2008 (4) GLR 3197

GUJARAT HIGH COURT

Hon'ble Judges:Y.R.Meena and J.C.Upadhyaya JJ.

Gail (India) Limited Versus Indian Petrochemicals Corporation Limited

LETTERS PATENT APPEAL No. 1622 of 2006 ;
SPECIAL CIVIL APPLICATION No. 4887 of 2006 ;
LETTERS PATENT APPEAL No. 1012 of 2007 ;
Civil Miscellaneous Application No. 270 of 2007 ;
CIVIL APPLICATION No. 13007 of 2007 ;
CIVIL APPLICATION No. 2203 of 2008 ;
CIVIL APPLICATION No. 14924 of 2006 ; *J.Date :- JUNE 17, 2008

- CONSTITUTION OF INDIA Article - 12 , 14 , 226 , 227
- CONTRACT ACT, 1872

Constitution of India - Art. 14, 226, 227 - Contract Act, 1872 - contract for gas supply - though gas was supplied through pipeline belonging to supplier transportation cost levied in guise of loss of transportation charges - Single Judge gave directions to refund the amount - held, levy of such charges arbitrary order of Single Judge confirmed.

Constitution of India - Art. 12 - whether Gas Authority of India "State" within meaning of Art. 12 - held, Gas Authority of India is instrumentality of "State" - appeals dismissed.

Imp.Para: [20] [34] [35]

Cases Referred To :

1. Abl International Ltd. V/s. Export Credit Guarantee Corpn. Of India Ltd., 2004 3 SCC 553
2. Bashesarnath V/s. Commi. Of I.T., AIR 1959 SC 149
3. Bhadrachalam Paper Board Ltd. V/s. Govt.Of A.P. , 1986 3 SCC 250
4. Central Inland Water Transport Corpn. Ltd. V/s. Brojonath Ganguly, 1986 3 SCC 156
5. Dwarka Das V/s. State Of M.P., 1999 3 SCC 500
6. Gujarat Steel Tubes Ltd. V/s. Board Of Trustees Of Port Of Kandla, 2002 2 GLR 934 : 2002 (3) GLH 268 : 2002 (1) GCD 373 : 2002 AIR Guj 173 : 2002 (1) GHJ 139

7. Hanuman Das Chhagan Lal V/s. Union Of India, 2001 10 SCC 513
8. Harbanslal Sahnia V/s. Indian Oil Corpn. Ltd., 2003 2 SCC 107
9. Hindustan Times V/s. State Of U.P., 2003 1 SCC 591
10. L.I.C. Of India V/s. C.E.R.C., 1996 2 GLR 83
11. Lipton India Ltd. V/s. Union Of India, 1994 6 SCC 524
12. N. M. Thomas V/s. State Of Kerala, 2000 1 SCC 666
13. National Textile Corpn. V/s. Haribox Swalram, 2004 9 SCC 786
14. New Bihar Biri Leaves Co. V/s. State Of Bihar, 1981 1 SCC 537
15. Orissa State Financial Corpn. V/s. Narsingh Ch. Nayak, 2003 10 SCC 261
16. P. R. Deshpande V/s. Maruti Balram Haibatti, 1998 6 SCC 507
17. Premchand Somchand Shah V/s. Union Of India, 1991 2 SCC 48
18. Premjibhai Parmar V/s. Delhi Development Authority, AIR 1980 SC 738
19. Radhakrishna Agarwal V/s. State Of Bihar, 1977 3 SCC 457
20. Ram Chandra Singh V/s. Savitri Devi, 2004 12 SCC 713
21. Ramchandra Shanker Deodhar V/s. State Of Maharashtra, 1974 1 SCC 317
22. Sahakari Khand Udyoh Mandali Ltd. V/s. C.C.E. , 2005 3 SCC 738
23. State Of U.P. V/s. Bridge & Roof Co. (I.) Ltd., 1996 6 SCC 22
24. Style (Dress Land) V/s. Union Territory, Chandigarh, 1999 7 SCC 89
25. Twyford Tea Co. V/s. State Of Kerala, 1970 1 SCC 189

Equivalent Citation(s):

2008 (4) GLR 3197 : 2008 JX(Guj) 474

JUDGMENT :-

J.C.UPADHYAYA, J.

1 LPA No.1622/2006 is directed against the impugned order dated 19.09.2006 passed by the learned Single Judge in Special Civil Application No.4887/2006, and LPA No.1012/2007 is directed against the impugned order dated 11.04.2007 passed by the learned Single Judge in Misc.Civil Application for direction No.270/2007 in Special Civil Application NO.4887/2006. In both these appeals, appellants herein are original respondents No.2 & 3 in Special Civil Application No.4887/2006, and the respondents No.2 & 3 herein are original petitioners, and respondent No.3 herein is original respondent No.1 in the aforesaid petition.

2 The respondents No.1 & 2 herein in both the appeals who are original petitioners in the petition (Indian Petrochemicals Corporation Ltd. for convenience referred to as IPCL) filed the petition before the learned Single Judge under Article 226 of the Constitution of India, whereby they had challenged the action of the appellants herein, who were respondents No.2 & 3 in the petition (Gas Authority of India Ltd. for convenience referred to as GAIL)

for incorporating clause in contract to pay transportation charges as the same is contrary to Government pricing orders dated 30.01.1987, 31.12.1991, 18.09.1997, 30.09.1997 and 20.06.2005. It is alleged by the IPCL that it is not liable to pay transportation charges or the price for supply of gas like HBJ (Hazira Bijaipur Jagdispur pipeline) consumers, who are using HBJ pipeline of the GAIL, since IPCL transports gas to its plant through its own pipeline from the ONGC Metering Station, and for getting the declaration that the clause for payment of transportation charges incorporated in the contract dated 09.11.2001 is unfair, unreasonable, unconscionable and opposed to the public policy, hence, violative of Article 14 of the Constitution of India as the contract was entered into with GAIL, who was monopolist and there was highly unequal bargaining power. The consequential relief was also prayed in the petition to direct the GAIL to refund the transportation charges paid pursuant to the same.

