

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.07.2015

**+ W.P.(C) 2973/2014, CM 6177/2014, 6387-6388/2014,
6933-6934/2014**

**DEEPAK FERTILIZERS AND PETROCHEMICALS
CORPORATION LIMITED**

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Dr A. M. Singhvi, Sr. Advocate with Mr Rishi
Agrawala and Mr Karan Luthra
For the Respondents : Mr Sanjay Jain, ASG with Mr Vikram Jetly,
CGSC and Mr Vidur Mohan for R-1 & 2.
Mr Vishnu Sharma with Mr K.R. Sasiprabhu,
for RGTIL

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner company is engaged in the business of manufacturing of complex fertilizers, i.e. Phosphatic & Potash (P&K) fertilizers, by using natural gas being supplied to the petitioner company from various domestic sources. Initially, the petitioner was allocated 0.6 mmcmd of natural gas from oil fields of ONGC, Tapti Basin and Pana-Mukta and on 27.10.2009, the Empowered Group of Ministers (hereafter 'EGoM') further allocated 0.178 mmcmd of natural gas to the petitioner from KG-D6 Basin. The petitioner has filed the present petition, *inter alia*, challenging a letter dated

01.05.2014 of the Department of Fertilizers (hereafter 'DoF') and a letter dated 13.05.2014 of the Ministry of Petroleum and Natural Gas (hereafter 'MoPNG') directing that the supply of gas to the petitioner be discontinued and diverted to urea manufacturing units facing shortfall of natural gas. The petitioner has also challenged an Office Memorandum dated 06.01.2014, issued by DoF, seeking recovery of undue benefits from the petitioner on account of use of cheap domestic gas in the production of complex fertilizers. The letters dated 01.05.2014 and 13.05.2014 are hereafter also referred to as impugned orders. The decision to suspend supply of gas to the petitioner is hereafter referred to as the impugned decision.

2. The relevant facts necessary to consider the disputes in the present petition are briefly stated hereafter. At the outset it is apposite to recount the chain of events with regard to policies on allocation and supply of natural gas to the petitioner. Until 2005, the Government used to allocate natural gas irrespective of its end use and without giving priority to any sector, as natural gas was in abundance because its demand was not high. A letter dated 20.06.2005, addressed by MoPNG to GAIL (India) Ltd., ONGC Ltd. and Oil India Ltd., indicates that the Government of India decided to allocate natural gas to certain end use that would result in economic value addition by reducing the subsidy burden on the Government. Therefore, fertilizer and power industries were considered for supply of natural gas at the rate of ₹3200/MCM as the output prices of these industries were either controlled or regulated by the Government.

3. It is stated that the petitioner established its manufacturing plant in 1983 and has been receiving the supply of natural gas since 1985. Initially

the petitioner was supplied 0.3 mmscmd of natural gas by ONGC Ltd. for use in its ammonia plant. This was subsequently increased to 0.6 mmscmd of natural gas and the petitioner was allocated additional 0.3 mmscmd of natural gas for its methanol plant.

4. In a meeting dated 28.05.2008, the EGoM, who were considering the New Exploration Licensing Policy (hereafter NELP), decided that contractors would supply gas in accordance with the priorities determined by the Government. The minutes of the said meeting also provided for the order of priority for the supply of natural gas from KG-D6 field. The Urea sector was given the highest priority therein so as to enable its full capacity utilization.

5. Apart from allocation of 0.6 mmscmd of natural gas to the petitioner from various domestic sources, the EGoM, in its meeting dated 27.10.2009, allocated further 0.178 mmscmd of natural gas on firm basis to the petitioner from KG-D6 field. The EGoM also decided to substitute Regasified Liquid Natural Gas (RLNG), contracted by Urea companies, with comparatively cheaper KG-D6 field gas. It was also decided that the gas suppliers, along with urea companies, would jointly explore the possibility of supplying RLNG to other sectors.

6. Nutrient Based Subsidy scheme (hereafter NBS Scheme) was introduced in the year 2010, wherein the prices of fertilizers except urea were de-controlled by the Government. In terms of the policy, the Government would provide a fixed subsidy based on the nutrient content of the fertilizer.

7. The MoPNG proposed - in its draft agenda note for the next EGoM meeting - for cancellation of natural gas allocation to the P&K fertilizer plants, including the allocation of 0.178 mmcmd KG-D6 field gas to the petitioner, as the subsidy under the NBS Scheme was capped and providing cheaper input gas to complex fertilizer units was not reducing subsidy burden on the Government.

8. In response to the said draft agenda, DoF, by its Office Memorandum dated 13.01.2012, recommended for the continuance of supply of domestic gas to all fertilizer plants without considering the type of fertilizer being manufactured by them. However, DoF also proposed that a differential amount be recovered for gas used for manufacturing fertilizers other than urea. The relevant extract of the said Office Memorandum is quoted below:-

“It is submitted that the issue of allocation of domestic Gas for NP/NPK plants, the letter of fertilizer Association of India (FAI) dated 3rd January 2012 (copy enclosed) is self explanatory. The Fertilizers Association of India has argued that in case domestic gas is not available to P&K plants they will have to buy spot LNG at USD 18/mmbtu which will result in Ammonia price of USD 700/MT which will be an unviable proposition and may result in closure of plants and greater dependence on imports. Apart from Deepak Fertilizer the other affected companies will be RCF and GSFC. In addition FAI has stated that priority allocation of domestic gas for NP/NPK plants will also help MFL, Chennai, FACT, Cochin, MFCL, Mangalore and ZIL, Goa when these plants switch feedstock from Naptha to gas in near future. It may be considered that the allocation of natural gas at a reasonable rate is essential for domestic Ammonia capacity and any reduction in these capacities may result in increase in International price apart

from greater dependence on imported Ammonia. It is a fact that in case of P&K fertilizers (All fertilizers apart from Urea) the subsidy is capped and cheaper input gas does not lead to lower subsidy burden on the government. It is therefore suggested that the MoP&NG to continue allocation of domestic gas to all fertilizer plants irrespective of the fact that they are producing Urea or other grades. In the meanwhile all natural gas used for any other purpose apart from Urea will be calculated by DOF and differential price from either imported Ammonia or any other benchmark will be recovered from these units Specific guidelines will be framed by DOF in this regard.”

