D6 and together account for about 400 Sq. Kms. as against 7645 Sq. Kms. being the total area of KG D6 block. The lease for these fields is twenty years each from the date of the respective communications. While for one field the initial agreed lease period would end in 2025, the lease period for the other would end in September 2028. There will be several such leases within KG D6. RIL has wrongly sought to confine RNRL's right to receive gas to one of the fields in KG D6.

242. It is submitted that RNRL's right to receive gas extends to gas produced by RIL from all its present and future exploration areas and not to only one field in KG D 6 the lease of which might expire in 2025. The aggregate area of all the blocks so far awarded oil and gas exploration to the consortia led by RIL is about 3,50,000 Sq. Kms. However, the actual lease which presumably includes a renewal clause has not been produced before the Court.

243. The learned Counsel for the applicants have strongly relied on the MOU and put up their submissions accordingly. Even as per the MOU, the quantum of

supply and/or source of supply are from the Proven P1 reserves of RIL "Whether the KDG6 basin or elsewhere", the concept therefore of supply of gas from Proven P1 reserves of RIL is well within the knowledge of the applicants. The formula and/or aspect of P1 reserves itself flow from the PSC. It, therefore, also follows the requirement of certified crude reserves attributable to such development plan. The CPR therefore as defined means certified proved reserves attributable to KGD6 development plan in Trillion Cubic Feet (TCF). The respondents themselves submitted that this formula in no way restricts the block KGD6. The insistence therefore that the available quantity "would have to be calculated" cannot be said to be beyond the MOU and/or the Scheme. The lease in respect of the KGD6, if expire on 31.3.2025, the applicants cannot insist that respondents should supply and provide the gas even after 31.3.2025. It will depend on the facts and circumstances and subject to extension of lease. The fixation of price, if Government insists for value in the gas even for their own share for 5 years or more, the price of respondent's gas, therefore, would definitely affect by the said fluctuation and/or change in the price fixed by the State Government. The insistence of fixing the price at this stage itself by the applicants is therefore also not correct. The respondents, as noted, and considering the whole MOU and the Scheme and the purpose of demerging, bound to provide and supply gas to the resulting companies at least to the period and quantity to the nearest possible time and quantity. It is a matter of mutual understanding and negotiation. The survival of both the parties is essential and not the destruction, because of some clauses like this in GSMA or GSPA. The respondents cannot be asked to perform their part of the contract beyond their capacity. They further cannot be insisted upon signing and executing the document blindly even for future basically considering the nature of natural resource and the business of production of gas in question."

244. It is submitted that this judgment does not give a definite finding on tenure. However, the highlighted portions reveal the error on the part of the Court.

245. It is submitted that the GSMA makes it clear that for the purposes of the formula, the supply is from the KG D6 basin. Secondly, as mentioned above, the lease has not been produced.

246. It is submitted that further, there is no discussion on the points mentioned above which detail the mischievous aspect of the CPR calculation. In fact these submissions have been reproduced in the judgment but have not been dealt with.

247. It is submitted that pursuant to the MOU the Board of RIL proposed a Scheme of Arrangement to give a formal legal effect to the same. Since the business of generation of power was to be transferred to the Anil Ambani Group, its interest in receiving the gas to be used for the generation of power also had to be secured. The Scheme of Arrangement clearly stated that the business of supply of gas to the power generation company constituted a separate and distinct business, which was a well considered decision taken by the Board of Directors of RIL as would be observed from the corporate announcements made

by RIL to Bombay Stock Exchange on 3rd August 2005 and 5th August 2005.

248. The Scheme of Arrangement expressly noted in clause A(f) (ii) (page 81, Volume 1, Memo of Appeal) that RIL proposed to use part of its gas discoveries for the generation of power for which purpose an appropriate gas supply arrangement will be entered into between RIL and Global Fuel Management Services Ltd. [now RNRL viz., the Applicant] pursuant to which gas will be supplied to REL for their power projects, including Reliance Patalganga Pvt.Ltd., for the generation of power. The abovementioned business of supply of gas to REL for their power projects including Reliance Patalganga Pvt.Ltd. for generation of power as an integrated whole, constituted the Gas Based Energy Undertaking of RIL that was to be demerged and transferred to RNRL. The aforesaid transfer was to be implemented by execution of an appropriate agreement.

249. It is submitted that it is therefore clear that the business of RNRL was to be of supply of gas to REL and its Affiliates. It was never intended that RIL would supply gas directly to REL because then there would be no reason for RNRL to come into existence and to be a Resulting Company under the Scheme. What was therefore demerged from RIL to RNRL was the business of supply of gas to REL and its affiliates. This could only happen if RIL was to supply gas to RNRL and in turn RNRL was to supply gas to REL and its Affiliates and for this purpose an appropriate agreement had to be executed. Any direct agreement between RIL and REL and/or its Affiliates, bypassing RNRL would not result in the transfer of the business of supply of gas to RNRL as envisaged by the Scheme. This position is further clarified by reference to Clause 19 of the Scheme which provides that RIL and RNRL would enter into a suitable agreement for "supply of gas for the power projects of Reliance Patalganga Pvt.Ltd. and REL". At this point of time it is also pertinent to note that the scheme recorded that an important rationale for the same was the enforcement of the MOU.

250. It is submitted that this position is further bolstered by a reference to the very definition of Gas Based Energy Undertaking in Clause 1.12 of the Scheme (page 88 of Volume 1, Memo of Appeal) which states it to be the entity "as described in item (ii) of subclause (f) of Clause A of the preamble" being the "Demerged Company"s undertaking, business, activities and operations pertaining to supply of gas for the generation of power by Reliance Patalganga Power Limited and REL for their power projects".

251. It is submitted that the MOU and the Scheme also clearly envisage that gas would be supplied by RIL to RNRL so that RNRL could supply the same to REL and its Affiliates for the generation of power.

252. It is submitted that however, the impugned GSMA stipulates that rather than RIL supplying gas to RNRL, individual agreements would be entered into between RIL and REL and its Affiliates which actually operate the power plant. If such agreements are to be entered into directly with RIL, there is no occasion or necessity for the existence of RNRL at all. The sole business of RNRL in the

Scheme was the supply of gas to REL and its Affiliates. By failing to do the same the entire substratum of RNRL has been wiped out. This is also in complete breach of the Scheme and the Order of the Hon'ble High Court sanctioning the Scheme.

253. Reference may be made in this regard to Clause 2.1 of the GSMA at page 348, Volume 2, Memo of Appeal. The said clause reads as under

2.1 Scope: Pursuant to this Agreement the Parties may execute or cause the execution of one or more GSPA's with regard to quantities of Gas available for contracting from the Subject Blocks

(a) Seller under each GSPA shall be RIL or Affiliate

(b) Buyer under each GSPA shall be the affiliate of RNRL that will own the Power Plant that will consume the Gas

254. It is submitted that the above clause in the GSMA makes it clear that the contracting parties are RIL and the power generation company, and not RIL and RNRL. There is to be no direct sale of gas to RNRL at all. This is a cleaver and mischievous device which has the effect of RIL retaining the Business of Supply of Gas to REL and Reliance Patalganga Power Ltd.

255. It is submitted that the Scheme and the MOU clearly provide that the business of supply of gas by RIL to REL / RPPL has been transferred and demerged to RNRL. Hence the gas would now be supplied by RNRL to REL / RPPL. This can only be achieved if Gas Supply Agreement envisages supply of gas from RIL to RNRL. However, contrary to clear provisions of the Scheme as stated above the GSMA unilaterally executed provides for supply of gas by RIL to REL/RPPL. Hence business of supply of gas to REL/RPPL has not come in the hands of RNRL as a result of the said GSMA but has been retained by RIL in breach of the Scheme and the Order of the Court sanctioning the Scheme

256. It is submitted that the identity of the buyer has been altered by the impugned GSMA and rather than RNRL being the buyer of the gas, REL and its Affiliates have been substituted as the buyers of the gas directly from RIL. This amounts to RNRL being reduced to a mere shell company (a company without the business demerged under the Scheme) and is contrary to the MOU and is clearly contrary to the Scheme Sanctioned by this Court. This also deprives the 20 million Shareholders of RNRL from the advantage they would have if the actual business of supply of gas was transferred to RNRL.