3 In the petition, the learned Single Judge held that the clause of term of contract, which compels IPCL to pay transportation charges is unfair, unreasonable, unconscionable, arbitrary and against the public policy and was quashed and set-aside. It was further held and declared that GAIL is not entitled to levy the transportation charges from the IPCL, much less under the heading and label of loss of transportation charges-. Accordingly the petition was allowed by impugned judgment dated 19.09.2006. However, in the impugned judgment the learned Single Judge did not issue any direction regarding the refund of transportation charges paid pursuant to the contract, the IPCL filed Misc.Civil Application for direction No.270/2007 in Special Civil Application No.4887/2006 for clarification /modification of the impugned judgment dated 19.09.2006 passed by the learned Single Judge in Special Civil Application No.4887/2006 and for getting direction upon GAIL for refund, mainly on the ground that disputed clause of contract between the IPCL and GAIL has been held as unfair, unreasonable, unconscionable, against the public policy and violative of Article 14 of the Constitution of India. The learned Single Judge by impugned order dated 11.04.2007 held that looking to the facts of the present case, refund order was required to be passed in Special Civil Application No.4887/2006, but the judgment is silent on the point of refund of transportation charges paid by the IPCL, the Misc.Civil Application was allowed, and the GAIL was directed to refund transportation charges paid by IPCL within a period of six weeks from the date of order and the Rule was made absolute accordingly.

4 In the result, as stated above, being aggrieved and dissatisfied with the impugned judgment dated 19.09.2006, and impugned order dated 11.04.2007 passed by the learned Single Judge, GAIL preferred these Letters Patent Appeals.

5 The learned Sr.Counsel Mr.K.B.Trivedi for GAIL seriously challenging the legality and validity of the impugned judgment dated 19.06.2007 passed by the

learned Single Judge, vehemently submitted that the learned Single Judge committed serious illegalities and erred in passing the impugned judgment and ultimately coming to the conclusion that the clause of term of contract which compels IPCL to pay transportation charges is unfair, unconscionable, arbitrary and against the public policy and erred in quashing and setting aside the clause of the term of contract, and further observing that the GAIL is not entitled to levy the transportation charges from the IPCL. That in fact the petition was not tenable at law, mainly for the reason that there is an arbitration clause in the contract agreement. There is clause No.13 in the contract regarding the arbitration. It was further submitted that the IPCL had entered into a contract with wide open eyes despite the Price Control Order, 1997 was in existence. The contract was entered into on 09.11.2001. The price control order is of the year 1997, despite this fact the IPCL had agreed to make the payment of additional charges like transportation charges, over and above the prices under the price control order. After taking benefit under the contract, the clause of contract cannot be challenged by the IPCL. It is also contended that the GAIL is charging the transportation charges not because the gas is being transported, but because of loss of transportation, in the sense that if the gas would have been supplied to the consumer along HBJ pipeline, GAIL would have earned transportation charges. It was further contended that in a contract, where the parties have chosen their rights and liabilities, the Court would not entertain the writ petition under Article 227 of the Constitution of India. The GAIL has installed huge pipeline known as HBJ pipeline, which is having a length of more than 2000 kms. For maintenance of this pipeline, transportation charges have been levied. So far as price is concerned, the cost of gas received by GAIL from ONGC is transferred to IPCL. Thus, the price at which the gas is received from ONGC by GAIL, at the same price the gas is supplied to the IPCL, retaining only the transportation charges. Therefore, as loss of transportation charges, GAIL is levying the amount equal to transportation charges from the IPCL, irrespective of the fact whether the gas is actually transported through HBJ pipeline or not. That the question of unequal bargaining power does not arise, both IPCL and GAIL at the relevant time i.e. on the date of contract (09.11.2001) were Central Government undertaking, and therefore, there was no question of unequal bargaining power. That therefore, clause 10.01 read with 4.04 of the contract cannot be labeled as unfair, arbitrary and unconscionable. That the IPCL can get natural gas from other sellers also. It can choose a seller. Therefore, there is no question of monopoly of GAIL, and therefore, the term of contract cannot be challenged under Article 226 of the Constitution of India. It was submitted that in the impugned judgment, the learned Single Judge placed much reliance upon the case of Essar Steel Ltd. reported in 2006(1) GLR 436. But, the terms and conditions of the contract entered into between GAIL and Essar Steel Ltd. are totally different than the terms and conditions of the contract between GAIL and IPCL. That therefore, the case of Essar Steel Ltd. and that of IPCL cannot be said to be similar and comparable. That the price control order published by the Central Government is not because of any statute or law, and therefore,

there is nothing like price control order much less having binding effect to the GAIL. As a matter of fact there is nothing in price control order that GAIL cannot charge transportation charges, and therefore, the term of contract cannot be said to be against public policy. It was further submitted that the learned Single Judge did not properly appreciate the ratio laid down in the case of Central Inland Water Transport Corporation Ltd. & Ors. V/s. Brojonath Ganguly & Ors. reported in (1986)3 SCC 156 in arriving at the conclusion that the contract dated 09.11.2001 was not between equal parties, as GAIL was holding monopoly in the field of natural gas and IPCL had no option but to abide by whatever terms and conditions settled by GAIL in the terms of contract. As a matter of fact, considering Brojonath Ganguly's case (supra) it clearly transpires that the contract involved in the said case was service contract between a gigantic Corporation on one hand and a poor labourer on other hand. In paragraph 101 of the said Ruling, Hon ble the Apex Court observed that "it is not possible for us to equate employees with goods, which can be bought and sold. It is equally not possible to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee. That therefore the learned Single Judge erred in applying ratio laid down in the aforesaid ruling in the present case.