9. On 16.02.2012, MoPNG, considered the aforesaid proposal of DoF and recommended for suspension of gas supply to P&K fertilizer plants till guidelines were issued by DoF, as it was considered that complex fertilizer units were making undue profits from supply of cheaper domestic gas. In a meeting held on 24.02.2012, the EGoM suspended the proposal of discontinuation of gas supply till the finalization of guidelines by DoF. The relevant extract of the minutes of the meeting dated 24.02.2012 is quoted below:-

“(ii) The proposal to suspend the supply of KG-D6 gas to P&K plants (Deepak, GSFC and RCF) including the proposal to restrict future supply of only to Urea fertilizer plants be kept in abeyance till 24.5.2012, during which time, the Department of Fertilizers will finalize the guidelines mentioned in paragraph 2 of the supplementary note and thereafter the matter be placed before the EGoM.”

10. The time for framing of guidelines for recovery of undue gains from P&K fertilizer plants was extended from time to time at the request of DoF.

11. On 23.08.2013, the EGoM decided to maintain the supply of 31.5 mmscmd of gas to the ‘fertilizer sector’.

12. On 06.01.2014, DoF issued an Office Memorandum for the recovery of undue benefits from the use of cheap domestic gas on the basis of the differential prices of fertilizers based on cost of imported ammonia and the APM gas, subject to reconciliation after final decision by the EGoM.

13. By a letter dated 01.05.2014, DoF recommended to MoPNG for immediate discontinuance of supply of gas to the petitioner and to transfer the same to urea manufacturing units which were facing shortfall of gas. The relevant extract of the said letter is extracted as under:-

“2. In this regard, attention is invited to the decision of E-GoM on gas pricing and commercial utilization of gas taken during the meeting held on 24th February, 2012 wherein it was decided that the proposal to suspend the supply of KG-D6 gas to P&K plants (M/s Deepak Fertilizers, M/s GSFC & M/s RCF) including the proposal to restrict future supply only to urea plant be kept in abeyance till 24th May, 2012 during which time, the Department of Fertilizers will finalize the guidelines mentioned in Para 2 of the Supplementary Note and thereafter the matter be placed before E-GoM. However, the said guidelines have not yet been framed by this Department. Action has now been initiated to prepare a Note for EGoM to finalise the guidelines. Pending finalization of the guidelines, the supply of domestic gas is still continuing to the aforementioned three units.

3. It is mentioned that the MRP for NPK Fertilizers under NBS Scheme is free and the manufacturers of NPK can absorb the high cost of Ammonia in the MRP. However, the MRP of urea is fixed and statutorily controlled by the Government. Owing to the shortfall in the supply of domestic gas, the urea manufacturing units have to necessarily rely on exorbitantly high priced RLNG. Since the cost of gas is pass through item, it leads to heavy burden on the Government exchequer in the form of urea subsidy.

4. In the circumstances, the competent authority has directed that the supply of domestic gas to M/s Deepak Fertilizers, which is manufacturing exclusively NPK Fertilizers, may be stopped with immediate effect and the said quantity of domestic gas may be allocated/shifted to urea manufacturing units which are having shortfall in supply of domestic gas or using high priced RLNG preferably to M/s National Fertilizers Limited. As regards M/s RCF and M/S GSFC, which are manufacturing urea alongwith complex fertilizers, this Department is in process of working out the estimated consumption of domestic gas for urea for necessary action.

5. In view of above, you are requested to take immediate action with regard to the stoppage of supply of domestic gas to M/s Deepak Fertilizers and to shift the said quantity of domestic gas to the urea manufacturing units which are having shortfall in supply of domestic gas or using high priced RLNG preferably to M/s National Fertilizers Limited.”

14. On 08.05.2014, the petitioner filed the present petition, *inter alia*, praying for the setting aside of the decision of DoF, directing discontinuance of supply of natural gas to the petitioner. By an order dated 09.05.2014, this Court issued notice and clarified that any action taken by the respondents shall be subject to further orders to be passed by this Court.

15. Subsequently, the MoPNG, by a letter dated 13.05.2014, disconnected the supply of gas to the petitioner. The relevant extract of the said letter is extracted as under:-

“Supply of domestic gas (APM, Non-APM, PMT, KGD6) to M/s Deepak Fertilizers may be stopped with immediate effect. As an interim measure, this gas may be distributed to other existing urea manufacturing units that have shortfall in supply of domestic gas in proportion to their shortfall. Swapping, if required, under the guidelines issued by the Ministry may be explored to implement this direction.”

Submissions

16. The learned senior counsel for the petitioner contended:-

16.1 That the classification between urea manufacturers and complex fertilizer manufacturers on the basis of grant of subsidy is irrational, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. Reliance was placed on **Karimbil Kunhikoman v. State of Kerala:** AIR 1962 SC 723, **A.P. Krishnaswami Naidu v. State of Madras:** (1964) 7 SCR 82 and **Rashbihari Panda etc. v. State of Orissa:** (1969) 1 SCC 414.