257. It is submitted that the finding of the learned Single Judge that the company is not a shell company since it is making a profit (page 1587, Volume 10, memo of Appeal) is erroneous inasmuch as the argument is that RIL has not permitted any business to come to RNRL thereby rendering it a mere shell company at the time of demerger. Since RIL is attempting to retain the business of supply of gas to REL and Reliance Patalganga what has been demerged and come to Anil Ambani Group is a Shell Company. RNRL could, of itself, always

generate profits through diversification in other businesses. However, this was not due to the beneficence of RIL but through the competent management of RNRL. The profits were earned through other, independent businesses. The fact of the excellent current management of RNRL cannot wipe away the injustices meted on it by RIL.

258. It is submitted that in order to make the Scheme workable, it is therefore, necessary that GSMA is altered to provide that gas would be supplied to RNRL for onward supply to REL / RPPL. Consequential changes can be easily made in rest of the GSMA / GSPA. The argument that with any single change of the structure of the GSMA the entire GSMA would be affected is false, wrong, incorrect and designed to mislead this Hon'ble Court and to prevent this Court from passing any order.

259. It is submitted that it is necessary to modify the definition of affiliate to bring in accordance with universally used and acceptable definitions so that RNRL is able to effectively use the Gas for all projects for which it has control and may not necessarily be its subsidiaries. The control can be exercised under the Agreement/Memorandum of Articles and in several other ways. It is not necessary that a Company must have 51% shareholding in the other Company to exercise control and in order to make it affiliate.

260. It is submitted that the Learned Single judge has held in favour of the Applicant. The Court holds as under:

129. In so far as the identity of buyer is concerned, as per clause A(f) (i) of the Preamble of the Scheme and in the backdrop of the MOU, it is clearly envisaged that gas would be supplied by RIL to RNRL so that RNRL could supply the same to REL and its affiliates for the generation of power. The submission is that the business of supply of gas to REL and its affiliates was the very reason for which RNRL had been contemplated. The execution of individual agreements as provided in the GSMA, it would be between RIL and REL and its affiliates. It means, such agreements would be entered directly with RIL by REL or such other affiliates. The RNRL will not be in picture.

261. It is submitted by the learned Counsel for RNRL that the Gas Supply Master Agreement unilaterally executed on 12.1.2006 provides in Clause 2.1 that the power under GSPA shall be supplied to affiliate of RNRL. It has already been submitted above that the supply has to be made by RIL to RNRL and not to RNRL's affiliation. Without prejudice to the same, it is submitted that even the definition of affiliate as provided for in the GSMA, is erroneous and needs modification.

262. It is submitted by the learned Counsel for RNRL that the definition of Affiliate as contained in the GSMA dated 12.1.2006, is set out hereinbelow (p. 344, Volume 2, memo of Appeal):

"Affiliate" means, with respect to any Party, any Person (other than an individual)

directly or indirectly controlling, controlled by, or under direct or indirect common control with, such Party or Person (including any subsidiary or parent undertaking of Seller or Buyer or any other subsidiary or parent undertaking of that parent undertaking). For purposes of this definition, control means the ownership directly or indirectly of fiftyone percent or more of the shares or voting rights in a company, partnership, or entity.

263. It is submitted by the learned Counsel for RNRL that the aforesaid definition needs to be modified for the following reasons:

(a) In the aforesaid definition, it has been provided that an affiliate would be one in which RNRL holds 51% or more of the shares. In this manner, RIL has equated the definition of affiliate with that of a subsidiary. Affiliate clearly has a wider meaning than that of a subsidiary. If Affiliate was to be defined to mean a subsidiary there was no need to have a definition of Affiliate.

(b) The NTPC Contract provide for the following definition of affiliate which is the correct definition and is acceptable to RNRL (page 227, Volume 2, Memo of Appeal). "Affiliate" means, with respect to any Party, any Person (other than an individual) directly or indirectly controlling, controlled by, or under direct or indirect common control with, such Party or Person (including any subsidiary or parent undertaking of Seller or Buyer or any other subsidiary or parent undertaking of that parent undertaking). A Person shall be deemed or ability to direct or another Person if such Person possesses, directly or indirectly, the power of ability to direct or cause the direction of the management and policies of such other Person, whether through the ownership of voting securities, by contract or otherwise (but excluding a Lender which has such power or ability to direct or cause the direction of the management and policies of such other Person).

(c) Even the noncompete Agreement and the Trade Mark Agreement executed on 12.1.2006 by RIL with other company as a part of the demerger scheme has the correct definition of Affiliate and the same is set out hereunder:

"Affiliate" shall mean with respect to any Party, any Person (other than a natural person), which, directly or indirectly, controls, in controlled by or is under common control with it. "Control" shall mean, as applied to any Person, the power or right to, directly or indirectly (i) direct or cause the direction of the management of that Person; (ii) direct or cause the direction of the policy decisions exercisable by that Person; or (iii) nominate for appointment the majority of the directors on the board of directors of that Person, by virtue of ownership of voting securities or management rights or contract or in any other manner.

(d) Even the Production Sharing Contract between RIL and the Government of India has a definition which does not equate Affiliate to a subsidiary. (see page 3, Volume 3 of the Compilation of Documents filed on behalf of the Appellants)

(e) It is, therefore, submitted that the aforesaid definition of Affiliate in the GSMA of 12.1.2006 has been deliberately engineered by RIL to frustrate the functioning of the GSMA. The definition given by RNRL in Exh. J (set out hereinafter for ready reference) is the correct definition.

(f) RNRLs definition of Affiliate is derived from the NTPC contract, the Production Sharing Contract and other contemporaneous Agreements such as the noncompete Agreement. Affiliate definition in Exhibit J (Page 510 of Volume 2, Memo of Appeal):

"Affiliate" means, with respect to any Party, any Person (other than an individual) directly or indirectly controlling, controlled by, or under direct or indirect common control with, such Party or Person (including any subsidiary or parent undertaking of Seller or Buyer or any other subsidiary or parent undertaking of that parent undertaking). A Person shall be deemed to control another Person if such Person possesses, directly or indirectly, the power or ability to direct or cause the direction of the management and policies of such other Person, whether through the ownership of voting securities, by contract or otherwise (but excluding a Lender which has such power or ability to direct or cause the direction of the management and policies of such other Person).

264. It is submitted by the learned Counsel for RNRL that the Learned Single Judge has not returned a clear finding on this issue. While he holds:

130. The insistence that affiliate company must be 51% of shareholding in other company to exercise the control in order to make it an affiliate as defined in the GSMA is contrary to the other RIL agreements contemplated under the scheme and even to the definition of "affiliate" under the Production Sharing Contract between the Government of India and RIL and to the definition given in the NTPC contract.

265. It is submitted by the learned Counsel for RNRL that however, in the next paragraph, the Court holds as under, thereby returning a contradictory finding. When regard is had to the ultimate directions though, it is clear that the findings are completely in favour of RNRL.

130...There is no dispute by the RIL to supply of gas to the power plants of RPPL and REL and also to the power projects of these entities. The requirement of 51% share of RPPL or REL in this backdrop cannot be said to be unjust or bad. The appellant/applicants cannot insist that any company which the applicants hold any shares whatsoever irrespective of the percentage is not within the scheme and never contemplated under the MOU. In my view, therefore, there is force in the submission of the learned senior counsel for the respondent that such clause cannot be said to be contrary to the Scheme.

266. It is submitted by the learned Counsel for RNRL that the Court does not deal with the contentions of RNRL and proceeds on the assumption that only a 51% owned subsidiary can be an affiliate.

