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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 28.08.2018
Pronounced on : 14.12.2018

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W.P.(C) 247/2015 & CM No.382/2015

INDIA GLYCOLS LTD. AND ANR. Petitioners

Through: Mr. Balbir Singh, Sr. Advocate with Mr.
Sagar Deep Rathi, Mr. Aman Singh Baroka
and Ms. Monica Benjamin, Advs.

versus

UNION OF INDIA & ORS Respondents

Through: Mr. Sanjeev Narula, CGSC for UOI.
Mr. Sridhar Potaraju, Mr. Prabhat Kumar and
Ms. Ankita Sharma, Advs. for R-7 to 10.
Mr. M.L. Lahoty, Adv. for R-4 to 6.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K.CHAWLA

S. RAVINDRA BHAT, J.

1. The petitioner is engaged in the business of manufacturing and marketing of Ethanol based Chemicals and is dependent upon the supply of Ethanol. Ethanol is a value added product derived from molasses- a sugar industry product. In 2003, the Central Government mandated use of 5% Ethanol in petrol through its Ethanol Blended Petrol (hereafter referred as “EBP”) Programme. By these proceedings, the petitioner challenges the EBP programme as discriminatory since it has an adverse and deleterious impact on the price of ethanol which is vital to its final product, as a raw material; the petitioner says that the scheme, inasmuch as it prescribes mandatory purchase price for

monopoly state owned petroleum and petroleum product companies, is arbitrary.

2. The petitioner has set up a “green” plant in the state of Uttarakhand and manufactures a range of chemicals including Mono ethylene Glycol, Diethylene Glycol, Tri ethylene glycol, Fatty Acid Ethoxylates, Fatty Amine Ethoxylates, Alkyl Phenol Ethoxylates, Castor/Natural Oil Ethoxylates, Ethoxylated and Propylated co-polymers, brake fluids, anti-freeze coolants and performance chemicals etc. Its activity is based on use of Ethanol as raw material; not on petroleum based raw material. It claims that such use not only saves valuable foreign exchange, but also is extremely environment friendly. Ethanol is based on recovery from molasses (a dark, viscous liquid made from sugarcane. Its production is a labour- intensive process requiring several steps, including cutting the sugarcane plants, boiling, straining, skimming and re-boiling.) The petitioner consumes about 2,40,000 kilo litres of ethanol annually; other major chemical plants, like it are ethanol based and produce articles. Put together, all these consume approximately 8,50,000 kilo litres annually. It is stated that the petitioner has a workforce of about 1350 and over the years, it has contributed to the exchequer by way of taxes, to the tune of ₹1000 crores.

3. The petitioner complains that on 9.10.2007, 5% blending of ethanol with petrol was made mandatory by the Union Cabinet Committee of Economic Affairs (hereafter referred as "CCEA") under the EBP, irrespective of the price at which ethanol was offered for sale. On 10.12.2014, the CCEA has fixed the administrative price of ethanol at ₹48.50 - 49.50 per litre for the purposes of EBP. The administered price fixed by CCEA is *ex-facie* impermissible as price fixation can be done by the Government only under the provisions of Essential Commodities Act, 1955 and ethanol is not one of the essential commodities

under the said Act. Hence, the present administered price of ethanol is bereft of the basic legal foundation.

4. Mr. Balbir Singh, learned counsel for the petitioner, argued that under the Government of India (Transaction of Business Rules), 1961, the CCEA is empowered to fix prices with respect to agricultural products and control prices in respect of industrial raw material. The CCEA is only empowered control prices with respect to industrial raw materials, but in the present case, the CCEA has acted in excess of its executive power by fixing the price of ethanol. It is argued on behalf of the petitioners that the EBP has resulted into complete diversion of ethanol from one of the two traditional consumer i.e. ethanol based chemical industries (using 35-40% of ethanol produced), which were set up and encouraged by an earlier policy of GOI for being environment friendly. The higher administered price of ethanol for EBP has resulted into increase in ethanol price for chemical industries as well, making them unviable. In this connection, the petitioners cite the report submitted by Dr. Saumitra Chaudhuri (Member- Planning Commission), prepared at the instance of the Central Government, categorically stated that government fixed price of ethanol will have powerful effect on the prices for other industrial users and therefore, ethanol should be traded in the commodity exchange for both spot and future deliveries to bring transparency in the industry. Further, the National Policy of Bio-fuels (December, 2009) stated that the EBP shall not create supply constraint of ethanol for other industrial use. It is submitted that a similar position was again reiterated by Dr. C. Rangarajan (Chairman, Economic Advisory Council to the PM) in a report that was submitted to the PMO in October 2012, which stated that all user industries i.e. chemical, alcohol and petroleum should compete for procurement of ethanol. The Senior counsel submitted that the National Policy on Bio-fuels, the Dr. Saumitra Chaudhuri

Report and the Dr. C. Rangarajan report were completely ignored by CCEA while fixing administered price.

5. The petitioners argued that on 29.12.2011, the Ministry of Chemicals and Fertilizers (Respondent No.2) expressed its serious reservations regarding implementation of EBP on mandatory basis stating that the chemical industry has been suffering from a long time from shortage of ethanol.