6 Learned Sr.Counsel Mr.Trivedi for GAIL further submitted that in the impugned judgment, the learned Single Judge did not pass any order pertaining to the refund, but, after the impugned judgment was delivered, IPCL preferred Misc.Civil Application for direction No.270/2007 seeking clarification/modification of judgment dated 19.09.2006 passed by the learned Single Judge. By impugned order dated 11.04.2007, the learned Single Judge allowed the said Misc.Civil Application, and GAIL was directed to refund transportation charges paid by the IPCL within a period of six weeks from the date of order. That as a matter of fact, once the impugned judgment was delivered by the learned Single Judge, the learned Single Judge had become functus officio. That the said Misc.Civil Application itself was not maintainable in the eyes of law. Either review application can be filed or Letters Patent Appeal can be preferred by the IPCL. The learned Sr.Counsel Mr.Trivedi for GAIL further submitted that even if the refund may be given, it ought to be ordered only for last 3 years, and not beyond the period of limitation. That though the grant of refund would amount to unjust enrichment, as the IPCL did not produce any evidences showing that the burden of transportation charges was never passed on to its consumers by the IPCL. Learned Sr.Counsel for GAIL has relied upon several judgments which are enumerated as under:-

(1986)3 SCC 156

(1986)6 SCC 250

(1994)6 SCC 524

(1999)3 SCC 500

(2004)12 SCC 713

(2005)3 SCC 738

The above decisions of Hon ble Apex Court have been cited in support of the arguments on behalf of the GAIL, that though the Writ Court has powers to order refund, but those powers are to be sparingly used by the Courts, and the order of refund cannot be automatically passed, while allowing the writ petition. That even the order under challenge is quashed and set-aside,c being violative of any fundamental rights, yet the order of refund cannot be a resultant consequence. The petitioner shall have to show that the final burden borne out by the petitioner was not passed on to its consumers, and in case there is unjust enrichment, the refund order cannot be passed, and if at all it is required to be passed, then so far as Civil Court is concerned, the order can be passed only confining to the period of 3 years before the institution of suit, and the Writ Court while passing order of refund, the period of limitation shall be taken into consideration. That the correction of mistakes or errors in judgments should be of the mistake or omission, which is accidental and non-intentional and does not go to the merits of the case.

7 The learned Sr.Counsel Shri Trivedi further relied upon the following judgments which are enumerated as under:-

(i) (2003)10 SCC 261

(ii) (1996)6 SCC 22

(2004)9 SCC 786

(2001)10 SCC 513(v)

(1977)3 SCC 457

(1981)1 SCC 537

(1970)1 SCC 189

AIR 1980 SC 738

The above judgments are relied upon regarding the scope and powers of High Court pertaining to judicial review in contractual filed and especially when the dispute involves voluminous factual aspects and requires fact finding inquiry. That what would be the approach of High Court in the matter, wherein the terms of the contract, favourable to the petitioners are not disputed by the

petitioner, but, only dis-advantageous terms in a contract are challenged by the petitioner; That what would be the approach of High Court in highly belated claim and the petition suffers from delay and latches, especially when alternative remedy was available to the petitioner.

8 That what are the circumstances, when certain ordinance, directives etc. can be labeled violative of Article 14 of the Constitution of India.

9 Therefore, the learned Sr.Counsel Mr.Trivedi for the GAIL submitted that both the L.P.A.'s be allowed and the impugned judgment and the impugned order passed by the learned Single Judge be set-aside.

10 The learned Sr.Counsel Mr.K.S.Nanavati for the IPCL during the course of his arguments fully supported the impugned judgment and order passed by the learned Single Judge. It was submitted that the contract was entered into between the IPCL and GAIL on 09.11.2001 for supply of natural gas. GAIL was enjoying a position like monopolist so far as supply of natural gas was concerned. On the basis of assurance to supply of gas given by the Central Government, IPCL installed plant at Gandhar by investing a huge capital of approximately of Rs.4500/- Crores. That one of the conditions for supply of gas was that IPCL shall lay down its own pipeline from Hazira to Gandhar, the distance being approximately 97 kms. That the IPCL to lay down its own pipeline incurred huge expense approximately Rs.354 Crores. That IPCL was compelled by the Central Government to lay down its own pipeline and on that condition only, the contract was entered into and the gas was supplied by GAIL to the IPCL. That the pipeline laid down by the IPCL was laid down with the only intention that Company can be saved from incurring expenses of transportation charges of gas. That while receiving the gas, IPCL does not use even a single inch of HBJ pipeline laid down by GAIL. That even this fact is also admitted by GAIL that IPCL is not using at all the HBJ pipeline, installed by GAIL. That before the contract, as well as after the contract, by several letters, IPCL ventilated its grievances about the transportation charges. Several meetings were convened to resolve the dispute, but all were in vain. That there was no option, but to fall prey to the unreasonable, arbitrary, unfair term of contract, and therefore, such terms were incorporated in the contract and reduced in writing as clause No.10.01 and 4.04. The GAIL is enjoying a monopoly so far as supply of natural gas is concerned. Very few are the other persons who are supplying gas even as on today. Thus, highly imbalanced bargaining power was there between the petitioners and GAIL, and huge amount of approximately Rs.4500/- Crores public money was at stake and pipeline for transportation of the gas was laid down by the IPCL at the cost of approximately Rs.354 Crores, there was no option with IPCL, but to sign the contract.

11 Learned Sr.Counsel Mr.Nanavati for the IPCL further submitted that so far as fixing of price is concerned, it is in the hands of the Central Government.

The price of the gas is being fixed by a separate order by the Central Government from time to time. Initially, ONGC was selling gas at a price which was dependent upon the need of the purchaser i.e. on the basis of demand and supply of gas. Thus, price of gas was varying, with the need. To avoid fluctuation of price of gas, Central Government published price order, which was made applicable all over the country. How much quantity of gas is to be supplied and to whom, is also in the hands of the Central Government. Thus, the quantity of gas and recipient of the gas are decided by the Central Government. The transportation charges have also been fixed by the Central Government for particular class of purchasers. To avoid any price fluctuation Pricing Control Order has been published by Central Government so that the purchaser can get the gas, at equal rate. That clause 10.01 r/w. 4.04 which compels the payment of transportation charge, is not only unfair and unconscionable, but, it is also violative of the Price Control Order issued by the Central Government. The Price Control Order fixes the price of the gas for the whole of the country, likewise it also fixes the transportation charges. If the gas is supplied through the pipeline of the GAIL, there is a fixed transportation charge at Rs.1150/MCM, whereas if the network of pipeline of GAIL is not to be utilized and if the gas is to be taken by the purchaser, at landfall point, then actual cost of the transportation is to be charged by the GAIL. The difference in these two types of consumers who are not using HBJ pipeline, which are known as non-HBJ consumers/Ex-Hazira consumer/landfall consumer is this that they shall not have to pay those fixed transportation charges. That the IPCL falls in the category of non-HBJ consumer/Ex-Hazira consumer/landfall consumer, and therefore, it is not liable to pay transportation charges at Rs.1150/MCM. That the Price Control Order makes a clear distinction between two classes of consumers, one who are using HBJ pipeline and the rest who are not using the pipeline. That the only difference between the two type of consumers is payment of Rs.1150/MCM and actual transportation. This distinguishing line has been wiped out by introducing clause 10.01 r/w. 4.04 of the contract. That the thing which cannot be done directly can never be done indirectly. The learned Sr.Counsel Mr.Nanavati contended that in the similarly situated case of Essar Steel Limited (supra), who had also their own pipeline, transportation charges were imposed upon it by the GAIL. The writ petition was filed bearing Special Civil Appln.No.3348/2001, which has been decided on 11.10.2005 in favour of the Essar Steel Limited to the effect that the GAIL cannot charge the transportation charges for the gas supplied through the pipeline of the Essar Steel Limited. That the facts of this case may not be similar with the facts of the present case, but so far as usage of pipeline is concerned, they are the same. Learned Sr.Counsel has relied upon following judgments:-