267. It is submitted by the learned Counsel for RNRL that the clause on limitation of liability is yet another instance of how the basic agreement contained in MOU and the concept of suitable arrangement contained in the Scheme has been undone in the GSMA to make the Scheme unworkable. Clause 14.3(i) (Page 420, Volume 3 of the Memo of Appeal) of the GSPA which is appended to the GSMA, limits / caps the maximum liability of RIL in the event of its failure to supply gas to a maximum period of 6 months. The said clause reads as under:

14(3)(i) Notwithstanding anything to the contrary provided in this Agreement, in no event shall the Seller's liability for Supply Deficiency Quantity or Delivery Default Quantity whether singly or cumulatively exceed the sum of USD(.) Million. (To be determined based on [Contract price "(Sum of ACQs in Schedule 7.1/Basic Term) "[1/2]" [Basic Term 17].

268. It is submitted by the learned Counsel for RNRL that it is pertinent to note that this limitation of liability has been imposed not merely in cases of force majeure or frustration but in the event of any default by RIL.

269. It is submitted by the learned Counsel for RNRL that tilt was agreed between counsel on both sides before the Hon`ble Court that the aforesaid clause would apply only in the event that there is physically no gas available in all the gas fields given to RIL by the Government of India at any point of time or for like reasons beyond the control of RIL. The clause, however, reflects otherwise. Based upon the agreement on both sides it is submitted that the aforesaid clause be made to amended to read as follows:

In the event supply of gas is not possible for reasons supply of deficiency quantity or delivery default quantity whether singly or cumulatively will not exceed the sum of USD [.] million.

270. In so far as the allegation that a gas plant of 7840 MW capacity would be the largest and would therefore be unlikely to be set up within a period of three to four years is concerned, this Court need not to into the said aspect.

271. The learned Counsel for RNRL further submitted that this Court can always mould the reliefs in the circumstances of a particular case despite the prayers which may be couched in a particular manner by placing reliance to the cases of Satish Chand Makhan and Others Vs. Govardhan Das Byas and Others, and U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, .

272. It is submitted that RNRL is entitled for being compensated on the basis of principles of restitution which are well recognised and as stated in the case of South Eastern Coalfields Ltd. Vs. State of M.P. and Others, and then submitted that the principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a

decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a preexisting rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In *Jai Berham v. Kedar Nath Marwari* Their Lordships of the Privy Council said: (AIR p. 271)

It is the duty of the court u/s 144 of the CPC to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed". Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved.

It is therefore, submitted that the Petition u/s 392 was filed for implementation of the scheme filed by RIL in order to ensure transfer of business of supply of gas which constituted the Gas Based Energy Undertaking. If no consequential orders are passed to ensure implementation of the scheme, it would result in the Gas Based Energy Undertaking being retained with RIL and no business coming to RNRL which would amount to fraud on the scheme, millions of shareholders and this Hon"ble Court. It is, therefore, prayed that this Hon"ble Court do pass appropriate orders to ensure that the Gas Based Energy Undertaking is actually demerged and comes to RNRL and the Scheme as sanctioned by the Court is implemented.

The Union of India's stand on pricing of gas and its allocation.

273. It is submitted by Mr. Mohan Parasaran, Additional Solicitor General of India that the purpose behind Union of India sought to intervene in the appeals filed by

the parties has to be viewed from the fact that India has been facing a chronic shortage of natural gas due to demand out pacing supply. Accordingly, the gas has been allocated to the priority sectors, mainly in fertilizer and power sectors, which are critical to the economy. Since India still remains a gas deficient country, it has augmented the availability of natural gas by importing LNG both on long term contract basis as well as through spot purchases. In view of the vital importance of natural gas for the national economy and for providing an environment friendly fossil fuel and also considering the fact that natural gas is one of the cheapest sources of feed stock for the fertilizer sector, natural gas needs to be utilized to the best possible benefit of the Indian economy and in the wider public interest/good.

274. It is submitted by the Additional Solicitor General of India that even the Hon"ble Supreme Court, in the larger public interest, has passed orders in the past, directing the Government to allocate gas to the transport sector, like the Delhi Public Transport System and supply to the Taj Trapezium Project to protect the Taj Mahal. It is respectfully submitted that these factors necessitated the Government to move this Hon"ble Court in its capacity as the sovereign owner of the natural gas as well as in the capacity of a regulator in the matter of prioritization in the allocation of gas.

275. This Hon"ble Court, as mentioned above, has requested the Union of India for providing assistance, in particular to the intent of the scope of Article 21 of the Production Sharing Contract (PSC), as pricing and distribution of gas have far reaching implications and wider public interest ramifications.

276. It is submitted by the Additional Solicitor General of India that under the New Exploration Licensing Policy (NELP) formulated by the Government in 1997 and operationalized in 1999, the Government had given contractors the freedom to market gas as well as oil in India in accordance with the terms & conditions provided in the PSCs. The objective was to encourage investment in high risk exploration ventures by allowing the contractors to sell oil and gas at market related prices discovered on competitive arms length basis in the domestic market. However, certain restrictions have been imposed on the freedom of the contractor to sell oil and gas. The prices at which sales take place have to be competitive, armslength prices. Besides, these competitive armslength prices are subject to approval of the proposal, of the contractor, by the Government. Government has also to be conscious of its present role as a regulator till such time that a regulatory authority is in existence. The gas can only be sold in accordance with the Government approved price formula / basis and the approved Gas Utilization Policy.

277. It is submitted by the Additional Solicitor General of to the launch of NELPI, kept a provision for approval of the gas price formula / basis by the Government prior to any sale of gas. The reasons for the Government approval to the gas price formula / basis was to protect the Government's entitlements, as Government revenue in the form of profit petroleum and royalty is directly

dependent on the price of gas, which has been elaborated in the PSC provisions, in particular Article 21.6. The contractor was also required to discover gas sale price formula/basis on a competitive, arms length basis to the benefits of the parties to the contract. Further, for granting such approval, the Government shall take into account the prevailing policy on pricing of natural gas which indicates the regulatory role of the Government in the pricing of natural gas.

278. It is submitted by the Additional Solicitor General of India that the relevant Article 21.6 of the PSC, that has been entered into between Government of India, RIL and Niko on 12th April, 2000 for block KGDWN98/3 is reproduced below:

Article 21.6 Valuation of Natural Gas

Natural Gas produced and saved from the Contract Area at armslength prices to the benefits of Parties to the Contract. Article 21.6.2: Notwithstanding the provision of Article 21.6.1, Natural Gas produced from the Contract Area shall be valued for the purposes of this Contract as follows:

(a) Gas which is used as per Article 21.2 or flared with the approval of the Government or reinjected or sold to the Government pursuant to Article 21.4.5 shall be ascribed a zero value;

(b) Gas which is sold to the Government or any other Government nominee shall be valued at the prices actually obtained; and

(c) Gas which is sold or disposed of otherwise than in accordance with paragraph (a) or (b) shall be valued on the basis of competitive arms length sales in the region for similar sales under similar conditions. shall be determined pursuant to Articles 21.6.2 (b) or (c) shall be approved by the Government prior to the sale of Natural Gas to the consumer / buyers. For granting this approval, Government shall take into account the prevailing policy, if any, on pricing of Natural Gas including any linkages with traded liquid fuels, and it may delegate or assign this function to a regulatory authority as and when such an authority is in existence.

3. Scope of the Article 21.6 of PSC: On a harmonious reading of Article 21.6, it is evident that the said Article deals with the following two distinct aspects: (i) Valuation and (ii) Price.

4. Articles 21.6.1 and Article 21.6.3 deal with price of gas whereas Article 21.6.2 deals with valuation.

279. It is submitted that Article 21.6.1 of the Production Sharing Contract (PSC) compulsorily obliges the contractor to endeavour to sell all natural gas produced and saved from the contract area at competitive, armslength prices to the benefit of parties to the Production Sharing Contract.