6. The basic objective of Ethanol has not been achieved due to shortfall in supply by the ethanol suppliers. Further, there has been more outflow of foreign exchange due to import of ethanol by chemical industry or value-added chemicals which earlier were being produced from ethanol. The petitioners argue that the EBP programme has not only been unsuccessful, but has failed in its objective. Contending that there is a significant change in the fact situation, during the decade between 2002-2003 to 2011-12, which witnessed a 68% rise in alcohol production (from 1392 million litres in the former period to 2342 million litres in the latter years) and in fact the procurement has not reached the targeted level (5%), but has on an average been in the range of 3.84% per annum.

7. It is argued by Mr. Balbir Singh that the respondents issued tenders, in 2014 to procure Ethanol at a price (delivered cost) of ₹46.96 to ₹73.51 per litre though, just before that as well as on 12-05-2014, there was a Central Government directive to the Oil companies to fix a benchmark pricing to procure Ethanol. In terms of that directive, the Inter-Ministerial Group (IMG) had agreed that the average refinery transfer price will be considered in the previous financial year for deriving the benchmark price of Ethanol which means as is available at Bharat Petroleum Corporation Ltd site with regard to the price Benchmark or petrol at Delhi, the RTP on landed cost basis for BS-1V

petrol is ₹27.25 per litre. Counsel stated that therefore, considering the calorific adjustment of ethanol (anhydrous ethanol has an energy that is about 35% lower than straight MS, i.e. 65% of the value of Motor Spirit), the price of Ethanol procurement (landed) should not be more than ₹17.71 per litre, being 65% of ₹27.25 per litre.

8. It is contended that the pricing mechanism adopted and continued by the UOI is utterly arbitrary and has prejudicial impact on the consumers, who are compelled to pay more for the final product, be it petroleum products used for varied purposes, or in the chemical sector, because the artificially created high prices result in increase of input cost and inflate prices. It is submitted that such pricing policy has also affected legitimate users of Ethanol, like chemical industries, (who use 35% to 40% of the Ethanol produced) being second only to the potable alcohol sector, which uses about 60% of the total Ethanol produced. The chemical industry is seriously prejudiced as it is deprived of the critical resource and is thus suffering tremendously on that account. This results in increased imports of ethanol by the chemical sector, and consequent depletion of valuable foreign exchange.

9. The petitioners rely upon the note and opinion of the Economic Advisory Council, which considered the draft interim report of the Saumitra Chaudhary Committee. It stated that the Council's report of 10th March 2011, commented that potentially EBP could be based either on a combination of the need to reduce consumption of fossil fuels and the motivation for this could be concern for the foreign exchange and import bills as also the environment and the need for improving the economics of the sugar industry by identifying a remunerative use for a by-product of the industry. The Council stated that according to the present EBP was based upon the latter consideration. The counsel then recommended that the end-use price paid for ethanol by the user should be

market determined and not on the basis of helping out an individual set-up; the Council highlighted that this is so in the context of there being a reasonably well-established market for ethanol, both the spirits industry and alcohol-based chemical industry. As a consequence, price for the EBP program should be left to normal commercial process.

10. The petitioners urge that the Committee also noted that in view of the tremendous year-to-year variations as well as supply falling short of demand, it was difficult to continue the compulsory blending program. It suggested, therefore, that the Oil Marketing Companies (hereafter referred as “OMCs”) should have the freedom to manage in EBP with the existing availability, which would ensure that in the surplus years they would achieve a higher blending and lower the levels in years when there is a sharp fall in ethanol production. It was also stated that this is reinforced by the fact that the two major international producers of ethanol i.e. Brazil and USA have their own industrial and political dynamics rendering imports a non-dependable source. In light of these observations, the Council recommended review of the decision of the Central Government of 25th September 2007 and permit sugar factories to produce ethanol directly from sugarcane juice. The petitioners argue that the Council further commented on the draft expert committee report chaired by Dr. Sumitra Chowdhury and stated that over a period of time in order to stabilize the ethanol blending program, it was necessary to encourage broad-based system of price discovery so that administered mechanism could be phased out. Both industrial and portable grade ethanol 95% and anhydrous ethanol should be traded in commodity exchanges for both spot and future deliveries. The committee stated that suitable initiatives should be undertaken and disfigured regard, which would bring about transparency to the industry and form the basis of a market-based price discovery system for the ethanol blending program.

11. It was submitted by the petitioner that when the Central Government was in the process of decision-making on pricing, the sugar mill owners and ethanol producers issued a threat in the form of a circular to its members on 23rd of November 2011 to close down mills for a day to mark the protest. The petitioner states that despite the recommendations of the Sumitra Chowdhary Committee as well as the EAC to the Prime Minister's office, nothing concrete was done to look into the interests of the chemical industries. Therefore, second respondent once again by letter of 29th December 2011 disagreed with the Chowdhary Committee recommendations.