(1986)3 SCC 156

(1995)5 SCC 482

(2003)1 SCC 591

(1998)6 SCC 507

AIR 1959 SC 149

(2003)2 SCC 107

(1991)2 SCC 48

(1974)1 SCC 317

(1999)7 SCC 89

From the aforesaid judgments, it is intended to convey by the IPCL that there cannot be a waiver of fundamental rights. Clause 10.01 r/w. 4.04 in the contract is violative of Article 14 of the Constitution of India. The said clauses are unfair, arbitrary, unconscionable and against the public policy. The contract was entered into with the monopolist, when huge investment of Rs.4500/- Crores was at stake. There is no delay in filing the petition looking to the constant pursuing the matter with the GAIL, which is evident from exchange of letters. Even after the contract, several representations were made and several meetings were held with GAIL, and even after the judgment of Essar Steel Ltd. (supra), there was a meeting, but no fruitful result was arrived at. It is also contended by the learned Sr.Counsel for the IPCL that GAIL had on earlier occasion tried to violate the Price Control Policy of the Government by imposing marketing margin charges, which was curbed by the Central Government in the initial stages itself. This type of levy of marketing margin charges was not allowed by the Central Government as it was found de hors the price fixing policy. That thus, under the guise of transportation charges or marketing margin charges or with any label whatsoever any additional charges made leviable, is de hors the public policy and Price Fixing Order.

12 Learned Sr.Counsel Mr.K.S.Nanavati submitted that no illegality is committed by the learned Single Judge while further clarifying the impugned judgment dated 19.09.2006 by allowing Misc.Civil Application for direction No.270/2007 and passing consequential order of refund. That in the main petition itself, one of the prayers was regarding the refund, and as observed by the learned Single Judge in the impugned order, it was unintentional error on the part of the learned Single Judge that though the term of contract has been held as unfair, unreasonable, unconscionable, against the public policy and violative of Article 14 of the Constitution of India, and though there was a prayer in the petition, and though there was an argument canvassed by counsel for the IPCL, he has not passed the order of refund. It is clearly further observed in the impugned order that the omission or mistake is not such that it requires further arguments for grant of refund. That consequently relying

upon the judgments delivered by Hon ble Apex Court, the said application was allowed and the order of refund was passed. Therefore, in the result it is submitted that both the L.P.A.'s be rejected.

13 Having heard the learned Sr.Counsels for both the sides, and looking to the facts and circumstances of the case, it is clear that GAIL is creation of the Union of India. The objective of GAIL is transportation, distribution, marketing and supply of natural gas. Articles of Association of GAIL makes it abundantly clear that GAIL is bound by any decision, directives, instructions etc. from time to time issued by the Union of India. Thus, considering clause 93 and 127 etc. of the Articles of Association of GAIL, it reveals that there is a direct control of Union of India upon GAIL. The GAIL is an instrumentality of Union of India, and if there is an unfair, unreasonable and unconscionable term in a contract, writ petition is tenable at law under Article 226 of the Constitution of India. In the impugned judgment, the learned Single Judge has further observed that continuous dispute was raised by the IPCL in the form of written representations ventilating its grievances regarding the transportation charges. The learned Single Judge referred some of such letters like the letters dated 1.2.2002, 26.7.2002, 20.11.2003, 8.4.2003, 20.8.2004, 2.9.2004, 20.9.2004, 5.3.2005 and 16.11.2005. By these communications, IPCL stated that it has its pipeline for transportation of gas and actually gas is transported at the cost and risk of IPCL. Therefore, GAIL cannot charge transportation charge for transportation of gas.

14 It was further observed by learned Single Judge that IPCL had invested approximately Rs.4500/- Crores for establishment of its project on the basis of the availability of gas from GAIL. In the impugned judgment, the ld.Single Judge took into consideration the events occurred prior to the execution of the contract. Considering the letter dated 1.1.1999 addressed to IPCL by Deputy Secretary to the Government of India, it clearly referred that the Government approved the allocation of 0.85 MMSCMD of semi-rich gas on firm basis from Hazira to IPCL Gandhar unit for extraction of C2 & C3 fractions. It is further stated in the letter that the above allocation will be subject to the following conditions:-

> Signing of Gas Supply Contract with GAIL. The pipelines required to transport semi-rich gas from Hazira to IPCL unit at Gandhar and to transport the lean gas back to Hazira, shall be laid by IPCL.

Thus, it is very clear that the allocation of gas was subject to fulfillment of above referred two conditions, and one of the conditions was to lay down pipeline by the IPCL itself. It is evident that towards the fulfillment of the above conditions, IPCL laid down pipeline from Ex-Hazira to its Gandhar unit approximately 97 kms. in distance at the cost of Rs.354 Crores. After this condition was satisfied by the IPCL, the contract was executed. In the impugned judgment, the learned Single Judge has further observed that even

before entering into contract, the IPCL had ventilated its grievance regarding the transportation charges to be levied from the IPCL on the same basis like the levy of transportation charges from the consumers of HBJ pipeline. It is pertinent to note that even the GAIL did not dispute the fact pleaded by the IPCL in the petition, that IPCL is receiving the gas only through pipeline laid down by itself and not a single inch of HBJ pipeline laid down by the GAIL is used by IPCL for the purpose of transmission of supply of gas received by the IPCL.