280. It is submitted by the Additional Solicitor General of India that the Production Sharing Contract defines "Arms Length Sales" as follows:

"Arms Length Sales" means sales made freely in the open market, in freely convertible currencies, between willing and unrelated sellers and buyers and in which such buyers and sellers have no contractual or other relationship, directly or indirectly, or any common or joint interest as is reasonably likely to influence selling prices....

This term "unrelated sellers and buyers" assumes great significance in the matter of determining an Arms Length Sale in the context of a relationship between the Appellant and the Respondent, who cannot be described as unrelated buyers and sellers.

281. It is submitted that under the PSC, the Government is vitally concerned and interested not only in the costs incurred by the Contractor but also in the prices at which the contractor commits to sell the gas produced and saved. As per the PSC, after the costs (Capital and Operating) incurred by the contractor are recovered, as per the cost recovery limit given in Article 15.9 of the PSC, the balance revenue i.e. "Profit Petroleum, is shared between the Government of India and the Contractor. The "Profit Petroleum" is shared depending upon the Investment Multiple (IM) ratio. Profit Petroleum share of the Government in the revenue derived from the gas produced and saved from the contract area can even go up to an extent of 85%, in this Production Sharing Contract (PSC), after recovery of cost petroleum by the contractor.

282. It is submitted that provisions of Article 21.6.2 read and construed in their literal meaning indicate that the valuation of the gas in terms of Article 21.6.2 is not merely to determine the Government's entitlement but for the purpose of all calculations and entitlements under the PSC. It is this valuation on the basis of which the Profit Petroleum share of the contractor and Government of India is determined.

283. All gas sold by the Contractor except the gas to which zero value has been ascribed in Article 21.6.2(a) and also excepting the gas which is sold by the Contractor to the Government or any Government nominee under Article 21.6.2(b), falls within the purview of subclause (c) of Article 21.6.2 for the purposes of valuation. Accordingly, all other sales of natural gas from the contract area shall fall within the purview of paragraph (c) of Article 21.6.2. Sub Clause (c) of Article 21.6.2 stipulates that all gas sold within the purview of Article 21.6.2. Sub Clause (c) of Article 21.6.2 stipulates that all gas sold within the purview of Article 21.6.2 (c) is to be valued on the basis of competitive Arms Length Sales in the region for similar sales under similar conditions. (As set out above, Arms Length Sales is a term defined in Article 1.8 of the PSC).

284. It is submitted that Article 21.6.3 (like Article 21.6.1) deals with pricing of sale of all gas to which Article 21.6.2 (c) is applicable. On a plain reading of the above Articles, it is evident that gas which is sold to the Government or any other Government nominee shall be valued at the prices actually obtained. Article 21.6.3 requires approval of gas price formula / basis by the Government to the

proposal of the contractor. Thus, all gas to which paragraph (c) of Article 21.6.2 applies and for which the price formula / basis proposed by the Contractor has been approved by the Government under Article 21.6.3, shall necessarily be sold at the approved price.

285. It is submitted that Article 21.6.3 says that price of gas to which the provisions of Article 21.6.2 (c) apply shall be determined as per the formula or as approved by the Government prior to the sale of natural gas to consumers or buyers. In this context, the following can be deduced from the said Article:

(i) Article 21.6.3 stipulates that while granting this approval, Government shall take into account the prevailing policy, if any, on pricing of natural gas including any linkage with traded liquid fuels.

(ii) The Government may delegate and assign this function to a regulatory authority as and when such an authority is in existence.

286. It is submitted by the Additional Solicitor General of India that on a plain interpretation of the provisions of Article 21.6 and particularly, Article 21.6.3, it is submitted that the Contractor is required to submit the formula or basis through which price is determined for approval of the Government prior to the sale of natural gas to consumer/buyers and the Government is entitled to approve, reject (as was done once in this case) or modify such proposed price formula / basis. Such Government approved price formula / basis has necessarily to be taken for calculation of all entitlements under the PSC as well as for other purposes such as preparing all accounts/statements required under the accounting procedure of the PSC. Therefore, the contractor cannot sell any gas at any price different from the gas price formula / basis approved by the Government of India.

287. It is submitted by the Additional Solicitor General of India that it may be relevant to point out that in the present case, Reliance Industries Ltd. had submitted the formula through which a price of US\$ 4.32 per mmbtu, at the dated Brent crude price of US \$ 65 per barrel or more, was discovered by it, to which provisions of Article 21.6.2(c) would apply. While granting this approval, the Government modified this and stated that the sale price of gas sold by RIL, as aforesaid would be US\$ 4.20 per mmbtu, as per the approved formula / basis by the Empowered Group of Ministers (EGoM), at the dated Brent crude price of US \$ 60 per barrel or more. The EgoM also approved that this gas price formula shall be applicable for sale of all gas to all sectors for a period of five years from the date of commencement of first commercial production.

288. It is submitted by the Additional Solicitor General of India that it would be evident from conduct of the parties, both the Appellant and the Respondent, that the provisions of Article 21.6.2(c) would apply in respect of sale of gas by the contractor and that the approval of the Government was mandatory.

289. It is submitted by the Additional Solicitor General of India that it may also

be pointed out that the sale price of US\$ 2.34 per mmbtu of gas stated to have been agreed to between RIL and RNRL was not discovered in accordance with the requirements of the PSC, including principle of competitive, armslength sales and, therefore, a proposal to this effect made by RIL in April 2006 was rejected by the Government since it was not an armslength transaction.

290. It is submitted by the Additional Solicitor General of India that it is also submitted that from various other provisions of the PSCs, it is evident that the role of the Government as sovereign owner of the petroleum resources in supervision of the PSCs is comprehensive. It will be useful to illustrate some of these provisions of the PSCs in the subsequent paras to demonstrate the supervisory role of the Government in the administration and management of these PSCs.

291. It is submitted by the Additional Solicitor General of India that Article 6 deals with a Management Committee. This committee is to be constituted in terms of Article 6.2. Two members are to represent Government of India, and each Company constituting the Contractor is to nominate one member. The representative of the Government is to be designated as the Chairman, as stipulated in Article 6.4. The matters which are to be placed before the Management Committee are given in Paras 6.5 and 6.6. The Management Committee cannot take any decision without obtaining prior approval of the Government of India where such approval is required under the PSC or any applicable law of India (Article 6.7). Government is having the right of a "positive vote" in the matter of decision making process and in situations where differences arise in MC meetings, decisions can be taken only with the positive vote of the Government nominee(s), as per Article 6.13.

292. It is submitted by the Additional Solicitor General of India that the fact is that the Contractor shall always be mindful "of the rights and interest of India" in the conduct of Petroleum Operations." This is highlighted in Article 8.3 (k).

293. It is submitted by the Additional Solicitor General of India that the Government can at all reasonable times, inspect and test the appliances used for measuring the volume and determining the quality of petroleum is stipulated in the Article 13.2.

294. It is submitted by the Additional Solicitor General of India that the fact that petroleum operations are to be carried out in a manner with due regard to concerns in respect of protection of the environment and for this purpose, the directions of the Government are to be complied with. This is apparent from Article 14.

295. It is submitted by the Additional Solicitor General of India that the Government of India is entitled to taxes, royalties and profit petroleum. This indicates the financial interest of Government of India.

296. It is submitted by the Additional Solicitor General of India that Article 18.1

provides that "until such time as the total availability to the Government of Crude Oil and Condensate from all Petroleum production activities in India meets the total national demand, each Company comprising the Contractor, shall be required to sell in the domestic markets in India all of the Company's entitlement to Crude Oil and Condensate from the Contract Area in order to assist it in satisfying the national demand". Thus, the paramount consideration before the Government of India is the national interest.

297. It is submitted by the Additional Solicitor General of India that the contractor also has to make available to the Government, free of cost, all data, as laid down in Article 26. The Government can use all data acquired under the PSCs for promoting exploration activities in the country.