12. It is argued that despite a recommendation by the C. Rangarajan Committee report of October 2012 that special pricing of the products should not be resorted to by the Central Government, and that rather the chemical, fertilizer and other segments of industry which wish to procure molasses should do so on the basis of a competitive market, the UOI went ahead, and issued a directive on 22-11-2012 with reference to price fixation, for procurement by the PSU oil companies. It is also stated that this was followed up by a Press release dated 7th December, 2012, by the Central Government.

13. Learned counsel relied on various replies to queries made to Union Ministers in Parliament during the period 2014-18 to say that the EBP never reached its target of 5% blending (of ethanol with petroleum); rather it reached only 3.49% annually in 2015-16 and during the previous years was lower. The total ethanol procurement was also 65.4 crore litres – it did not go up as dramatically as envisioned; in 2010-11 it was 36 crore litres. It was submitted that on the other hand, the price fixation by the Central Government artificially drove up prices of a commodity which could well be procured at a cheaper rate by domestic industry, which due to the constraint of higher prices, was forced to import the product, to the national detriment.

14. It was submitted that barring statutory price fixation which is constitutionally well recognized, the state or its agencies cannot resort to controlling prices, or dictating to state agencies to procure any product otherwise freely available in the market, on which no curbs are placed, in exercise of executive power. While price fixation under law is known – and has been recognized even as a legislative exercise, in judgments reported as *Union of India v Cynamide India & Anr* AIR 1987 SC 1802; *Shree Meenakshi Mills v Union of India* 1974 (1) SCC 468; and *Premier Automobiles Ltd v Union of India* 1972 (4) SCC N1, it has also been held that such price fixation can be questioned in judicial review, under Article 226 of the Consitution of India. It was argued also that the Constitution Bench in *Shri Sitaram Sugar Mills Company v Union of India* (1990) 3 SCC 223 has ruled that price fixation, even of essential commodities can be challenged on the ground of arbitrariness.

15. It was argued that price regulation which has the effect of adversely impacting the fundamental right to free trade and business, even if resorted to by the state, through its own procuring agencies, is to be through statute. Nothing short of a legal framework can be valid, if it prejudicially impacts the exercise of the right to conduct one's business. In the present case, the price fixation through the medium of executive policy has a disruptive effect on the market of molasses, which disturbs the economics of industries other than sugar. The absence of any law, authorizing such barriers, which are the inevitable result of a controlled market force, is an unreasonable restriction and not saved by Article 19(6) of the Constitution of India; it is also arbitrary. Learned senior counsel cited *Union of India v Naveen Jindal* AIR 2004 SC 1559; *Bijoe Emmanuel v State of Kerala* 1986 (3) SCC 315 and *State of M.P. v Thakur Bharat Singh* AIR 1967 SC 1170.

16. It is submitted by the respondents that the claim to prohibit the Central Ministry of Petroleum and Natural Gas (hereinafter referred to as the "MoP&NG") from implementing the directive of CCEA dated 10.12.2014 on uniform price for procurement of ethanol. Counsel for the Union highlighted that the petitioners and others had approached the Competition Commission of India (hereafter referred as "CCI") complaining against the price fixation orders.

17. The Commission was of the opinion that there existed no *prima facie* case of violation of any of the provisions of either Section 3 or Section 4 of the Competition Act and accordingly closed the matter. Aggrieved by the aforesaid Order of CCI, the petitioner filed an Appeal No. 119 of 2012 (*India Glycols Limited vs. Indian Sugar Mills Association & Ors*) before the Competitive Appellate Tribunal. That Tribunal, in its order dated 9th December 2013, dismissed the appeal. Later the petitioner also preferred a Civil Appeal No.810 of 2014 before the Supreme Court of India, which is *sub-judice*.

18. It is submitted that the Central Government introduced the EBP keeping in mind the beneficial effects it will have on the agricultural sector as well as on the environment. It is further submitted that before the Union Government's decision to implement the EBP consultations were held with the stakeholders and only upon careful consideration of the benefits of the said programme, and the logistical and financial advantages it entailed for a country like India, did the Central Government eventually take an informed decision of mandating EBP. The programme was initiated keeping in mind the long-term advantages that it entails. The Central Government is taking initiatives to ensure that the EBP Programme is successfully implemented. It is also submitted that the petitioner's requirement is for a product of lower purity which is different from what is required by the OMCs for the purposes of blending with motor spirit for the

implementation of the EBP Programme. The main difference between product required by the petitioner and what is required by OMCs is in terms of purity. While the product required by the petitioner has a purity of around 95%, ethanol used by OMCs has a markedly higher purity of 99.6%.

19. Counsel for the Union further submitted that the Central Government notified the EBP programme to help the farmers, to increase the export of petroleum product(s) which will reduce foreign exchange budget of petroleum products as well as to improve environmental quality since EBP leads to lower emission compared to normal petrol.

20. The respondents urge that the basic premise of the present petition is that as a result of the Government's EBP Programme, the Petitioner's business is affected (since it was the main purchaser of base raw material for Ethanol prior to the implementation of the EBP Programme) and the Petitioner, by alleging misleading averments, is trying to sabotage the Government's policy initiative that has been implemented for the benefit of the general public, environment and the Indian economy as a whole. It is submitted that the Petitioner has indulged in forum shopping and has filed several proceedings against the Union with a view to obtain orders from different courts in pursuance of similar (if not identical) remedies.