16.2 That apart from the petitioner, Gujarat State Fertiliser Corporation Limited ('GSFC') and Rashtriya Chemicals and Fertilisers Limited ('RCF'), are two other government companies which also deal in the manufacture of complex fertilizers and are being supplied with the natural gas on cheap prices; however, discontinuance of the supply of gas was only directed against the petitioner and is therefore arbitrary, discriminatory and violative of Article 14 of the Constitution of India. Further, the gas was also supplied to non-priority sectors such as tile manufacturers and petrochemicals manufacturers.

16.3 That the allocation of gas to the petitioner was not made on the basis that petitioner's business was being subsidized by the government and therefore, the disconnection of gas on the ground that the burden of subsidy on the government is higher in case of urea sector is highly irrational and arbitrary and would amount to giving preference within a sector itself.

16.4 That the reason now given for disconnection of 0.6 mmcmd of gas was that the said gas was used for industrial application in violation of the

decision of the EGoM. Firstly, it was submitted that the initial allocation of 0.6 mmcmd gas was never limited to the fertilizer sector and even various agreements that were entered into by the petitioner with the gas suppliers mentioned the usage of the said gas as industrial application. Secondly, the usage of gas for industrial application was neither considered by DoF nor by MoPNG in their decisions and the same was improved upon at a subsequent stage, which is not permissible under law, as the impugned decision has to be tested on the basis of the reasons contained therein. Reference was made to **Mohinder Singh Gill v. Chief Election Commissioner: (1978) 1 SCC 405.**

16.5 That the decision of disconnection of entire gas was arbitrary, as only the suspension of supply of gas from KG-D6 field was under consideration as the usage of the same was restricted for manufacturing fertilizer. The said submission was made without prejudice to the contention that supply of gas could not be discontinued in view of the EGoM's decision, dated 23.08.2013, which directed that supply of 31.5 mmcmd of gas be maintained to the fertilizer sector. It was further contended that the reduction in supply of gas, if any, was required to be made on pro-rata basis across the fertilizer sector, in view of the Cabinet decision dated 19.05.2010.

16.6 That the suspension of supply of gas was due to the fault of DoF in not framing the guidelines. Further, any disconnection for recovery of any gain would be subject to the framing of guidelines and therefore, the EGoM, in its meeting dated 24.02.2012, decided to suspend the decision of disconnection of gas till framing of guidelines by DoF.

16.7 That the diversion of gas to National Fertilizers Limited (NFL) on the ground that it would result in reduction of subsidy burden on government is incorrect, as NFL purchases gas at spot rates which are the highest rates possible. On the other hand, the gas supplied to the petitioner is at a long term contracted price, which is substantially lower.

16.8 The use of imported gas by the petitioner is not viable and was considered to be impracticable by the Government.

16.9 That the disconnection of gas was directed without serving any show cause notice and without affording any opportunity of hearing and therefore, the said decision is in violation of the principles of natural justice.

16.10 That the rights of the petitioner to avail the supply of gas under the contracts entered into with the gas suppliers could not be interfered with or withdrawn by the respondents without any statutory backing. Even Article 73 of the Constitution of India, which deals with the executive power of the Union, does not allow the Government to interfere with private rights.

17. The learned ASG appearing for the Government of India contended as under:-

17.1 That the disconnection of natural gas to the petitioner and its diversion to NFL would result in reducing the subsidy burden of ₹700 crores on the Government. The same is a policy decision of the government and the scope of interference by Courts under Article 226 of the Constitution of India in policy and economic matters is very limited.

17.2 That as per the letter dated 20.06.2005, domestic gas was directed to be allocated on cheap prices to fertilizer and power sectors only as it would result in economic value addition. Further, the EGoM in its meeting dated 23.08.2013, decided to give first priority to the fertilizer sector and to maintain the supply of 31.5 mmcmd of gas to the said sector. Even as per the guidelines enclosed with a letter dated 28.06.2010, fertilizer plants were given the highest priority for utilizing Non-Administrative Price Mechanism gas. Therefore, the entire gas allocated to the petitioner should have been utilized for manufacturing of fertilizers only; however, the petitioner was misusing it for industrial application in derogation of the letter dated 20.06.2005 and the decision of the EGoM taken on 23.08.2013. Further, the priority of maintaining 31.5 mmcmd gas to the fertilizer sector was related to *inter se* priority between the power and fertilizer sector.

17.3 That the supply of gas to Urea Sector was always on priority and other sector or units were to receive the gas after fulfillment of requirement of Urea Sector. The EGoM, in its meeting dated 28.05.2008, decided that the Urea Units be given the highest priority in the supply of gas from KG-D6 field so as to cover up the shortfall. Further, KG-D6 field gas was allocated to the petitioner on 27.10.2009 as the requirement of priority sector i.e. Urea units was fulfilled and the supply of the said gas would also result in economic value addition as the prices of the complex fertilizers at the material time were controlled by the government. Further, there was shortfall of gas for the priority sector i.e. Urea units in June 2013 and the disconnection of gas allocated to the petitioner and diversion of the said gas to the NFL was directed to fulfill the requirement of the priority sector in

furtherance of the EGoM decisions whereby the Urea Sector was given the highest priority. It was contended that the petitioner has not challenged the EGoM decisions whereby the Urea Sector was accorded the highest priority for receiving the gas and therefore, the challenge to the disconnection of gas allocated to the petitioner and diversion of the same to NFL is not maintainable.