298. It is submitted by the Additional Solicitor General of India that Article 27.1 of the Production Sharing Contract clearly states that "the Government is the sole owner of Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract except as regards that part of Crude Oil, Condensate or Gas the title whereof has passed to the Contractor or any other person in accordance with the provisions of this Contract". Article 27.2 provides that title to Petroleum to which Contractor is entitled under this Contract, and title to Petroleum sold by the Companies shall pass to the relevant buyer party at the Delivery Point. Thus, till the delivery point the Government of India continues to be the owner and the title in the gas vests in the Government of India.

299. It is submitted by the Additional Solicitor General of India that Article 16.2.1 states that when the investment multiple of the contractor at the end of any year is less than 1.5, the Government shall be entitled to take and receive 10% of the total profit petroleum from the contract area. Article 16.2.2 states that when the investment multiple of the contractor at the end of any year is equal to or more than 1.5 but is less than 2, the Government shall be entitled to take and receive 16% of the total profit petroleum from the contract area. Article 16.2.3 states that when the investment multiple of the contractor at the end of any year is equal to or more than 2 but is less than 2.5, the Government shall be entitled to take and receive 28% of the total profit petroleum from the contract area. Article 16.2.4 and subsequent Articles state that when the investment multiple of the contractor at the end of any year is equal to or more than 2.5, the Government shall be entitled to take and receive 85% of the total profit petroleum from the contract area.

300. It is submitted by the Additional Solicitor General of India that from the various clauses enumerated above, it becomes apparent that

(a) The Government of India continues to have title of the natural gas, till the Delivery Point.

(b) It has a paramount and dominant role in approval of the gas price formula / basis.

(c) It has a paramount role in the Management Committee under the PSCs.

301. It is therefore, submitted by the Additional Solicitor role in the matter of price approval and if a price has been approved, it cannot be the subject matter of a dispute raised in a Company Petition

302. It is submitted by the Additional Solicitor General of India that the stand of Union of India on merits is that

(a) The gas has to be distributed in terms of the Gas Utilization Policy.

(b) That the Appellant and the Respondent cannot settle between themselves as to how the gas which is a National Asset and a National Resource, which vests in the Government of India and which is to be utilized for the welfare of the nation is to be distributed. It is not the private property of the Appellant or Respondent and any understanding arrived at between them is not binding upon the Government of India. The gas has to be distributed in terms of the EgoM approved Gas Utilization Policy.

(c) The argument raised by the Reliance Natural Resources Ltd. that it is entitled to a particular quantity of gas cannot be sustained. It is for the Government of India to determine as to who is entitled to the gas in terms of the Gas Utilization Policy.

303. The Additional Solicitor General of India therefore, summarized that:

i) Article 21.6.1 obliges the contractor to sell all the gas at arms length prices to the benefits of the parties to the PSC.

ii) The formula / basis on which the arms length sale is determined is required to be mandatorily approved by the Government of India (GOI) prior to the sale of all gas.

iii) The entire amount of gas will, necessarily, have to be valued at the approved price for determining the entitlements of each of the parties to the contract i.e. The Government and the Contractor.

iv) The right of the Contractor to market the gas under provisions of the PSC is subject to the restrictions contained in the PSC and the decisions taken by EgoM on pricing and utilization of gas.

v) The gas has to be marketed domestically and in accordance with the Government Policy on utilization of natural gas and approval of price formula / basis.

vi) Based on the above requirements, the Contractor did approach the Government of India for approval of the price formula / basis for the purpose of sales of gas to RNRL, which was rejected by the Government for not having been based on an arms length transaction.

vii) It is not as though the parties were not aware of the obligations of the

Contractor under the PSC.

viii) It was always understood by the parties to this litigation that, under the PSC, the contractor's right to market the gas is subject to the approval of price formula / basis of Government of India as well as the gas utilization policy of the Government of India. Therefore, no third party can suggest a different interpretation to the provisions of the PSC, in particular Article 21, other than the interpretation that has been laid out and understood by the parties to the PSC.

304. It is accordingly submitted by the Additional Solicitor General of India

(i) that the Government of India continues to be the owner of the gas till the delivery point.

(ii) the gas is to be produced and utilized in terms of the Gas Utilization Policy.

(iii) the Government has a dominant role in the matter of approval of gas prices.

(iv) by private negotiations, no party can decide as to how the natural resources which are national assets vesting in Government of India are to be dealt with.

(v) That the price which has been arrived at is binding on the contractor.

(vi) No party to this litigation can raise a challenge to this approval of price by the Government in accordance with the PSC in a Company Petition.

305. Lastly it is reiterated by the Additional Solicitor General of India that in view of the facts mentioned above, continuance of interim order restraining creation of any third party rights would seriously jeopardize public interest and has to be necessarily vacated to pave the way of unhindered production of supply of gas to the energy starved consumers of India at the approved price of the Government of India.

Findings and Conclusions:

306. On 14.1.2009 during the course of hearing of the appeals the learned Counsel for the parties i.e., RIL as well as RNRL tendered the Memorandum of Understanding by consent and agreed it to be exhibited. Accordingly, the Court has taken the relevant portion of the MOU which pertains to gas supply to the resulting company of Anil Ambani Group. The same was tendered along with affidavit of one Mr. Venkatrao Ponnada, Group Legal Head of the Reliance Anil Dhirubhai Ambani Group of which RNRL is a part. The same has been marked Exhibit I in appeal. The contention of Mr. Harish Salve on behalf of RIL that the said MOU cannot form or read in corporate domain for the reason that it is a document which is by way of a family arrangement which has been recorded in the Memorandum of Understanding dated 18.6.2005 signed between the members of Promoters of RIL relating to the reorganization of the business of RIL and its associate companies and, therefore, it will not bind Reliance Industries Limited or the scheme of demerger approved by this Court and, therefore, it cannot be said to fall within corporate domain. On the other hand,

Mr. Jethmalani vehemently argued that the very foundation on the basis of which the scheme of demerger came to be filed stems out of the Memorandum of Understanding dated 18.6.2005 and it reveals as to what were the reasons for demerger of RIL into two groups i.e., Anil Ambani Group and Mukesh Ambani Group to be controlled and supervised by various corporate entities and, therefore, it cannot be said that it was only meant for only three individuals i.e., the mother and two sons. He has also contended that the implementation of the MOU resulted in a legal problem and the scheme u/s 391 of the Companies Act, 1956 before the Company Court. Obviously, the company was aware of the same and thirdly the Board of RIL made a public announcement on 18th June 2005 i.e., soon after the execution of the MOU publicly acknowledging, with gratitude to the mother, Smt. Kolilaben, that a settlement of disputes has been reached between the members of the family which had been festering for some time. Further, our attention has been drawn to the fact that after the scheme came to be approved by the Company Court and it was acted upon, negotiations between the parties in the matter relating to supply of gas which was the subject matter of the application preferred by RNRL before the Company Court and the subject matter of the appeals reliance has been placed on documents exchanged between the parties and tendered along with the application Exhibit "F" collectively in which both the parties have taken the liberty of freely referring to the Memorandum of Understanding for the purpose of finalising the GSMA annexed with the form pertaining to GSPA which relates to the terms and conditions on which gas requires to be supplied by RIL to the resulting company No. 2 i.e., Global Fuel Management Services Limited (the "Gas Based Energy Resulting Company") which company by virtue of the scheme of demerger has been given to Anil Ambani Group or RNRL. The learned Company Judge in the impugned judgment and order has also exhaustively referred to the said MOU Exhibit1. We have already mentioned in the introductory part of our judgment that the only flaw in referring to the Memorandum of Understanding which is one of the ground of appeal raised by RIL is that the learned Company Judge could not have referred to the said MOU without the same being on record, in addition to the fact that the said MOU does not fall within the corporate domain.

307. The MOU having now tendered and taken on record and marked Exhibit1 can very well be taken into consideration though strictly speaking it will not fall within the corporate domain but it does form the very foundation on the basis of which the parties were expected to enter into an agreement in consonance with what was agreed between the parties in the Memorandum of Understanding. The following facts rather lift the corporate veil and denotes that the Memorandum of Understanding was considered when the Board meeting of RIL took place to consider the scheme of reorganisation of the business as rightly pointed out by Mr. Jethmalani.