21. It is urged that the executive power of the Union, under Articles 73 is co-extensive with Parliament's legislative power; and under Article 298 of the Constitution it can enter into trade or contracts, etc. The CCEA is equivalent to the Cabinet, as has been held by various verdicts of the Supreme Court, and is constituted as it is physically and practically not possible for the Union Cabinet to examine all matters of importance. It is urged that the right to formulate a policy is an exercise of legitimate Constitutional Executive Power and the

Central Government is competent for good reasons to modify or change its policy.

22. Learned counsel emphasized that it is a settled law that policy decisions of the Government are not to be reviewed by the courts and that the Courts are to refrain from intervening or venturing into the executive domain of policymaking. Counsel also argued that change in policy based on an established foundation of public interest and in the absence of any allegation that the policy is structured to suit one particular private party or harm a particular private party is impregnable to a challenge. No private right will prevail over a change in policy, structured and mandated in public interest. A change in policy occasioned by application of some principles of public interest cannot be challenged on the ground that it affects private rights of private individuals.

23. It was contended by the Respondent that in economic matters especially, the Government enjoys wide latitude of discretion. In such matters, geographical classification which is based on sound rationale and proper reasons is not *per se* violative of Article 14. In support of this, the respondents relied on *Parisons Agrotech (P) Ltd v. Union of India* (2015) 9 SCC 657; *Anant Prasad Lakshminiwas Generiwal v. State of AP*, AIR 1963 SC 853; *State of Kerala v. TP Roshana*, (1979) 1 SCC 572; *State of MP v. Bhopal Sugar Industries*, AIR 1964 SC 1179 and *Harshendra Choubisa v. State of Rajasthan* (2002) 6 SCC 393.

24. Learned counsel for the respondents also emphasized that the scope of judicial review in economic policy matters is limited and the courts cannot preference one choice of executive policy over another. Therefore, the courts cannot question the wisdom of a policy, only its legality. Reliance was placed

on *State of MP v. Nandlal Jaiswal* (1986) 4 SCC 566 *Arun Kumar Agrawal v. Union of India* (2013) 7 SCC 1 and *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664.

Analysis and Conclusions

25. The relevant extract of the notification regarding the sale of 5% ethanol blended petrol, in several regions of the country, subject to express terms. The extract of the said policy is as follows:

“MINISTRY OF PETROLEUM & NATURAL GAS

NOTIFICATION

New Delhi, the 27th October, 2004

G.S.R.705(E) In exercise. of powers conferred by section 8 of the Essential Commodities Act, 1955 (10 of 1955) read with clause 3(F) of the Motor Spirit and High-Speed Diesel (Regulation of Supply and Distribution and, Prevention of Malpractices) Order, 1998, and in supersession of the notification numbers G.S.R.:644(E) dated the 12th September 2002, G.S.R, the 26th December 2002, G.S.R. 519(E) dated the 27th June, 2003, G.S.R. 778(E), dated the 29th September, 2003, S.O. 39(E), dated the :1st January 2004, G.S.R.146(E), dated the 30th January 2004, and S.O. 522(E), dated the 21st April, 2004,

Central Government hereby directs that 5% ethanol-blended petrol, as per Bureau of Indian Standards specifications, shall be sold in the following States and Union Territories if the price of sourcing indigenous ethanol for supply of ethanol-blended petrol is comparable to the price of indigenous ethanol for alternative uses, and the delivery price of ethanol at the location is comparable to the import parity price of petrol at that location and the indigenous ethanol industry is able to maintain the availability of ethanol for ethanol-blended petrol programme at such prices: -

States

1. *Andhra Pradesh (except Chittor and Nellore districts)*
 2. *Goa*
 3. *Gujarat*
 4. *Haryana*
 5. *Karnataka*
 6. *Maharashtra*
 7. *Punjab*
 8. *Tamil Nadu (only in districts Coimbatore, Dindigul, Erode, Kanayakumari, Nilgiri, Ramanathpuram, Tirunelveli, Tuticorin and Virudhunagar)*
 9. *Uttar Pradesh*
 10. *Uttaranchal.*
- Union Territories*
- Daman and Diu*
- Dadra and Nagar Haveli*
- Chandigarh.*

2. The Central Government may, suo motu, or on a reference made to it, after due consideration of facts, by an order, modify the areas, and the percentage of ethanol in the ethanol blended petrol that may be supplied, and specify the period for the same.

[F.NO. P-45018/28/2000-CC]”

26. Later, the Central Government issued the National Policy on Bio-fuels. The relevant extract of the said policy, dealing with Bio-fuels, reads as follows:

“5.6 Ethanol is mainly being produced in the country at present from molasses, which is a by-product of the sugar industry. 5% blending of ethanol with gasoline has already been taken up by the Oil Marketing Companies (OMCs) in 20 States and 4 Union Territories. 10% mandatory blending of ethanol with gasoline is to become effective from October, 2008 in these States. In order to augment availability of ethanol and reduce over supply of sugar, the sugar industry has been permitted to produce ethanol directly from sugarcane juice. The sugar and distillery industry will be further encouraged to augment production of ethanol to meet the blending requirements prescribed from time to time, while ensuring that this does not in any way create supply constraints in production of sugar or availability of ethanol for industrial use.