17.4 That subsequently, with the introduction of the NBS scheme in 2010, the prices of complex fertilizers were decontrolled and on 24.02.2012, the EGoM decided to continue with the supply of gas to the complex fertilizers units subject to the undue benefits being recovered from the said units in accordance with the guidelines to be framed by DoF. That inspite of the letter dated 16.01.2014, written to the petitioner for recovery of the undue benefits, the petitioner did not agree for the recovery of undue benefits and therefore, the continuation of gas would be in violation of decision of the EGoM dated 24.02.2012 as supply of the gas was subject to the recovery of undue benefits.

17.5 That the petitioner does not have a vested right for supply of the gas and the allocation and supply of gas would depend on diverse factors like shortfall of gas to priority sector, economic value addition to the government etc.

17.6 That there was no violation of Article 14 of the Constitution of India, as RCF and GSFC were also producing urea apart from complex fertilizers and the amount of gas being used for complex fertilizers would be subject to disconnection after calculation.

17.7 That in response to the contention that the ground of misuse of gas by the petitioner was not considered at the time of disconnection, it was submitted that when larger public interest is involved, additional grounds and subsequent events can always be looked into, to justify an order. Reliance was placed on **PRP Exports and Ors. v. Chief Secretary, Govt. of Tamil Nadu & Ors.:** (2014) 13 SCC 692.

17.8 That the petitioner was not required to be given a hearing before disconnecting the gas as the decision was purely a policy decision. Even otherwise, the petitioner had been misusing the gas allocated to it and is, therefore, not entitled to claim violation of principles of natural justice or to seek any discretionary relief from this Court.

Discussion and Conclusion

18. The learned ASG had advanced arguments contending that gas supplied to the petitioner has been misused and the impugned order directing discontinuance of gas to the petitioner ought to be sustained on this ground alone. And as indicated above, the aforesaid contention has been stoutly disputed by the petitioner.

19. Concededly, the petitioner has been receiving natural gas since the year 1985. The minutes of the meeting of the Gas Linkage Committee held on 21.03.1994, indicates that 0.3 mmcmd of gas was allocated for manufacturing fertilizers and further 0.03 mmcmd of gas had been allocated for the methanol plant. Apparently, the methanol plant had been shut down in 1992 and the petitioner had claimed that the same had been re-commissioned. In view of this assertion, the Gas Linkage Committee had

on 21.03.1994, directed the Department of Petrochemicals to assess the petitioner's requirement of natural gas for methanol production and sent a report. It is not disputed that thereafter, the petitioner had continued to receive 0.6 mmscmd of gas.

20. The learned counsel for respondents referred to a letter dated 20.06.2005, addressed by MoPNG to GAIL India Ltd., ONGC Ltd. and Oil India Ltd., which indicated that the Government had decided that all available APM Gas would be supplied only to the power and fertilizer sectors. He contended that therefore, the gas supplied to the petitioner was only to be utilized for production of fertilizer. However, a plain reading of the letter dated 20.06.2005 does not clearly establish the same. The said letter only indicates that all available APM gas (i.e. gas which was under the Administered Price Mechanism) be supplied to the power and fertilizer sector. It is not disputed that subsequently on 10.05.2006, the petitioner had entered into an agreement with GAIL India Ltd. for supply of 0.6 mmscmd gas on APM as well as non-APM basis. The petitioner had drawn the attention of this Court to a letter dated 13.06.2006, addressed by the Director, DoF to MoPNG, expressing his opinion that it would not be fair to charge different prices for the gas supplied from two units, namely, RCF and the petitioner. Apparently, the Director, DoF was of the view that charging a higher price for non-fertilizer use would render the activities of the said units unviable. This letter clearly indicates that the respondents were fully aware that the gas allocated to the petitioner was also being used for purposes other than for producing fertilizer. It is apparent that the aforesaid view was not accepted and the petitioner was charged the market

price of gas used for manufacturing products other than fertilizer. Thus, the petitioner paid the APM rates for gas used for manufacturing fertilizers and paid the market price for gas used for products other than fertilizer. This appears to be in conformity with the decision of the Government to allocate the entire APM gas to fertilizer units. In the circumstances, the contention that the petitioner had misutilized the gas supplied to it does not seem correct.

21. The respondent has further referred to the decision of EoGM taken at the meeting held on 23.08.2013, whereby it was decided to maintain the level of supply of domestic gas to fertilizer sector at 31.5 mmscmd. The relevant extract of the minutes of the said meeting of EoGM are reproduced below:-

“2. In light of the above, the EGoM decided:

- (i) to maintain at 31.5 MMSCMD the level of supplies of domestic gas to the Fertilizer sector and give the sector first priority in meeting the requirements of any shortfall below the level of 31.5 MMSCMD from any additional production of NELP gas;
- (ii) the entire additional NELP gas production available during the years 2013-14, 2014-15 and 2015-16, after meeting the supply level of 31.5 MMSCMD to the Fertilizer sector, be supplied to the Power sector. The plant-wise allocation of additional production of NELP gas available during these years shall be done by the Ministry of Power; and
- (iii) to allow supply of NELP gas to Power plants based on short term Power Purchase Agreements (PPAs) in all cases where medium/long-term PPAs are not

practicable in view of limited balance tenure of the Gas Supply and Purchase Agreements (GSPAs).”