15 Further, considering the impugned judgment delivered by the learned Single Judge, it transpires that the GAIL though admitted the situation that IPCL is receiving gas through pipeline laid down by itself, justifying the stand of the GAIL to recover transmission charges from the IPCL, the GAIL in the affidavit-in-reply contended that what is charged by the GAIL is not the transportation charges, but it is a loss of transportation charges by supplying gas to the IPCL and if the IPCL was not its customer, GAIL would have supplied said quantity of gas to some other customer through HBJ pipeline network and would have received not only the basic price of the gas from said customer, but would have received transportation charges from said customers. This is interpreted by GAIL as loss of transportation charges'. The learned Single Judge in paragraph 11 of the impugned judgment about such stand taken by the GAIL observed that though such stand appears to be attractive, but if looked closely, then it has no substance in the eye of law. It was observed that the pricing policy of the allocation of gas is in the hands of the Central Government. GAIL cannot charge more than what was fixed by the Central Government. Even as stated above, looking to the Articles of Association of GAIL, not only the Central Government has all the powers to give directions to the GAIL, but in turn the GAIL has to follow such directives issued by the Central Government, be it in the nature of fixation of price etc. As stated above, the very object of issuing Pricing Orders from time to time was to see that the gas can be supplied to different customers throughout the country at uniform price. The learned Single Judge observed that especially looking to the Price Control Order dated 18.9.1997, it is clear that GAIL has to follow the pricing order which fixes total consideration, including price as well as transportation charges etc. if the gas is to be supplied through HBJ pipeline connectivity. The learned Single Judge referred one letter dated 14.1.1999 wherein the word Ex-Hazira' is used, meaning thereby that the gas will be supplied by GAIL to IPCL, Ex-Hazira. There is no dispute that from the point at which the gas is supplied by GAIL to IPCL at Hazira, from that point itself, the pipeline installed by the IPCL is laid down upto the IPCL project at Gandhar. Under such circumstances, learned Single Judge observed that there cannot be payment of transportation charges for not transporting anything. This situation can be explained by simple illustration that if a person travels from one city to another city in his own car, but still however, he is required to pay railway fare to the railway on the ground that if he had not traveled in his own car, he would have traveled by railway, and would have incurred expenses for purchasing a ticket

and thereby railway sustained loss of revenue because the person traveled from one city to another city in his own car and not by the train.

16 Referring clauses 6 & 7 contained in Price Control Order dated 18.09.1997, the learned Single Judge observed that HBJ pipeline is a pipeline for transportation of natural gas owned and maintained by the GAIL. Clause 6 & 7 reads as under:-

> "vi. Over the period October 1,1997 to March 31,2000, the transportation charge payable to GAIL along the HBJ pipeline would be Rs.1150/MCM. The transportation charge will increase by 1% for every 10% increase in the consumer price index. This increase will be paid to GAIL out of the Gas Pool Account. The transportation charge will be linked to the calorific value of 8500 K.Cal/cu.mtr. till such time as it would be denominated in terms of calories. The transportation charge will be reviewed after years.
>
> vii. In addition to the price as fixed above, the transportation charges and royalty, taxes, duties and other statutory levies on the production, transportation and sale of natural gas will be payable by the consumers."

(Emphasis supplied) Thus, one consumer is such who is receiving the gas through the pipeline of the GAIL known as HBJ pipeline consumer. He shall have to pay the cost of transportation charges of the natural gas at Rs.1150/MMSCMD. So far as second consumer is concerned, he is not taking natural gas through HBJ pipeline, and he is known as non-HBJ consumer. The second type of consumer known as non-HBJ consumer/Ex-Hazira consumer/landfall point consumer, is not taking gas along the HBJ pipeline as he is having his own pipeline. As stated above in this judgment, though the IPCL ventilated its grievance regarding transportation charges, but, no satisfactory response was given to the IPCL, either by the GAIL or even by the Union of India. As stated above, before the execution of contract, IPCL was compelled to incur expenses to lay down its own pipeline from Hazira to IPCL project at Gandhar. In the impugned judgment, the learned Single Judge has observed, that as almost 95% of the stock of supply of gas was in the hands of the GAIL in the open market. There is nothing that at the time when the contract was entered into on 09.11.2001, the natural gas was even otherwise easily available from open market at fixed price. It is but natural that if the supply of natural gas was easily available in open market, and the GAIL had no monopoly of the supply of gas, then IPCL would not have incurred huge expenses of Rs.354 Crores simply for the purpose of laying down pipeline to receive gas from Hazira to its unit at Gandhar. Moreover, the laying down of pipeline was made condition precedent for the supply of gas by the GAIL. Such conduct on the part of the IPCL in incurring huge expenses in laying down the pipeline for the purpose of receiving gas from Hazira itself suggests that GAIL

was in monopolistic position. In other words, there was no option with the IPCL, but to obey the monopolistic position of the GAIL.

17 In the impugned judgment, the learned Single Judge referred clause 10.01 r/w.4.04 contained in the contract dated 9.11.2001. We need not reproduce in this judgment those terms, but suffice it to say that in addition to the basic price of the gas, which was required to be paid by the IPCL to GAIL, buyer (IPCL) was required to pay to the seller (GAIL) transportation charges as applicable from time to time along the HBJ pipeline system. As discussed above, despite the several representations made by IPCL, raising its grievance about the transportation charges and number of meetings have been held to discuss about payment of transportation charges, no fruitful result was arrived at. The copies of such letters and even minutes of the meeting have been annexed by the IPCL with the memo of the petition. In nutshell series of such letters have been sent by the IPCL from as early as 1st February 2000 till 16th November 2005. However, one fact is explicitly and unequivocally coming forth on the surface that the IPCL had no option, but to accept the term of contract viz. over and above the Price Control Order dated 18.09.1997, the transportation charges shall be paid by IPCL as applicable to the consumers, who are using HBJ pipeline consumer.