5.7 Setting up of processing units by industry for bio-oil expelling/extraction and transesterification for production of bio-diesel will be encouraged. While it is difficult to exactly specify the percentage of bio-diesel to be blended with diesel in view of the uncertainty in the availability of bio-diesel at least in the initial stages, blending will be permitted up to certain prescribed levels, to be recommendatory initially and made mandatory in due course. Gram/Intermediate Panchayats would also be encouraged to create facilities at the village level for extraction of bio-oil, which could then be sold to bio-diesel processing units. 5.8 The prescribed blending levels will be reviewed and moderated periodically as per the availability of bio-diesel and bio-ethanol. A National Registry of feedstock availability, processing facilities and off take will be developed and maintained to provide necessary data for such reviews with a view to avoid mismatch between supply and demand. 5.9 In order to take care of fluctuations in the availability of biofuels, OMCs will be permitted to bank the surplus quantities left after blending of bio-diesel and bio-ethanol in a particular year, and to carry it forward to the subsequent year when there may be a shortfall in their availability to meet the prescribed levels.

5.10 The blending would have to follow a protocol and certification process, and conform to BIS specification and standards, for which the processing industry and OMCs would need to jointly set up an appropriate mechanism and the required

facilities. Section 52 of the Motor Vehicles Act already allows conversion of an existing engine of a vehicle to use biofuels. Engine manufacturers would need to suitably modify the engines to ensure compatibility with biofuels, wherever necessary.

Financial and Fiscal Incentives.

5.16 Financial incentives, including subsidies and grants, may be considered upon merit for new and second generation feedstocks; advanced technologies and conversion processes; and, production units based on new and second generation feedstocks. If it becomes necessary, a National Biofuel Fund could be considered for providing such financial incentives.

5.17 As biofuels are derived from renewable biomass resources they will be eligible for various fiscal incentives and concessions available to the New and Renewable Energy Sector from the Central and State Governments. 5.18 Bio-ethanol already enjoys concessional excise duty of 16% and biodiesel is exempted from excise duty. No other Central taxes and duties are proposed to be levied on bio-diesel and bio-ethanol. Custom and excise duty concessions would be provided on plant and machinery for production of bio-diesel or bio-ethanol, as well as for engines run on biofuels for transport, stationary and other applications, if these are not manufactured indigenously.”

27. The record contains minutes of the CCEA on pricing and supply of Ethanol of 25.09.2007. The later note of 16.02.2010 reads, *inter alia*, as follows:

“CABINET NOTE FOR THE CABINET COMMITTEE ON ECONOMIC

AFFAIRS (CCEA)

No.P-32017/5/2007-CC vol.m

Ministry of Petroleum & Natural Gas decisions taken in the meeting as approved by Hon'ble Minister of Agriculture, Food and Consumer Affairs are as under: -

- i) *The CCEA had in October 2007 decided a fixed price for ethanol on ex-factory basis and the same principle needs to be continued.*
- ii) *A price of Rs. 27/litre ex-factory for ethanol may be fixed for a period of 3 years in the light of affordability by the OMCs and the present scenario of cane and sugar prices. This price can thereafter be reviewed by a Committee of Experts to be appointed for this purpose: which will review the above price after a period of 3 years. If the QMCs so desire, the price of Rs. 27/litre ex-factory can also be referred to the Committee of Experts comprising of Dr. Yashwant Thorat, former Chairman, NABARD as, the Chairman, Chairman, CACP, a representative of sugar industry, a representative of oil industry, Joint Secretary from Ministry of Petroleum & Natural Gas and Joint Secretary (Sugar). The price being fixed will be subject to the approval-of CCEA.*
- iii) *Pricing of ethanol needs to be done on the basis of principles to be arrived after taking into account the dynamics of pricing of sugar cane and petroleum products which needs to be finalized and could be applied in future as well. The Committee should determine the formula/principles which will determine the price for the 3-year period.*
- iv) *The Group of Secretaries as mandated by the CCEA will monitor the implementation of the programme and remove difficulties.*
- v) *A working group of officers from Ministry of Food, Ministry of Petroleum and representatives of oil and sugar industry would be constituted to allocate quantities and locations for supply by the sugar industry as well as reallocations in case of default by some party. The Working Group will also ascertain the possibility of implementation of the programme in States facing problems of availability and other procedural issues, and in case it is not possible to implement the programme then it will recommend accordingly and this will be informed to the CCEA.*

3.5 In the meeting held on 1.12.09, the informal Group of Ministers decided that a price of Rs.27/litre ex-factory for ethanol may be fixed for a period of three years. This price can thereafter be reviewed by a Committee of Experts to be appointed for this purpose which will review the above price after a period of three years. The Committee should determine the formula/principle which, will determine the price for three-year period. However, Department of Expenditure, Ministry of Finance is of the view that the price of Rs 27/litre may apply for a period of six months and the Committee of experts should be set up immediately to finalize its recommendations within a period of six months. Planning Commission has suggested that this committee may be by Dr Saumitra Chaudhury, Member Planning Commission. The suggestion of Planning Commission is accepted as the expert committee headed by a Member Planning Commission can more effectively take care of competing interests in pricing of ethanol.