22. The learned counsel for the respondents also handed over a tabulated statement, which indicated the breakup of 31.5 mmcmd of domestic gas. As per the said statement, the petitioner had received 0.49 mmcmd gas during the year 2012-13. It does appear from the above that the EoGM considered that the 0.49 mmcmd of domestic gas allocated to the petitioner was being used for the manufacturing fertilizers. However, it is not possible to readily accept that the utilization of gas by the petitioner for any other purpose was in violation of any binding stipulation or that the petitioner is liable to be visited with any punitive action for using the gas for non fertilizer purposes.

23. In view of the aforesaid, I am not inclined to entertain in this petition the controversy regarding misuse of gas by the petitioner, principally, for the reason that, I do not think it appropriate that this issue should be considered in the first instance in these proceedings. Admittedly, misuse of gas is not the reason for the suspension of supply of gas to the petitioner. It is also not the case of the respondents that the alleged misuse of gas was discovered for the first time after the impugned orders had been issued. On the contrary, the material produced on record clearly indicates that DoF is always aware of the use of the allocated gas. Admittedly, the gas to be supplied to the petitioner was from two sources i.e. 0.6 mmcmd from GAIL India and 0.178 mmcmd from KG-D6 field; whilst the gas from KG-D6 field was solely for the purposes of manufacture of fertilizers, the gas supplied to the petitioner pursuant to its agreement with GAIL India was for industrial application. This supply comprised of two components;

whilst the petitioner was charged at APM rates for gas used for manufacture of fertilizer, the gas used for other applications was charged at market rates.

24. It is apparent from the above that the issue whether the use of gas for industrial application amounts to a violation of the terms at which the gas was allocated to the petitioner, is a question that is required to be determined by the concerned authorities in the first instance, after affording the petitioner a reasonable opportunity to place its contentions. Concededly, no communication was issued by the respondents to the petitioner, alleging that the petitioner had violated the terms of allocation. There has been no effective determination by the respondents of this issue. Apparently, the said ground was urged during the course of arguments only with a view to support the impugned orders. It is well established that orders must be tested on the basis of the reasons indicated in the orders and the same cannot be supplemented at subsequent stages by averring fresh grounds, which were not in contemplation of the concerned officers at the time of passing the order.

25. In my view, the decision in **PRP Exports** (*supra*) is not applicable to the facts of this case. In that case, the District Collector and the Superintendent of Police had taken steps to seal a factory, which had been set up for cutting and polishing of granite. It was alleged that the petitioner in that case had indulged in unauthorized quarrying. In a Writ Petition filed before the Madras High Court, the learned Single Judge had noted that no show cause notice had been issued to the petitioner therein and admittedly, there was no justification for stopping mining operations at the mines

leased to the petitioner. However, the learned Single Judge had noted that there were serious allegations against the petitioner. Therefore, although the petitioner was permitted to continue its mining operations, certain other directions were also issued. The State Government preferred an appeal against the decision of the learned Single Judge before the Division Bench of Madras High Court. During the pendency of the Writ appeals, suspension orders were issued under Section 19(2) of the Granite Conservation and Development Rules, 1999 as well as a show cause notice was issued. The Supreme Court noted that the District Collector had inspected the mines in question and the District Administration had decided to conduct a comprehensive scientific survey of the granite quarry functioning in the Madurai District. Consequent to the said decision, Inspectors had been appointed and after a scientific survey, the concerned authorities had submitted an evaluation report. It was reported that the petitioner firm had not carried out quarrying operations as per the mining plan and had further encroached upon the adjoining lands, tanks, water bodies and had illicitly quarried granite from adjacent leasehold areas. In view of the various violations, including large scale unauthorized quarrying, the Commissioner of Geology and Mining had recommended that further action and orders be issued by the Government suspending the mining operations. Show cause notice had also been issued for recovery from the petitioner. It is, in the aforesaid backdrop, the Supreme Court held that the Division Bench was correct in examining the subsequent events as it involved larger public interest.

26. In the present case, there has been no enquiry by the respondents

with regard to the allegations of misuse of allocated gas. Further, no proceedings have been commenced against the petitioner for alleged misuse of gas. Further, as pointed out earlier, the fact that the petitioner was utilizing the gas for manufacture of chemicals was well within the knowledge of the respondent. Therefore, in my view, the said allegation need not be considered in these proceedings.

27. The principal controversy to be considered is whether the decision of the Government to divert natural gas to fertilizer units producing urea is discriminatory, capricious and/or falls foul of Article 14 of the Constitution of India. The only reason provided by the Government for suspending supply of domestic natural gas to the petitioner and diverting the same to fertilizer units producing urea is that the same would result in a lower subsidy burden.

28. Admittedly, the price of urea is administered and as per the current policy, the cost of inputs to urea producing units is directly subsidized. It is not disputed that the cost of gas is in effect a pass through cost which is borne by direct subsidies provided by the Government. On the other hand, the subsidy provided to manufacturers of complex fertilizer (i.e. P&K fertilizer) is a fixed subsidy based on the nutrient content and the cost incurred in manufacture of complex fertilizer is not directly passed through to the Government. The petitioner uses the gas for manufacture of Ammonia which is further used for the manufacture of complex fertilizer (i.e. P & K Fertilizer); on the other hand, a urea manufacturer utilizes the gas for manufacture of Ammonia which is further processed to manufacture urea.