18 Elaborately discussing the above aspects in the impugned judgment, the learned Single Judge observed that such type of compulsion and addition of the clause in the contract is against the price fixing policy of the Union of India, whereby the prices are so evenly fixed that in all over the country, there may not any arbitrary levy of price or any other amount in the guise of price by the gas supplying company. Looking to the pressing need of the purchaser, if such objective was not behind issuing the pricing orders, then before the issuance of such pricing orders, the price was fluctuating, depending upon demand and supply of gas. To avoid such a situation, it was the Union of India who took the lead and issued directives to GAIL about the price fixing orders. Therefore, any clause which violates the directives issued by the Union of India, incorporated by GAIL, in any contract with any consumer can be said to be against the public policy. In the price fixing orders regarding the transportation charges, difference was created by the Central Government between two unequal classes i.e. consumers receiving gas through HBJ pipeline connectivity and the non-HBJ pipeline consumers.

19 Even before the learned Single Judge on behalf of GAIL, the maintainability of the writ petition under Article 226 of the Constitution of India was challenged. It was contended that considering clause 13 of the contract, there is an arbitration clause. Therefore, an alternative remedy was available to the petitioner to resort to arbitration. In the impugned judgment, the learned Single Judge elaborately dealt with said contention and observed that there is no dispute regarding such arbitration clause contained in contract, but the real dispute involved in the petition was as under:-

"Whether a term of a contract, which compels petitioner (Non-HBJ Consumer) for the payment of transportation charges as applicable from time to time to HBJ Consumers, is against the Pricing Orders, unfair, unreasonable, against the public policy, unconscionable and violative of Article 14 of the Constitution of India or not? and Whether petitioner can waive its fundamental right enshrine under Article 14 of the Constitution of India?

20 The learned Single Judge therefore observed that the incorporation of unfair and unconscionable clause like clause 10.01 and 4.04 in the contract, such situation has arisen, which creates unequals equal and violates Article 14 of the Constitution of India. The two classes of customers i.e. HBJ pipeline customers and non-HBJ pipeline customers are treated equals. The two classes of customers have been created by the Price Control Order issued by the Union of India itself, and there was a clear directive that from HBJ pipeline consumers, the transportation of gas is to be recovered at Rs.1150/MMSCMD by incorporating such clause in the contract. Though the IPCL is not the consumer of HBJ pipeline consumer, yet, it was required to pay the transportation charges. Therefore, two classes are different and ought to have been treated differently. Exactly opposite is the treatment, which is given as per contract clause 10.01 r/w. 4.04. Ultimately it was held that there is a clear violation of Article 14 of the Constitution of India and therefore, it was further observed that the learned Single Judge was not accepting the argument of GAIL that there is an arbitration clause, and therefore, the petition is not tenable under Article 226 of the Constitution of India. On the contrary, when the instrumentality of the Government is using its monopoly and highly unequal bargaining power for incorporation of term, which is against the public policy, the writ is tenable at law under Article 226 of the Constitution of India. IPCL can not waive the fundamental rights, much less the right given under Article 14 of the Constitution of India. Under Article 14 what is defined is not directly a right of the IPCL, but what is defined in Article 14 is duty/obligation of the GAIL and that too, with a mandate given in a negative terminology. Whenever negative sentence is used, which imposes a duty as per Rules of interpretation, the breach thereof shall be viewed seriously. The learned Single Judge in arriving at such conclusion relied upon the case of Bashesarnath V/s. Commissioner of I.T., Delhi and Rajasthan and Ors. reported in AIR 1959 SC 149. Ultimately it was observed that such type of waiver of rights under Article 14 of the Constitution of India is not permissible, and therefore, a term of the contract whereby IPCL has waived its right to be treated unequally, deserves to be quashed and set-aside.

21 Learned Sr.Counsel for IPCL submitted that on earlier occasion with a view to violate the Price Control Policy of the Government, the GAIL attempted to impose marketing margin charges, which was rightly curbed by the Central Government in the initial stage itself. Under such circumstances, under different nomenclatures viz.marketing margin charges or transportation

charges etc., the GAIL recovers the total price of the gas under different components, over and above the basic price of the gas, which is not even permitted by the Union of India.

22 So far as the case of Essar Steel Ltd. is concerned, no doubt as observed by the learned Single Judge in the impugned judgment, the terms of contract entered into between GAIL and Essar Steel Ltd. are some what different than the terms of contract entered into between the GAIL and the IPCL. However, what is common in both the cases i.e. Essar Steel case and the present case is that the gas was not transported through HBJ pipeline installed by the GAIL. In other words, neither the Essar Steel Ltd., nor the IPCL used even a single inch of HBJ pipeline for the purpose of transportation of natural gas received by them. However, it is true that the judgment delivered in Essar Steel Ltd. case (supra) is challenged by the GAIL by preferring Intra Court appeal in this Court and the said appeal is pending.

23 On behalf of the GAIL, much was said that the contract was entered into on 09.11.2001 and the writ petition was filed in the year 2006 challenging some of the clauses of the contract. The learned Single Judge elaborately dealt with this argument in the impugned judgment and relying upon the case of Ramchandra Shanker Deodhar & Ors. V/s. State of Maharashtra & Ors. reported in (1974)1 SCC 317, especially relying upon paragraph 10 of the said judgment observed that the petition does not suffer by delay and latches. Paragraph 10 of the said judgment reads as under:-

> "10. .... There was a delay of more than ten or twelve years in filing the petition since the accrual of the cause of complaint, and this delay, contended the respondents, was sufficient to disentitle the petitioners to any relief in a petition under Art.32 of the Constitution. We do not think this contention should prevail with us. In the first place, it must be remembered that the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition. .... Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Art.16 is itself a fundamental right guaranteed under Art.32 and this Court which has been assigned the role of a sentinel on the quivive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of latches, delay or the like."

(Emphasis supplied)

24 Following ratio laid down in Ramchandra's case (supra), the learned Single Judge referred the letters addressed to GAIL as well as Government of India by IPCL, ventilating its grievance about the transportation charges and also observed that several meetings were held in this respect. However, no fruitful result was arrived at and ultimately the IPCL had no option but to file the writ petition. Therefore, the learned Single Judge rightly did not accept such technical contention raised on behalf of the GAIL.