308. On 18th June, 2005 after the execution of the Memorandum of Understanding, a Board Meeting of RIL took place (Minutes have been produced by RIL before this Court on 12.8.2008 on the request of RNRL). In that meeting

the resolution of matters between the promoters was noted and there was discussion on the action to be taken by the Board. In order to implement the resolution of matters between the promoters, the Board resolved to consider a Scheme of reorganisation of the businesses. It was inter alia recorded in the Meeting as under:

The Chairman was pleased to inform the Board that Smt. Kokilaben D. Ambani, wife of found Chairman, Shri Dhirubhai H. Ambani, with the help of some family wellwishers has been instrumental in settling the differences among the family members and the Promoter Directors. He stated that the broad contours of the amicable resolution as suggested were that Shri Anil D. Ambani should be responsible for the energy, telecom and financial services businesses of Reliance Industries Limited and its associate companies and the Chairman should continue to remain incharge of other businesses including petrochemicals, oil and gas, refining and textiles. The Chairman placed on table copy of the Press Statement which has been issued by Smt. Kokilaben D. Ambani earlier in the day conveying the amicable settlement arrived amongst the Promoters' family members in the overall interests of the Company and its shareholders.

The Minutes of the meeting clearly demonstrate that:

(vi) Amarchand & Mangaldas were appointed by RIL as lawyers of the company for the Scheme;

(vii) The Board recognised the segregation of businesses between the Mukesh Ambani and the Anil Ambani groups;

(viii) The Board of RIL was informed of the details of the amicable resolution by Mr. Mukesh Ambani himself;

(ix) The Board recognised that the Scheme shall become effective within 18 months and if it did not become effective, Shri Anil Ambani was to be reinstated as a Director;

The Resolution 17 of 2004 dated 27.7.2004 was to be annulled which showed a tacit understanding that the Resolution was unfair and wrong.

309. Further by way of a media release dated 18.6.2005 the Board of Directors of RIL noted their appreciation for the sincere and painstaking efforts taken by Smt. Kokilaben Ambani in working towards the settlement. Hence, RIL and its Board were fully aware of the settlement between the promoters and resolved in the Board meeting to reorganise the businesses of the Company in order to implement the settlement.

310. On 18.6.2005 Press release issued by the Board of Directors of RIL, inter alia, stating the following:

Board Committee To Consider Reorganisation Of Reliance's Businesses Mumbai, 18th June 2005: The Board of Directors of Reliance Industries Limited took note of the Press Statement issued by Smt. Kokilaben D. Ambani, wife of the Founder

Chairman Shri Dhirubhai H. Ambani and expressed happiness at the amicable settlement arrived amongst the Promoter family members. The Board decided to place on record its deep appreciation and sense of gratitude for the tireless and painstaking efforts of Smt. Kokila D. Ambani who holds a special place in the heart of Reliance family of shareholders and other well wishers in settling the differences amongst the family members and Promoter Directors in the overall interests of the Company and its shareholders. In the light of the statements resolving issues between the Promoters in managing the affairs of the Reliance Group of Companies, the Board decided to consider a proposal to reorganize the businesses as per Smt. Kokila D. Ambani's principle of ensuring the highest shareholders value. with various business interests and, therefore, any business reorganization ought to be done keeping in mind the paramount interests of shareholders and the best interest of the Company. The Board, therefore, decided to authorise the Corporate Governance and Stakeholders' Interface Committee to examine in depth all the relevant issues including statutory and legal requirements and suggests a suitable scheme or reorganization. In this task, the Board further empowered the said Committee to avail of professional and legal expertise to advise on preparing the reorganisation scheme expeditiously.

311. In the aforesaid circumstances, we concur with the learned Company Judge in so far as the conclusions are concerned which are enumerated in paragraph 184 of the impugned judgment and particularly sub paragraphs (4) to (7) which read as under:

(4) The MOU (Memorandum of Understanding/Family parties RIL and RNRL and all the concerned, Mr. Mukesh Ambani and his group of Companies and Mr. Anil Ambani (ADA) and his group of Companies have already acted upon at the pre and post stages of the MOU and the pre and post stages of the Scheme accordingly.

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

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

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

312. The core issue which has given rise to the dispute is the allocation of gas to

RNRL out of the cost gas and "profit gas" (as defined under the Production Sharing Contract) of RIL for which an appropriate GSMA and GSPA is required to be prepared by the parties. From the correspondence between the parties which is recorded in the documents placed on record as Exhibit "F", it is quite clear that the parties have failed to arrive at a mutual agreement in this regard. The learned Company Judge after examining the case in depth and particularly as to what should be the suitable arrangement between the parties in context to Clause 19 of the scheme while concluding the matter issued directions by once again leaving it to the parties by passing the impugned resultant order:

i) For the aforesaid reasons and conclusion, it would be appropriate for both the parties to renegotiate, reconsider and settle the terms of existing GSMA and GSPA afresh within four months or as early as possible.

(ii) In view of this the interim order dated 3.5.2007 (in C.A. No. 1123/2007) & 20.6.2007 (in C.A. No. 695/2007) and further modified on 18.7.2007 in Appeal Nos. 440/2007 and 441/2007 are continued and be maintained only for further four months.

(iii) In view of above, Company Application No. 1122/2006 is disposed of with liberty.

(iv) Therefore, accordingly, all other interlocutory and related Company Application Nos. 1123/2006 and 697/2007 are also disposed of with liberty in the above terms.

313. Before the appeal came to be filed the parties did make an effort to work out a suitable arrangement in respect of supply of gas by remodelling the terms and conditions of the agreement i.e., GSMA and the format GSPA but again reached a stage of deallock and the applicant RNRL finding itself at an disadvantageous position for want of a GSMA along with GSPA and thereafter parties having failed to reach a suitable arrangement, have approached this Court by filing appeal impugning the order of the Company Judge joined by the original applicant RNRL.

314. In our view the allocation of gas to RNRL for its resulting companies i.e., the supply of gas for power project of Rliance Patalganga Power Limited and REL with the Gas Based Energy Resulting Company, a suitable arrangement which is required to be made by incorporating the same in the GSMA and GSPA according to the Memorandum of Understanding reached between the parties on 18.6.2005. The relevant porton of the Memorandum of Understanding relating to gas supply reads as under:

II. GAS SUPPLY

(i) An expert international firm will be appointed to evaluate the nature and extent of gas reserves particularly at KGD6 and all other gas fields from which RIL produces gas from which gas could be supplied to Reliance Energy Limited ("REL"), for all its projects (including without limitation its proposed Dadri Power

Project). The expert shall be appointed by ICICI Bank Limited in consultation with both groups (who must agree within 72 hours hereof) and if they are unable to agree, an international energy consultancy firm, as may be nominated by the energy/E&P department of ICICI Bank Limited will nominate an international expert who will carry out this survey and provide an independent report. Such international consultancy firm shall not have any conflict of interest. The report of such agency could consider the DGH letter as one of the inputs and its decision shall be final as to the quantity and nature of reserve (including matters such as P, P2, P3 reserves) and this would be the factual basis for the rest of the decisions. The Mukesh Ambani Group will move expeditiously for facilitating such verification and is to provide all information for this purpose.

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

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

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

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

By way of examples:

? If the P1 reserves are identified at 60 MMSCD, the sequence would be NTPC12,

REL28 and RIL (captive) - 20.

? In case the reserves are 100, the sequence would be NTPC 12, REL 28, RIL (captive) 25, Anil Ambani Group (second installment) 16.67 and in so far as the balance 18.33 is concerned, the same would be shared in the ratio of 60:40. This shall be an option but not an obligation.

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

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

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

(vi) 50% of the commitment for supply of gas would be supplied in the financial year 20089 and the balance 50% in 200910.

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

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

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

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

(xi) Swapping of gas is permitted.