3.6 In the National Policy on Bio-fuels approved by the Cabinet on 23.7.2009, it has been provided that the National Bio-fuel Steering Committee chaired - by Cabinet Secretary would determine the price of ethanol and decided by the National Bio-fuel Coordination Committee chaired by the Prime Minister. It has been further that the OMCS will be compensated for any losses they suffer on account of fuel falling below the minimum purchase price (extracts of Bio-fuel Policy at Annexure-XII)

3.7 In line with the decision of the Government taken in October, 2007 accepting the principle of a uniform purchase price of ethanol throughout the country and in view of the mandate as per the National Policy on Biofuels, OMCs may be advised to close all the existing tenders and procure ethanol at a uniform ex-factory price of 27/litre for the period of six months, or till the time price as recommended by the Expert committee is approved, whichever is earlier.

3.8 A Committee of Experts may be constituted under the Chairmanship of Dr. Saumitra Chaudhury, Member Planning Commission, Sr. Advisor (energy) and other members as mentioned in Para 2.3(ii) Chairman will have a three years term

or till such time he remains a member of Planning Commission and' subsequently a new Chairman will be appointed by MoP&.NG in consultation with the Planning Commission. Sri Thorat, nominated by the Department of Food and Public Distribution will have a tenure of 3 years on the committee. The Committee will be serviced by MoP & NG. The Committee determine the formula/principle which will' determine the price of ethanol. The recommendation of the Committee would be submitted within six months of its constitution to the Bio-fuel Steering Committee as approved in National Policy on Bio-fuels and the final price so determined would be decided by the National Bio-fuel Coordination Committee."

28. It is apparent, therefore, that from inception, the EBP factored in purchase of ethanol by OMCs, which are public sector units, at prices to be decided by the Central Government. This was part of its overall strategy of not only ensuring cleaner fuel, and lowering emission, but increasing -eventually bio fuel component to 10%. The material on record shows that from an initial low of about 1.75% in 2009, the EBP achieved upto 3.5% of bio fuel element in the petroleum sold. The various cabinet notes and decisions also indicate that a key component in EBP and its envisioned success was on the basis of sustained supply of ethanol at prices determined by the Central Government. This, it was felt, would act as incentive to those supply ethanol, for the EBP. The February 2010 minutes suggests that the Saumitra Chowdhury Committee was set up at the behest of the Central Government.

29. The petitioner has placed considerable reliance on the Saumitra Chaudhary report. The relevant extract of that report is as follows:

"The Draft Report of the Expert Committee chaired by Dr. Saumitra Chaudhuri concludes ...Finally, over a period of time, in order to stabilize the ethanol blending programme, it is necessary to encourage a broad-based system of price discovery so that the administered mechanism may be phased out. Both industrial/potable grade ethanol (95%) and anhydrous ethanol should be traded in the commodity exchanges for both spot and

future deliveries. Suitable initiatives may be taken in his respect. This will bring transparency to the industry and form the basis of a market-based price discovery system for the ethanol blending programme.”

30. The C. Rangarajan Committee, which submitted its report, in October, 2012 to the Central Government, stated *inter alia* as follows:

“The Committee is of the view that there should be no quota imposed (quantitative restrictions) on the mills for sale of molasses. All user industries, viz., potable alcohol, chemicals and petroleum product industries should compete for molasses, and the market should determine its price.”

31. The Economic Advisory Council, by its report dated 10th March, 2011, stated, *inter alia*, as follows:

“(i) The end use price paid for ethanol (by any user) should be market determined and not on the basis of helping out an individual sector. This is particularly so in the context of there being a reasonably well-established market for ethanol both in the spirits industry and alcohol based chemical industry. So the pricing for the EBP programme could be left to the normal commercial process.

(ii) In view of the tremendous year to year variations as well as supply falling short of demand, it is difficult to mandate a compulsory blending programme. The OMCs should have the freedom to manage an EBP with the existing availability. This would ensure that in surplus years they could achieve a higher blending and lower the level in years when there is a sharp fall in ethanol production. This is also reinforced by the fact that the two major international producers of ethanol, Brazil and USA, have their own industrial and political dynamics, rendering imports a non-dependable source.

(iii) The decision of Government dated 25th September 2007 to permit sugar factories to produce ethanol directly from sugarcane juice to augment availability of ethanol and reduce oversupply of sugar may be reviewed in the context of high inflation.”

32. It is evident from the above extracts that the Central Government over the period of 10 years, had been issuing orders, on various aspects concerning biofuel use in the country, including monitoring the EBP, which was first put into place in 2004. The efficacy of that programme was also subjected to close scrutiny, as was the pricing policy associated with it. During the course of these consultations and policy reviews, the Soumitra Chowdhary Committee, the C. Rangarajan Committee and the Economic Advisory Council recommendations were made; they were considered by the Union.