25 In the impugned judgment, the learned Single Judge relied upon the case of Central Inland Water Transport Corporation Ltd. & Ors. V/s. Brojonath Ganguly & Ors. reported in (1986)3 SCC 156 in arriving at the conclusion that whenever a term of contract is unfair, unconscionable, unconstitutional and against the public policy and contract is entered into due to unequal bargaining power, the Court can quash and set-aside that part of terms of contract and can declare it unenforceable. However, on behalf of the GAIL, learned Sr.Counsel submitted that the learned Single Judge erred in relying upon the ratio laid down in Brojonath's case (supra) for the simple reason that considering the facts of said case there was a contract of service between employer and employee and in paragraph 101 of said judgment, Hon ble Apex Court clearly observed that employees cannot be equated with goods, which can be bought or sold. That it was equally not possible to equate the contract of employment with a mercantile transaction between two businessmen. However, considering paragraph 79, 80 and 83 of the said judgment delivered by Hon ble Supreme Court, it cannot be said that whatever observations made by the Hon ble Apex Court in the aforesaid ruling, are confined only to the contract of employment. What is ultimately observed in the referred paragraphs in the aforesaid judgment by Hon ble Apex Court is the nature of contract and the parties involved in such contract. If the contract is entered into due to unequal bargaining power, Court can quash that part of term of contract and can declare it unenforceable. In support thereof, the learned Single Judge further relied upon the ratio laid down by the Hon ble Apex Court in the case of LIC of India and Ors.V/s. CERC & Ors. reported in (1995)5 SCC 482. Hon ble the Apex Court in paragraph 23 clearly observed that if it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State or its instrumentality to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor do in the field of private law.

26 Much was said on behalf of the GAIL that normally while exercising writ jurisdiction under Article 226 of the Constitution of India, the Writ Court should not enter into resolution of disputes arising out of a contractual obligation and if need be it should be in rarest of rare cases. Normally speaking there cannot be any dispute regarding the contention raised on behalf of the GAIL. However, considering the case of ABL International Ltd. & Anr. V/s. Export Credit Guarantee Corpn.of India Ltd. & Ors. reported in (2004)3 SCC 553, the Hon ble Apex Court observed that the question whether a writ petition

under Article 226 of the Constitution of India is maintainable to enforce contractual obligation of the State or its instrumentality by an aggrieved party is no more res integra and is settled by a large number of judicial pronouncements of the Supreme Court. Paragraph 28 of the judgment reads as under:-

> "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. V. Registrar of Trade Marks) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

Now, in the instant case, as observed above by incorporating clause 10.01 r/w.4.04 in the contract there is clear violation of fundamental rights guaranteed under Article 14 of the Constitution of India and the learned Single Judge rightly held that the writ was maintainable.

27 The ld.Sr.Counsel for the IPCL further submitted that from June, 2002 in line with the disinvestment policy of Govt.of India, 26% of the shares of IPCL were sold to Reliance Petro Investment Ltd., and immediately after taking over the stake in the Company, even management of Reliance issued letters to GAIL, ventilating its grievances regarding the transportation charges. It is further submitted that in the contract, arbitration clause is contained in Article 13, and in case of dispute between the parties, for its resolution, the dispute can be referred to Permanent Machinery of Arbitrators in the Bureau of Public Enterprises. That therefore, the dispute was to be resolved by such arbitration, which resolves the dispute between public sector undertakings. Therefore, the ld.Sr.Counsel Mr.Nanavati for the IPCL submitted that since IPCL (Reliance) ceased to be public sector undertaking w.e.f. 4.6.2002, the arbitration clause automatically becomes void, inapplicable and infructuous.

28 The judgments referred by the ld.Sr.Counsel appearing for the GAIL are challenging mainly the liability or benefit under the contract, but, no term of contract is challenged as being unfair, unconscionable, against the public policy and violative of Article 14 of the Constitution of India. In the facts of the present case, consistent grievance have been ventilated by the IPCL before the

GAIL by writing several letters, and even during the course of meetings with GAIL and representatives of Union of India, that the IPCL is a non-HBJ consumer and it is transporting gas through its own pipeline, no fruitful result was arrived at.

29 In one of such meetings held on 20.09.2004, copy of minutes is produced; one of the agenda was withdrawal of HBJ transportation charge on Hazira gas. In the meeting on behalf of IPCL, its representatives had clearly stated that IPCL had entered into gas supply contract with GAIL under duress, as the pipeline installed by IPCL was ready and it was in urgent need of gas for commissioning of its plant. The representative of GAIL conveniently replied said agenda, that the matter of transportation charges on Essar is sub-judice in the Gujarat High Court, therefore, no fruitful result was arrived at in the meeting.

30 Perusing the impugned judgment, it is true that no direction regarding refund was issued by the learned Single Judge. However, in the main petition as stated above, one of the prayers was regarding refund of transportation charges. In the result the IPCL moved this Court by filing Misc.Civil Application for direction No.270/2007 for clarification/modification of impugned judgment dated 19.09.2006. The learned Single Judge, after hearing both the parties, delivered the impugned order on dated 11.04.2007. It is true that on behalf of the GAIL, various objections were raised that the learned Single Judge once delivered the impugned judgment has become functus officio, the ground of refund would amount to unjust enrichment to the petitioner, and that alternatively if the refund may be given, it ought to be ordered only for last 3 years and not beyond the period of limitation. In the impugned order, the learned Single Judge observed that considering the facts of the present case, there was unintentional error in not issuing any order regarding the refund, despite the fact that term of contract has been held as unfair, unreasonable, unconscionable, against the public policy and violative of Article 14 of the Constitution of India. The learned Single Judge further observed that not only there was a prayer in the petition, but, there was an argument canvassed by the learned counsel for the IPCL, but by unintentional error, no order was passed regarding refund. It was further observed that the omission or mistake is not such that it requires further arguments for grant of refund. That therefore, there was no intention to not grant refund, but by sheer mistake and error, the refund has not been granted. Referring to various judgments and especially relying upon the case of N.M. Thomas V/s. State of Kerala & Ors. reported in (2000)1 SCC 666, the learned Single Judge observed that it is not a power of the Court but it is duty of the Court to correct the error apparent on the face of the record. About the refund it was further observed that in the impugned judgment, the clause 10.1 r/w.4.04 of the contract has been declared as unfair, unreasonable, unconscionable against the public policy and violative of Article 14 of the Constitution of India. The payment is made under the term of contract by the IPCL. The amount is not of tax, cess or duty under the law, but the payment was made under the terms of the contract, and

therefore, there was an error apparent on the face of record in not passing the order of refund and the same was required to be corrected. The case of Gujarat Steel Tubes Ltd. V/s. Board of Trustees of Port of Kandla reported in 2002(2) GLR 934 was relied upon and especially referring paragraphs 19, 20 and 21 it was observed that doctrine of unjust enrichment is wholly inapplicable to the facts of the present case as the wharfage charges were paid in excess to Kandla Port Trust.