29. There is considerable merit in the petitioner's submission that the subsidy provided by the Government is in effect subsidy to the farmers and is to ensure that the fertilizer is available to the farmers at a subsidized rate. In this view, reducing the price of urea at the cost of increase in the price of manufacture of complex fertilizer would effectively be contrary to the Government's policy of encouraging use of complex fertilizer. The petitioner further urged that if the economic impact of diverting gas to urea manufacturers is considered, there may not be significant impact in the subsidy burden borne by the Government. Be that as it may, it cannot be disputed that diversion of gas to urea manufacturers would result in lowering of the direct subsidy borne by the Government as the price of urea is administered and the Government does provide subsidy based on the cost incurred by the urea manufacturers. The learned ASG also assured this Court that the urea manufacturing units would receive natural gas at cheaper rates, which would directly reduce the subsidy burden.

30. The only question, thus remains is whether this reason by itself would justify the impugned decision. In my view, it is not open for this Court to subject the merits of the aforesaid reasoning to judicial review. Clearly, the priority in which the gas is to be allocated is a policy decision and unless it is shown that the said decision is malafide, motivated by oblique reason and/or is arbitrary or unreasonable, no inference is warranted in proceedings under Article 226 of the Constitution of India.

31. In **G.B. Mahajan v. Jalgaon Municipal Council** : (1991) 3 SCC 91, the Supreme Court had observed as under:-

“The criticism of the project being ‘unconventional’ does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all government enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State’s presence in the field of trade and commerce and of the range of economic and commercial enterprises of Government and its instrumentalities there is an increasing dimension to government concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against timescales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator’s right to trial and error, as long as both trial and error are bona fide and within the limits of authority.”

32. In **Premium Granites v. State of Tamilnadu** : (1994) 2 SCC 691, the Supreme Court emphasized as under:-

“54. It is not the domain of the Court to embark upon uncharted ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be.”

33. In **Balco Employees’ Union (Regd.) v. Union of India and Others** : (2002) 2 SCC 333, the Supreme Court referred to various decisions

including the aforesaid decisions and held as under:-

“It is evident from the above that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. ”

34. In the present case, although the merits of the policy to allocate gas to urea manufacturers or complex fertilizers may be debated, it is clear that the Courts would have no role to play in entering upon this controversy. There is no material to allege that the decision by the Government is *mala fide* or motivated by any oblique reason. It is also not possible to conclude that the impugned decision of the Government to suspend supply of gas fails the *Wednesbury* test of reasonableness. Thus, in my view, no interference with the impugned decision is called for.

35. The petitioner has contended that preferring urea manufacturers over manufacturers of other complex fertilizers for the purposes of supply of gas amounts to hostile discrimination. It was contended that the petitioner is also in acute need of domestic gas and its needs could not be overlooked. The petitioner relied upon the decision of the Supreme Court in **Karimbil Kunhikoman** (*supra*). In my view the aforesaid contention is devoid of any merit and the reliance placed by the petitioner on the aforesaid decision of the Supreme Court is misplaced. It is well settled that reasonable classification is not prohibited by Article 14 of the Constitution of India. In the present case, urea manufacturers stand on a different footing than P&K

manufacturers, as in the former case the burden of increase in price of gas is directly borne by the Government by way of subsidies, while this is not so in case of P&K manufacturers. Thus, granting higher priority to the allocation of gas to urea manufacturers also has a direct nexus with the reduction of subsidy burden on the Government. In the case of **Karimbil Kunhikoman** (*supra*), the Supreme Court considered the challenge to the constitutional validity of the Kerala Agrarian Relations Act, 1961. The said Act, *inter alia*, provided for ceiling of land holdings. Whilst tea and coffee plantations were exempt from ceiling, others were not. The Supreme Court observed that exemption from ceiling was granted to ensure that production does not suffer and found that there was no reason to differentiate erica and pepper plantations, which were similarly placed. In the present case, the reason for differentiating urea manufactures and P&K manufacturers is the extent of direct subsidy burden borne by the Government. Undeniably, P&K Manufacturers do not stand on the same footing as urea manufacturers on the anvil of this reasoning. The decisions in **A.P. Krishnaswami Naidu** (*supra*) and **Rashbihari Panda** (*supra*) are also of no assistance to the petitioner in the facts of this case.

36. The petitioner has referred to the minutes of the meeting of the EGoM, held on 24.02.2012, and has drawn the attention of this court to the following direction issued by the EGoM:

“(ii) the proposal to suspend the supply of KG-D6 gas to P&K plants (Deepak, GSFC and RCF) including the proposal to restrict future supply only to Urea fertilizer plants be kept in abeyance till 24.05.2012, during which time, the Department of Fertilizers will finalize the guidelines mentioned in paragraph 2

of the supplementary note and thereafter the matter be placed before the EGoM.”

37. It was contended that in view of the above, the impugned decision to suspend supply of KG-D6 field Gas to P&K manufacturing plants and to restrict future supply to urea plants only, was contrary to the decision of the EGoM.

38. It is not disputed that the impugned decision is contrary to the earlier decision taken by the EGoM. However, it is important to note that the said decision was taken in 2012 and it would be always open for the Government to review its policy and modify its decisions. It is also relevant to note that the EGoM has not rejected the proposal to suspend the supply of gas to P&K manufacturing plants, but had only kept the same in abeyance till 24.05.2012, to enable DoF to finalize the guidelines as mentioned in the supplementary note. Thus, the decision to keep the proposal in abeyance was only a temporary measure and it would always be open for the Government to take an appropriate decision in that regard.