33. The petitioner's challenge to the EBP is two-fold: a constitutional challenge on the basis that the policy is an unsustainable restriction, as it is not founded even on a statute; and two that its continued existence is arbitrary, since it has the effect of driving up the price of ethanol, which has applications other than for biofuel purposes, especially in the chemical industry.

34. So far as the first ground of challenge (i.e. that the policy is not premised on enacted law), the petitioner relies primarily on *Bijoe Emmanuel, Naveen Jindal* and *Thakur Bharat Singh* (supra). In this context, it would be also useful to consider decisions of the court where government policies, not based on legislation, but framed in exercise of the state's executive power, were considered. For instance, in *State of Orissa and Anr. v. Radheysham Meher & Ors.*, 1995 (1) SCC 652, the Supreme Court had to deal with an issue concerning executive power of the State Government to permit the opening of medical stores in hospital campuses, twenty four hours of the day. Storekeepers across the road (of hospitals) challenged the policy, complaining that such a policy had an adverse impact on their business. The court held that setting up such stores within the campus had direct nexus with public interest particularly that of patients and that the policy could not be interfered with because it was not based on any law. It was held that :

“5. Learned Counsel appearing for the appellants vehemently urged before us that the said advertisement inviting applications for settling the shop to have a medical store inside the hospital premises was issued in pursuance of the Government policy and with the sole object to make the medicines available to the patients even at odd hours and, therefore, the High Court should not have interfered with the administrative decision of the Government taken in the public interest. We find considerable force and much substance in these submissions.

6. In the aforesaid background the question arises whether, in the absence of any rule or regulation to the contrary, can the power of the State be abridged on the basis of an individual interest of certain trader, even to the extent of restricting the State's capacity to advance larger public goods. It can hardly be disputed that the consideration of availability of the medicines to the patients should be the uppermost consideration as compared to the right of a person to derive income and make profits for his sustenance by running a medical store for the reason that the medical stores are primarily meant for the patients and not the patients for the medical stores or those who run the same. The submission of the respondents that if a medical store is opened within the campus of the hospital, the same will jeopardise their interest adversely affecting their business and that they will not be able to sustain themselves could not be a valid ground to disallow the appellants to open a shop within the hospital campus. Undoubtedly, the opening of a medical store within the hospital campus will provide a great facility to the patients who may not be having any attendant of their own in the hospital for their assistance at odd hours in the event of an emergency to go out to purchase the medicines. There may be patients having an attendant who may not find it convenient or safe to go out of the campus to purchase the medicines in the night hours. In these facts and circumstances, the paramount consideration should be the convenience of the patients and protection of their interest and not the hardship that may be caused to the medical store keepers who may be having their shops outside the hospital campus. Thus the intention of the appellants to open a medical store within the hospital campus is to salvage the difficulties of the patients admitted in the hospital and this object of the appellants has direct nexus with the Public Interest particularly that of the patients and, therefore, the High Court should not have interfered with the decision of the State

Government to settle the holding of a medical store in the Hospital premises. However, if the respondents so choose, they may keep their medical stores also open day and night. Consequently, the impugned order could not be sustained."

35. In another decision, *Dalmia Cement (Bharat) Ltd. v Union of India*, 1996 (10) SCC 104, the Supreme Court has observed that above economic justice means abolition of such economic conditions which remove inequality between man and man. In our opinion, there has to be positive action for that equality. Again, in *Indian Drugs & Pharmaceuticals Ltd & Ors v Punjab Drug Manufacturers Association & Ors*. (1999) 6 SCC 247, constitutional validity of the policy requiring state authorities to purchase certain medication for use in public hospitals only from public sector manufacturers was challenged. The High Court had quashed the policy. However, quoting its ruling in *Rai Sahib Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549, the Supreme court held that conditions were valid, under the executive power of the state (Article 162 of the Constitution). The challenge on the ground of infraction of rights under Articles 19(1)(g) and 19(6) was turned down. The court observed thus:

"16. It is clear from the various judgments referred to above that a decision which would partially affect the sale prospects of a company, cannot be equated with creation of monopoly. In Ram Jawaya Kapur AIR 1955 SC 549 and Naraindas's [1974] 4 SCC 788 cases, the Constitution Bench also held that the policy restrictions, as discussed above, can be imposed by exercise of executive power of the State under Article 162 of the Constitution. Therefore, the contention of the appellants in regard to creation of monopoly and violation of the fundamental right under Articles 19(1)(g) and 19(6) should fail. The judgment cited above also show that preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation

of Article 14 of the Constitution. We have noted above that this Court in the cases of Oil & Natural Gas Commission v Association of Natural Gas Consuming Industries of Gujarat (1990) Supp SCC 397 ; Krishna Kakkanth (1997) 9 SCC 495 and Hindustan Paper Corpn Ltd v Govt of Kerala (1986) 3 SCC 398, has held that the preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution.