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

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

Therefore, there cannot be any issue between the two corporate entities i.e., the demerged company and the resulting companies controlled and managed by Anil Ambani Group and Mukesh Ambani Group that there is a fixed quantum of gas which stands allocated to the Anil Ambani Group i.e. R.N.R.L. i.e. 28 MMSCD to REL and in the event NTPC contract does not materialise or is cancelled the entitlement of NTPC to the said extent shall go to the Anil Ambani Group in addition to its entitlement of 28 MMSCD in addition to this allocation from the cost and profit gas which will be available for sharing with the Union of India by RIL. It is also agreed between the parties that for entire future of the balance reserves (including new discoveries of gas from new explorations and/or bids as may be submitted from time to time), the quantity of gas would, at the option of the Anil Ambani Group (exercised from time to time) be split in the ratio of 60:40 with 60% to Mukesh Ambani Group and 40% to Anil Ambani Group. Subject to the above, after the 28 MMSCD to REL, the next order of priority would be of RIL for its captive consumption for Mukesh Ambani Group companies to the extent of a maximum of 25 MMSCD. Such 25 MMSCD will be set off against 60% entitlement of the Mukesh Ambani Group. This is very clearly mentioned in the MOU and is binding on the parties.

315. The second aspect is in respect of the tenure for which the gas supply from the quota allocated under the MOU is concerned. The MOU clearly carves out that the NTPC supply agreement would be a general guidance for the same and shall as far as possible be the basis for such contracts, and the terms of such contracts shall be no less favourable than those of the NTPC contract. The NTPC contract clearly provides the period for which RIL will supply gas as 17 years and in so far as 28 MMSCMD of quantity of gas has to be for a period of 17 years from the date gas could be supplied to Reliance Energy Limited (REL) for all its projects including without limitation to its Dadri Power Project.

316. Needless to say that in so far as the price factor is concerned, the price at which the assured supply of gas is required to be supplied to REL for all its projects including for all its affiliates would be subject to and under the terms of Production Sharing Contract which REL has entered with the Ministry of Petroleum and Niko Resources Limited, a joint venture company on 12th April,

2000. At this stage we would like to make it clear that one thing cannot be lost sight of that under the Scheme RIL has proposed to use part of its gas discovery for the generation of power for which purpose an appropriate gas supply arrangement was required to be entered into between RIL and Global Fuel Management Services Limited, pursuant to which gas will be supplied to REL for their power projects, including Reliance Patalganga Power Limited, for the generation of power and the above mentioned business of supply of gas to REL for their power projects including Reliance Patalganga Power Limited, for generation of power as an integrated whole, constitute the Gas Based Energy Undertaking of RIL and, therefore, the Global Fuel Management Services Limited, the resulting company under the Scheme pursuant to which gas will be supplied to REL for their power project constitutes a class of its own in so far as it relates to the obligation on the part of RIL to supply gas of the aforesaid quantity and tenure at a price to be approved by the Government in terms of the Production Sharing Contract in context to the definition of consumers / buyers as mentioned in the Production Sharing Contract. In so far as the assured allocation of gas under the scheme is concerned to Global Fuel Management Services Limited it cannot be subject to allocation by the Government under the Production Sharing Contract nor any allocation of gas by the Government amongst its nominees may affect this assured quantity of allocation and it will have to be from the share of RIL from the quota of cost gas and profit gas which is to the extent of 90% which may not be so from the option quota agreed between the two corporate entities as regards supply of gas from the "profit gas" which of course will be within the purview of the regulatory authority under the Production Sharing Contract.

317. The last and most important factor is price at which such gas has to be supplied to Global Fuel Management Services Limited. The contention of RNRL is that the agreed price at which 28 MMSCMD of gas for power generation is required to be supplied is governed by NTPC contract. We would not like to impinge on the merits of the suit pending between NTPC and RIL and, their right to have 12 MMSCMD of gas at the Commodity Price being the price of the Natural Gas at the Delivery Point as defined in the proposed GSPA to be USD 2.34 per MMBtu on not heating value (NHV) basis plus processing fees and charges. In the course of the submission, our attention was drawn by the learned Counsel for RIL to the correspondence made with the Government of India, Ministry of Petroleum and Natural Gas in respect of the Gas Price formula / basis for valuation of natural gas from KGDWN98/3 block wherein by a communication dated 10.10.2007 Director (EII & IC) in reply to their application dated 14.4.2006, to its letter dated 26.7.2006 and their letter dated 18.5.2007 a formula has been quoted and it is contended that under Article 21.6.3 of the Production Sharing Contract the same has been approved on which price shall be determined. Further, our attention has been drawn to the fact that in so far as the government stake is concerned, the government has already communicated to RIL a specific price i.e. US\$ 4.32 per MMBtu for valuation of gas and has clarified its stand in the letter dated Nov., 4, 2008 which are reproduced in the following paragraph.

318. A judgment rendered by the Supreme Court of India in the case of Commissioner of Income Tax, Dehradun and Another Vs. Enron Oil and Gas India Ltd., , the Supreme Court while dealing with the issue as regards tax liability arising out of production sharing contract and while dealing with Section 42 of the IncomeTax Act, 1961 in reference to translation losses has also referred to two main systems around the world : royalty/tax systems or production sharing systems. It has observed as under:

There are two main systems around the world : royalty/tax systems or production sharing systems. PSCs have become the fiscal system of choice for most countries. Taxes are embedded in the Government share of profit oil. The PSC is a complex system. In it, the foreign company provides the capital investment in exploration, drilling and construction of infrastructure. The first proportion of oil extracted is allocated to the company, which uses oil sales to recoup its costs and capital investment. The oil used for this purpose, namely, to recoup capital investment and cost is termed "cost oil". Once costs have been recovered, the remaining "profit oil" is divided between the State and the company in agreed proportions. The company is taxed on its profit oil. Sometimes, the State participates either itself or through its nominee as a commercial partner in the contract, operating in joint venture with foreign oil companies. In such cases, the State provides its percentage share of capital investment, and directly receives the percentage share of cost oil and profit oil.

The Supreme Court has further observed:

As stated above, in the PSC the foreign company provides the capital investment and cost and the first proportion of oil extracted is generally allocated to the company which uses oil sales to recoup its costs and capital investment. The oil used for that purpose is termed "cost oil". Often a company obtains profit not just from the "profit oil", but also from the "cost oil". Such profits cannot be ascertained without taking into account translation losses. Moreover, as stated above, taxes are embedded in the profit oil. If these concepts are kept in mind then it cannot be said that "translation losses" under the PSC are illusory losses..

319. It is true that as provided under Article 21.6.3 for the purpose of sale in domestic market, the contractor shall be at liberty to market the gas but then the same will have to be regulated on the basis of formula on which the price shall be determined pursuant to Articles 21.6.2 (b) and (c) to be approved by the Government prior to the sale of natural gas to the consumer / buyer. On this issue we do not accept the contention of Mr. Jethmalani that the freedom to market the gas would be at the discretion of the contractor without being subject to the regulatory authority. Though we may like to make it clear that the price specified in the NTPC contract which also form the basis of the price at which the gas allocated to Anil Ambani Group has been fixed i.e., at the rate of US\$ 2.34 MMBtu is lesser than the price fixed by the Government for the share of its gas and further that there is no specific provision under the Production Sharing Contract to prevent the contractor to sell the gas at lesser price than the price

fixed by the Government for valuation of gas to the extent of its share. During the hearing of the appeal in response to the news item in Times of India dated October 31, 2008 under the heading "RIL ready to give higher price for gas: Govt." The Director General (DGH under MoP and Natural Gas) addressed a letter dated Nov. 4, 2008 to the Secretary (P & NG) MoP & N.G. Clarifying its stand on the issue of pricing/valuation of Govt. share of Profit Petroleum which is reproduced below:

Directorate General of Hydrocarbons (Under Ministry of Petroleum & Natural Gas)

C139, Sector 63, Noida 201 301 Phone : +911204029401, 402 Fax : +911204029403 email : dg@dghindia.org

V.K. SIBAL DIRECTOR GENERAL

D.O. No. DGH/CC/5 1/2005

November 4, 2008

Dear Shri Pandeyjee,

This is with reference to the news Item in Times of India dated October 31, 2008 under the heading "RIL" ready to give higher price for gas: Govt". At the first instance I would like to clarify the first paragraph of the report, which incorrectly projects that the price of US \$ 4.20 per mmbtu will be used for valuation of petroleum, and that the JV can sell gas at higher price. The factual position is that under the PSC, the price at which the petroleum is sold at arm's length will be taken into account for the purpose of valuation of petroleum and in cases where JV sells petroleum at other than arm's length at a price less than the price formula approved by Government, the price formula approved by Government will be used for valuation. In other words, for the purpose of petroleum valuation under PSC, the price actually received by JV or the price based on approval price formula, whichever is higher will be considered as a basis for valuation.