39. The petitioner contended that the impugned decision interferes with its private rights, as the petitioner had already entered into arrangements for supply of gas. The petitioner further relied upon the decision of the Supreme Court in **Central Dairy Farm v. GLINDIA Ltd and Others: (2004) 1 SCC 55** in support of the contention that the Government cannot interfere with private rights. In my view, the said contention is without merit. Indisputably, there is a shortage of production of domestic gas and therefore the requirements of various industries and sectors cannot be met by the current production. Therefore, it is necessary that the domestic gas

be allocated to various sectors/units. The petitioner contends that as per the Cabinet decision dated 19.05.2010, it was incumbent on the respondent to make *pro rata* cuts across the entire fertilizer sector. Undoubtedly, it would be well within the respondent's right to direct that a *pro rata* cut be effected across the entire fertilizer sector and the said decision could not be faulted. However, this does not mean that the respondent is precluded from adopting another policy to effect cuts based on its priorities. Clearly, the decision of the Government is within the domain of its power and cannot be interfered with only on the ground that the petitioner or the Court is of a view that a more equitable scheme of allocation could be adopted. As indicated above, this decision is, clearly, a policy decision and the same cannot be interfered with unless it is found to be *mala fide*, discriminatory or ill informed of reason. There is also no law which precludes the respondent from modifying its policy from time to time as it considers expedient.

40. The petitioner has suggested that the shortage of supply in gas be met by a pro-rata cut across the entire fertilizer sector. Indisputably, this would be one of the ways to distribute the available domestic gas. However, the respondent has decided to allocate the gas based on priorities as determined by it.

41. In ***Central Dairy Farm*** (*supra*), the Court had concluded that the notification issued by the State Government in exercise of its powers under Section 15 of the U.P. Milk Act, 1976 were for oblique purposes and to circumvent the judgment of the High Court in an earlier writ petition. In that case, there was a dispute regarding the price payable for cream/*paneer*.

This dispute was carried to the High Court and an order was passed directing the determination of the prices by consensus and in absence of any agreement, on the basis of the price payable by cooperative societies to purchasers along with overhead charges. The High Court had further directed that the dispute regarding over payment be resolved by a Committee to be appointed by the disputing organizations and officials designated under the U.P. Milk Act, 1976. This judgment had attained finality and pursuant to the negotiations held thereafter, the price of products had been fixed. This exercise was sought to be frustrated by issue of a notification under Section 15 of the UP Milk Act, 1976, fixing the price of cream and *paneer* below the agreed rates. It is in this context that the Supreme Court had held that since the prices for the products had been settled through negotiations between the concerned parties, the power of price fixation under Section 15 of the UP Milk Act, 1976 could not have been invoked by the State Government to nullify the agreement reached between the two organizations. As is apparent, the *ratio* of the said decision would have no application in the facts of the present case. The respondents have taken the impugned decision not to frustrate any earlier agreement but to settle the allocation of gas, since the supply of gas has fallen short of the supply that was anticipated earlier.

42. The petitioner's contention that it was necessary for the respondents to have afforded an opportunity of hearing to the petitioner before taking the impugned decision is also without merit. The impugned decision is a policy decision regarding priority in allocation of gas and in the circumstances, it was not necessary to hold any hearing.

43. Although, the Writ Petition has also impugned the Office Memorandum dated 06.01.2014, the petitioners did not press this challenge and no arguments were advanced to assail the said Office Memorandum. The learned counsel for the petitioner filed written submissions as well as additional submissions in response to the submissions advanced on behalf of the Government of India; the challenge to the Office Memorandum dated 06.01.2014 was not pressed. In the circumstances, it is not necessary to consider the prayer made by the petitioner in this regard.

44. Having stated above, it is necessary to refer to the said Office Memorandum dated 06.01.2014 issued by DoF, the operative part of which reads as under:-

“Pending finalisation of the guidelines on recovery, it has been decided to recover undue benefits to these P&K fertilizer companies on account of use of cheap domestic gas in the production of P & K fertilizers from the date of issue of this O.M., considering differential prices of fertilizers based on cost of imported ammonia and the APM gas, subject to reconciliation after final decision by EGoM.”

45. The petition indicates that the petitioner had, by a letter dated 18.02.2014, disputed that any undue benefit had been received on account of supply of domestic natural gas. The petitioner had further disputed the premise that ‘cheap’ gas was meant only for the urea sector. In this regard, it is necessary to note that in 2012 a proposal had been made before the EGoM to suspend the supply of gas to P&K fertilizer plants as the same did not lead to lowering the subsidy burden on the Government. The relevant extract of the note dated 13.01.2012 which indicates the stand of DoF at the material time is quoted below:-

“MoP&NG vide para 8 a. ii. Page 11 of draft agenda note has proposed that P&K fertilizers plants should not get cheap domestic gas because in case of P&K the subsidy is capped and cheaper input gas does not lead to lower subsidy burden on the government. Therefore MoPNG has proposed that allocation to Deepak fertilizers of 0.178 MMSCMD of KG D6 gas may be cancelled and on the same principle, MoPNG may be authorized to cancel any other KG D6 allocation for P&K plants or any allocations in which KG D6 gas is being used for P&K fertilizers. It is submitted that the issue of allocation of domestic Gas for NP/NPK plants, the letter of fertilizer Association of India (FAI) dated 3rd January 2012 (copy enclosed) is self explanatory. The Fertilizers Association of India has argued that in case domestic gas is not available to P&K plants they will have to buy spot LNG at USD 18/mmbtu which will result in Ammonia price of USD 700/MT which will be an unviable proposition and may result in closure of plants and greater dependence on imports. Apart from Deepak Fertilizer the other affected companies will be RCF and GSFC. In addition FAI has stated that priority allocation of domestic gas for NP/NPK plants will also help MFL, Chennai, FACT, Cochin, MFCL, Mangalore and ZIL, Goa when these plants switch feedstock from Naptha to gas in near future. It may be considered that the allocation of natural gas at a reasonable rate is essential for domestic Ammonia capacity and any reduction in these capacities may result in increase in International price apart from greater dependence on imported Ammonia. It is a fact that in case of P&K fertilizers (All fertilizers apart from Urea) the subsidy is capped and cheaper input gas does not lead to lower subsidy burden on the government. It is therefore suggested that the MoP&NG to continue allocation of domestic gas to all fertilizer plants irrespective of the fact that they are producing Urea or other grades. In the meanwhile all natural gas used for any other purpose apart from Urea will be calculated by DOF and differential price from either imported Ammonia or any other benchmark will be recovered from these units Specific guidelines will be framed by DOF in this regard.”