31 In the aforesaid case, the petition was allowed, and in the aforesaid paragraphs of that judgment, it has been held that principle of unjust enrichment is not applicable. Excess wharfage paid by the present petitioners to Kandla Port Trust ought to be refunded.

32 Reliance was also placed in the case of Essar Steel Ltd. (supra) on the issue of refund of transportation charges, and in said case this Court has granted refund in paragraph 18 of said case. It was observed that "the petitioner shall be entitled to get all the consequential benefits in pursuance of the implementation of Pricing Orders of Govt.of India. The learned Single Judge relying upon the said judgment further observed that said judgment delivered in Essar Steel Ltd. case (supra), GAIL filed L.P.A. in this Court, but Division Bench of this Court has allowed refund of 50% of transportation charges at the time of admitting said L.P.A. Consequently, the learned Single Judge observed that as the judgment dated 19.09.2006 was silent on the point of refund of transportation charges paid by the IPCL, the application bearing Misc.Civil Application for direction No.270/2006 was required to be allowed, and the GAIL was directed to refund transportation charges paid by the IPCL. The learned Single Judge further observed that the gas, which is received by IPCL from GAIL, IPCL itself is consuming said gas. IPCL is not further transporting said gas to any of its consumers.

33 In the case of Bhadrachalam Paper Board Ltd. & Ors. V/s.Govt. of Andhrapradesh reported in (1998)6 SCC 250 though the High Court held that the transactions in question were not exigible to tax, the refund was however denied on the ground that the appellants must be deemed to have passed over the liability to the consumer. Hon ble Apex Court in paragraph 9 of said judgment observed that the appellants were reimbursed the tax liability, which was on the Forest Department, and the appellants have consumed the goods for manufacturing paper boards etc., therefore, the question of the appellants passing on the tax liability to the consumers on the face of this case would not arise. However, refund order was issued not for the entire period, but for the period commencing 3 years prior to the date of filing of the writ petition. In the case of Lipton India Ltd. & Ors. V/s. Union of India & Ors. reported in (1994)6 SCC 524, allowing the request for refund, Hon ble Apex Court observed that since the relief could have been sought in a Civil Court, and therefore, relief in respect of the refund was restricted to period of 3 years prior to the date of filing of the writ petition.

34 Now in the present case, as discussed above, IPCL itself is consuming the gas received from the GAIL, and therefore, no question of drawing any presumption regarding unjust enrichment to the IPCL will arise. The IPCL is not re-transferring or reselling the gas to any of its consumers. It is not even the defence of the GAIL that the IPCL is selling the gas to its consumers by receiving the consideration inclusive of transportation charges. The above judgments were relied upon on behalf of GAIL in light of the alternative defence raised by the GAIL, that if at all the order of refund is required to be passed, then it should be confined to the period of only 3 years prior to the date of filing of the writ petition. However, considering the facts of both the above referred cases, neither any contract nor any term thereof was challenged or was held violative to any of the fundamental rights. In the instant case, as discussed above, clause 10.01 r/w. 4.04 is held to be violative of Article 14 of the Constitution of India, and about the maintainability of the writ petition in this Court, we need not here reproduce the entire discussion made in this judgment, but suffice it to say that the writ was held to be maintainable by the learned Single Judge, and there is no reason whatsoever for this Court to interfere with the said finding in this L.P.A. This is the reason that though similar request was made on behalf of the GAIL before the learned Single Judge, that the refund may be given only for last 3 years prior to the date of filing of the writ petition, the learned Single Judge did not grant such request, and by assigning cogent reasons, such request was not adhered to.

35 In the result, considering the facts and circumstances of this case, and the elaborate discussions made by the learned Single Judge in the impugned judgment and order, we are in agreement with the findings arrived by the learned Single Judge, that the clause of term of contract, which compels IPCL to pay transportation charges is unfair, unconscionable, arbitrary and against the public policy and violative of Article 14 of the Constitution of India. The learned Single Judge therefore rightly quashed and set-aside the said clause, and rightly declared that GAIL is not entitled to levy transportation charges from the IPCL, much less under the heading and label of "loss of transportation charges . The learned Single Judge consequently by allowing Misc.Civil Application for direction No.270/2007 by impugned order dated 11.04.2007, rightly allowed the prayer of refund made by the IPCL by directing the GAIL to refund transportation charges paid by the IPCL to the IPCL. The IPCL did not raise any dispute regarding basic price of the gas fixed by the GAIL. What was challenged by the IPCL in the petition, was levy of transportation charges of the gas by the GAIL, in the same manner as GAIL recovers transportation charges of the gas from its customers, who are getting gas through its HBJ pipeline. Admittedly IPCL is not receiving the gas from HBJ pipeline. ONGC procures gas from Bombay High and transports said gas upto Hazira, and at Hazira, ONGC supplies the gas to GAIL, and in turn as per the contract, GAIL supplies gas to IPCL. And as discussed above, IPCL transports said gas from Hazira to its project through its own pipeline. Therefore, the basic price of the gas was not disputed by the IPCL. As stated above, the clause of the term of the contract

which compels petitioners to pay transportation charges is held to be unfair, unconscionable, arbitrary, against the public policy and violative of Article 14 of the Constitution of India.

36 In the result, we find no merits in these appeals and the appeals deserve to be dismissed and the same are hereby dismissed.

37 Civil Applications stand disposed of accordingly.