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19. For the above reasons, we are of the opinion that the High Court was right in coming to the conclusion that by the impugned policy, there was no creation of any monopoly nor is there any violation Of Articles 14, 19(1)(g) or 19(6) of the Constitution. In view of the above, we are of the opinion that these appeals should fail and the same are dismissed accordingly. No costs.

CA Nos. 3723 and 3744 of 1988:

20. These appeals are preferred against the judgment and order of the High Court of Punjab and Haryana dated 3-6-1988 made in Civil WP No. 6144 of 1987 wherein the High Court was pleased to allow the writ petition filed by the respondents in these civil appeals, quashing the policy decision of the State of Punjab whereby the State had directed its authorities concerned to purchase certain medicines from the public sector undertakings only. We have today in CA Nos. 4550- 51 of 1989 held that a similar policy decision issued by the State of Rajasthan does not amount to creation of monopoly nor is there any violation of Article 14 or 19(1)(g) of the Constitution. The facts giving rise to the writ petitions before the Punjab and Haryana High Court from which the above civil appeals have arisen being the same, we allow these civil appeals and set aside the judgment and order of the Punjab and Haryana High Court dated 3-6-1988 made in Civil WP No. 6144 of 1987. Consequently, the said writ petition stands dismissed. No costs."

(emphasis supplied)

36. Earlier, in *Bishambhar Dayal Chandra Mohan v State Of Uttar Pradesh & Ors* AIR 1982 SC 33, the Supreme Court had ruled as follows:

“The State in exercise of its executive powers is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the constitution of any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise the administration would come to a standstill.”

37. It is therefore, evident that not all activities of the state, carried out through its executive powers, need to be based on legislation. The state can don the robes of a trader, and enter into commercial relationships; it can procure goods, set price limits for procurements of article by its officers and agencies and in the course of commerce or other multifarious activities it engages in, fashion guidelines including pricing parameters, ceiling limit in respect of nature of articles, or the spelling out the kind of services it wishes to procure, or set out the standard terms of contract. This freedom to contract is fettered only to the extent that it should be aimed at securing public interest and inuring to the larger public good.

38. As to the second argument that the decision to continue with the EBP is unfair, as it results in artificial and tends to drive up prices of ethanol and that without such intervention, whereby the oil manufacturing companies are directed to procure the product at specified prices, the court recollects that in the exercise of policy framing and implementation, the state has flexibility in its approach. In *Premium Granites and Anr. v. State of T.N. and Ors.* (1994) 2 SCC 691 the Supreme Court clarified that it is the validity of a policy and not its efficacy that can be challenged:

“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. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right...”

39. Similarly, in *Delhi Science Forum & Ors. v. Union of India & Anr.* (1996) 2 SCC 405 the court, while rejecting a claim against the opening up of the telecom sector held that courts are not the forum for debate and discourse over the merits and demerits of a policy; it was also stated that no direction can be given by the courts, unless the implementation of executive policies, results in infringement of any of the constitutional or statutory provisions. It held that:

“7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies...”

40. *BALCO Employees' Union (Regd.) v. Union of India and Ors.* (2002) 2 SCC 333 is a decision which highlighted deference to the executive in regard to matters of policy, and underlining that judicial review of economic matters, should be limited to scrutiny of constitutionality of the measure or law, and not the efficacy of the measures.

41. In *Peerless General Finance and Investment Co. Limited & Anr. v. Reserve Bank of India* (1992) 2 SCC 343 the court held that some matters like price fixation are based on such uncertainties and dynamics that even experts

face difficulty in making correct projections, making it all the more necessary for this Court to exercise non- interference:

“31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.”

42. In *State of Madhya Pradesh v. Narmada Bachao Andolan & Anr.* (2011) 7 SCC 639, the court stated that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

43. It is thus, apparent that the court’s jurisdiction is limited to examining the validity or legal efficacy of a policy and ensuring that it does not violate any statutory canon or is not the outcome of an irregular or unfair procedure; nor tainted by *mala fides*. In the facts of the present case, what the petitioner frontally challenges is not just the legality of the EBP but its efficacy as well, contending that it has not yielded the benefits envisioned on the one hand, and on the other, is wreaking havoc on its business. The relative unwisdom – as is

urged by the petitioner in its complaint about the policy, is clearly beyond the ken of this court, which does not simply possess the tools, wherewithal or jurisdiction to examine. The EBP was perceived of as a measure for the larger public good; its implementation is to ensure cleaner, greener fuel, as a measure to protect the environment and also to promote production of ethanol. The Central Government's dictat to its OMCs (oil manufacturing companies) is a conscious policy choice made after considering the relevant macroeconomic considerations. Given the bounds of judicial review, it is unfeasible for this court to venture into the area of a merits review of that policy, purely because the procurement price fixed, tends to drive up prices of ethanol for use by industrial consumers, like the petitioner.

44. In view of the above reasons, it is held that the petition is unmerited; it is accordingly dismissed, without order on costs.



**S. RAVINDRA BHAT
(JUDGE)**

**A.K.CHAWLA
(JUDGE)**

DECEMBER 14, 2018

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