46. The stand of DoF in the supplementary note dated 16.02.2012 reads

as under:-

“DoF has observed that “in case domestic gas is not available to P&K plants they will have to use spot LNG at USD18/mmbtu which will result in Ammonia price of USD700/MT which will be an unviable proposition and may result in closure of plants and greater dependence on imports. Apart from Deepak Fertilizers, the other affected companies will be RCF and GSFC. It is a fact that in case of P&K fertilizers the subsidy is capped and cheaper input gas does not lead to lower subsidy burden on the Government. It is, therefore, suggested that the MoPNG to continue allocation of domestic gas to all fertilizer plants irrespective of the fact that they are producing Urea or other grades. In the meanwhile, all natural gas used for any other purpose apart from Urea will be calculated by DoF and differential price from either imported Ammonia or any other benchmark will be recovered from these units. Specific guidelines will be framed by DoF in this regard.”

47. It is apparent from the above that, at the material time, DoF had suggested that the allocation of gas to plants manufacturing P&K fertilizer may be cancelled. It was, however, noted that the same would lead to fall in the Ammonia production capacity of the country and this would result in greater dependence on imported Ammonia and reduction in the domestic capacity could also result in increase in the international prices. In order to sustain the domestic capacity, DoF had suggested that the supply of domestic gas to P&K manufacturers be continued and an amount representing the differential between the prices of imported Ammonia or any other benchmark be recovered from the P&K manufacturers. The learned counsel for the parties pointed out that Ammonia constitutes the basic component for producing direct fertilizer i.e. Urea as well as complex fertilizer i.e. P&K. Ammonia can be manufactured either by utilizing

domestic natural gas, imported natural gas, Naphtha or fuel oil.

48. In view of the above, it is apparent that, at the material time, DoF felt that P&K manufacturing units ought not to derive any benefit of lower cost of Ammonia resulting from use of domestic gas and, therefore, had suggested that supply of domestic gas be continued to P&K units but an appropriate recovery be made from them. The MoPNG, on the other hand, had suggested that till the guidelines for recovery are framed, supply of domestic gas to P&K units be suspended. At that stage, the EGoM has taken a decision to continue supply of domestic gas to P&K units on a temporary basis till the guidelines for recovery were framed.

49. As noted before, respondents have decided to change the aforesaid decision and have suspended the supply of gas to the petitioner. In the circumstances, the question whether any recovery can be made on an *ad hoc* basis would clearly be a contentious issue. But, since the petitioner has not pressed its challenge in respect of the aforesaid issue, the same is not being considered. However, it is noticed that the petitioner has represented against such recovery, therefore, it is clarified that the petitioner would not be precluded from agitating this issue at a later date and all its contentions in this regard would be open.

50. Before concluding, it would be necessary to observe that it is incumbent upon the respondent to implement its policy uniformly and without discrimination. Since, the only reason for suspending the gas supply to the petitioner and allocating the same to urea manufacturing units is that the same would result in lowering of the subsidy burden, it would be

necessary to ensure that the no part of the domestic gas is used by other fertilizer units for manufacturing complex fertilizer.

51. The petitioner has pointed out that the respondent had not taken any steps to discontinue the supply of gas to RCF or GSFC, which are also producing P&K Fertilizers. In response to the aforesaid contention, the learned ASG had stated that the said companies were also producing Urea in addition to P&K Fertilizer and the amount of gas being used for manufacture of P&K Fertilizer is being calculated and the same would be discontinued.

52. In my view, it would not be open for respondents to implement their policy in a piecemeal manner. The implementation of the policy for different manufacturing units at different times would be discriminatory and would fall foul of Article 14 of the Constitution of India. The Supreme Court in the case of **Natural Resources Allocation, In Re, Special Reference No. 1 of 2012: (2012) 10 SCC 1** had observed that “*The legality and constitutionality of policy is one matter, and the manner of its implementation quite another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem.*”

53. Since the respondents have adopted a policy to suspend supply of gas to P&K Fertilizer units, the said decision ought to be implemented uniformly for all P&K manufacturing units. It is not open for the respondents to suspend the supply of gas to the petitioner while continuing the same to other P&K Manufacturing units, namely, RCF or GSFC. In the

circumstances, the respondents are directed to resume the supply of gas to the petitioner till the time the Government of India are in a position to implement their policy to discontinue supply of gas for manufacture of P&K Fertilizer by other units as well.

54. The petitioner has also pointed out that domestic gas is also being supplied to other industries. It is, thus, also necessary that the policy for allocation of gas is clearly indicated and is implemented in a transparent manner. It is, therefore, directed that the Government of India shall disclose its comprehensive policy for allocation of gas in public domain within a period of six weeks from today and ensure that the same is implemented uniformly.

55. The petition is disposed of with the aforesaid directions. All pending applications are also disposed of. No order as to costs.

JULY 07, 2015
RK

VIBHU BAKHRU, J