In this context, I would like to bring to your kind attention that Government share of Profit Petroleum under this Contract increases to 85% when the Investment Multiple of the Contractor touches 2.5 times of the Contractor's investment. Therefore, at higher petroleum prices, Government would stand benefited substantially by way of additional profit petroleum. During the production stage of the field, after the Contractor recovers his initial investment, Government may use the PSU buyers to offer a higher price and leverage a higher share of profit petroleum for Government, high enough to compensate the additional price offered by the PSU. It may be advantageous overall to buy the gas by PSU paying a higher price than offered by private buyers to increase the investment Multiple beyond the threshold level of 2.5. Beyond this threshold, 85% share of profit petroleum to Government will enable the Government to subsidize the PSU, particularly PSU in priority sector. This could be used as a strategy to counter any possible attempt by the Contractors to depress the price in order to reduce the Government share of Profit Petroleum, which has

remained as an Issue of public concern time and again.

The PSC regime and the Contract structure are based on the best global practices and enable the Government get maximum "take" while ensuring private and foreign investment in exploration activities.

With kind regards,

Yours sincerely,

sd/- (V.K.Sibal)

Shri R.S.Pandey Secretary (P&NG) MOP&NG, Shastri Bhawan, New Delhi 10001.

Therefore, it is crystal clear that the contractor has freedom to sell Production Sharing Contract out of their share of profit gas to which Article 21.6 of the Production Sharing Contract applies.

320. On the issue of price, this Court made a specific query to Mr. Salve, the learned Senior Advocate, appearing for RIL as to whether the price of US\$ 2.34 per MMBtu has a component of profit to which Mr. Salve made a very categorical statement that even at that price RIL makes a profit. Further, Mr. Salve has not been able to draw our attention to any part of the Production Sharing Contract to show that the Government has prevented the contractor from sharing gas at a price lesser than the price fixed by the EGOM out of contractors entitlement of the cost Gas, as in our view this is how the demerged company can fulfill its commitments to the resulting company under the scheme.

321. In so far as the tenure is concerned, in our view so far as the gas required to be allocated to REL under the "suitable arrangement" in accordance with the scheme and as agreed between the parties under the MOU, it refers to the terms and conditions on which the gas is to be supplied to NTPC, the period of 17 years will have to be construed accordingly and it could be only curtailed in contingencies where the doctrine of force majeure applies.

322. Before we pass appropriate directions in the matter, we would like to further clarify two concepts on which, in our humble view, the learned Company Judge has given finding. One is in respect of definition of the word "affiliate" and the other is in respect of the applicant RNRL claiming that for want of assured gas supply under an agreement which should be bankable the applicant would be merely a shell company. The meaning attributed by RIL in GSMA is in consonance with the definition provided under the Production Sharing Contract by which the contract is governed. Article 1.3 defines the word "Affiliate" as under:

1.3 "Affiliate" means a company or a body;

a) Which directly or indirectly controls or is controlled by a Company which is a Party to this Contract; or

b) Which directly or indirectly controls or is controlled by a company which directly or indirectly controls or is controlled by a Company which is a Party to this Contract.

For the purpose of this definition it is understood that "control" means:

- i) ownership by one company of more than fifty percent (50%) of the voting securities of the other company; or
- ii) the power to direct, administer and dictate policies of the other company even where the voting securities held by such company exercising such effective control in that other company is less than fifty percent (50%) and the term "controlled" shall have a corresponding meaning.

Therefore, the contention of Mr. Jethmalani that this has to be attributed the same meaning as understood in commercial parlance and so defined in Black's Law Dictionary and further incorporated in contract with NTPC. In view of the fact that the contracts which were entered into between the Government of India and Reliance Industries Ltd., before its demerger provides for a specific definition of the word "affiliate". To follow the dictionary meaning of the word "affiliate" or as understood in common parlance and commercial transactions or recorded in the proposed GSMA (Exhibit "J" to the application) would be in breach of the said terms and conditions and, therefore, the finding arrived at by the learned Company Judge on this issue does not call for any interference.

323. In so far as the concept of shell company is concerned, this has been misconstrued by the learned Company Judge. It was the case of RNRL that for want of an assured allocation of gas relating to its quantity, tenure and price, which are the basis of a bankable agreement, the resultant company on acceptance of the scheme of demerger i.e., the Global Fuel Management Services Limited or RNRL one of the group of companies headed by Anil Ambani Group which depends on gas supply would be a shell company if it is left without assured supply of gas which the scheme did not contemplate and merely transferring the assets and liabilities as specified in the schedule annexed to the scheme of demerger will not be sufficient and, therefore, there has been insistence on an agreement to record "suitable arrangement" for supply of gas for the generation of power by gas based power projects.

324. In the backdrop that in spite of there being a prolonged negotiations since the time of the parties entering into a MOU till the scheme of demerger was approved by the Court and thereafter the parties having failed to settle the terms and conditions resulting in RNRL approaching the Company Court for seeking effective implementation of the scheme for gas based power projects and further even after the decision of the application by the Company Judge, the parties having failed to arrive at "suitable arrangement", we dispose of these appeals with a direction to the parties that within one month from the date of pronouncement of this judgment and order the parties should enter into a "suitable arrangement" on the basis of quantity, tenure and price as specified

and agreed between the parties under the MOU Exhibit I either by renegotiating the terms and conditions of the agreement so as to make it a bankable agreement or revert back to Smt. Kokilaben Dhirubhai Ambani who had reserved her ability to intervene again if the parties fail to act upon the MOU dated 18th June, 2005 and the Anil Ambani Group may opt for a claim for damages. On failure to arrive at suitable arrangement by entering into an agreement the scheme itself provides for a remedy to the resulting company under Clause 24 of Part VI of the General Terms and Conditions which reads as under:

24. Indemnity.

In the event of non fulfillment of any or all obligations under this Scheme by any party towards any other party, interse or to third parties, the non performance of which will place any other party under any obligation, then the defaulting party will indemnify all costs and interest to such other affected party.

This, in our view, sufficiently meets the need of the party which proposes to seek restitution. We may further record that if all the options available to the parties in the MOU and/or Scheme of Demerger approved by the Company Court meet with failure within the stipulated time of one month it will be open for the aggrieved party to approach the Company Court for modification of the Scheme, till then the interim arrangement ordered by the Court at conclusion of the arguments will continue to operate.

325. Before we part with the appeals, we would like to record that the marathon hearing of the appeals has occasioned as affected by various factors like the hearing of the appeal being assigned to our Bench by the Hon''ble the Chief Justice after it was heard at length and the adjournments and accommodation sought by the learned Counsel for the parties then in between change of assignments. But in spite of all odds, we have been able to successfully conclude the hearing and reserve the judgment.

326. It will be proper on our part to record our appreciation for the learned Counsel appearing for the parties but for the able assistance given by them we would not have accomplished the task. The learned Counsel appearing for the Union of India i.e., Mr. Doiabia, Senior Advocate appearing for Union of India and Mr. Mohan Parasharan, Additional Solicitor General assisted the Court with the required calm and grace befitting the stand taken by the Central Government in the matter for which it was permitted to intervene.

327. Both the appeals stand disposed of in the aforesaid terms.