

Supreme Court of India

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Arun Kumar Agrawal vs Union Of India & Ors. on 9 May, 2013

Author: â lâ lâ lâ lâ lâ lâ lâ lâ lâ lâ !..J.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 69 OF 2012

Arun Kumar Agrawal .. Petitioner Versus

Union of India & Others .. Respondents

J U D G M E N T

K. S. RADHAKRISHNAN, J.

1. Petitioner, through this Public Interest Litigation, has challenged the approval granted by the Government of India dated 24.1.2012 for the acquisition of majority stake in Cairn India Limited (CIL) for US \$8.48 billion and also for a direction to the Oil and Natural Gas Corporation of India (ONGC) to exercise its right of pre-emption over sale of shares of CIL on the same terms without causing any loss or profit to the Cairn Energy, and also for a direction to CBI to investigate the reasons for ONGC, a Government of India Undertaking, in not exercising their legal rights under the Right of First Refusal (RoFR) and giving clearance to the CAIRN â Vedanta Deal on the basis of the existing right to share the royalty and cess on pro-rata basis and also for the consequential reliefs.

FACTS

2. Government of India had, earlier, retained the exclusive privilege for mining of hydrocarbons, which was carried out on nomination basis through the statutory corporations like ONGC. The need for maximising domestic exploration of production of oil led to the Government of India encouraging private sector participation in the exploration of oil and natural gas from the year 1980. Rajasthan Block (RJ-ON-90/1) was one of the Pre-New Energy Licensing Policy (Pre-NELP) exploration block offered by a Competitive Bidding Mechanism. The said block was offered in the 4th round of Pre-NELP regime to M/s. Shell India in execution of a Production Sharing Contract (PSC) on 15.5.1995. Since the exploration licence for Rajasthan Block was held by ONGC, the PSC had three parties, (a) Government of India, (b) the bidder, M/s. Shell India Production Development BV (Shell) and (c) the licensee ONGC. PSC was entered into for the exploration and exploitation of crude oil and natural gas. As per the PSC, ONGC is holding 30% of the participating interest (PI) in the development or within the contract area since 13.1.2005.

3. Shell failed to make any commercial discovery even after investing US\$ 9 million and was contemplating to part with its interest in the PSC. Consequently, Cairn Energy India Pvt. Ltd. (CEIL) acquired 27.5% of Shellâ s interest under the contract with effect from 27.1.1999 and a further 22.5% with effect from 20.12.1999. Cairn Energy Hydrocarbons Ltd. (CEHL) acquired Shellâ s remaining 50% interest under the contract with effect from 23.6.2003. CEIL and CEHL, subsidiary companies of CAIRN, have accordingly succeeded Shell as parties to the aforementioned contract and together became the holder of the 70% of the PI.

4. CIL is a company incorporated under the laws of India and listed on the Bombay Stock Exchange and the National Stock Exchange. CAIRN Energy PLC UK (CAIRN) is incorporated under the laws of UK, listed on London Stock Exchange and is a majority shareholder in CIL having 62.4% equity stake in it through its wholly owned subsidiary, CAIRN UK Holdings Limited. Upon its acquisition of 50%, Shell's interest under the contract, CEIL became the operator under the operating agreement with effect from 1.1.2000.

5. CIL and its subsidiary have interests in the seven exploratory blocks (out of which Block VN-ONN-2003/1 has already been relinquished) and three producing fields in India and another exploration block in Sri Lanka as per the following details:

- 70% Participating Interest (PI) & operatorship in producing Development Areas of RJ-ON-90/1 (ONGC 30%),
- 22.50% PI in producing Ravva Field & Operatorship (ONGC 40%),
- 40% IP & Operatorship in producing fields of CB-OS/2 Block & (ONGC 50%); and
- PI in eight other Blocks in India and Sri Lanka where there is currently no production; out of these ONGC has PI in 5 Blocks.

6. CAIRN, vide its letter dated 16.8.2010, informed ONGC that it had announced disposal of its substantial shareholding in CIL to Vedanta. ONGC had a PI in number of blocks/fields where CAIRN is operating through CIL (and/or its affiliates) and it was felt that the proposed transaction might have implications on operations of these blocks/fields. ONGC was of the view that its, inter alia, pre-emptive rights in relation to PI of CAIRN and/or its affiliates under the various agreements with the Government of India and ONGC, and that CAIRN and/or its affiliates required consent of ONGC besides other governmental approvals, to consummate the proposed transaction. ONGC, later, by its letter dated 30.8.2010, requested CAIRN to provide full details of the proposed transaction along with copies of the agreements and other arrangements entered into between CAIRN and/or its affiliates and the proposed buyer and/or its affiliates. CAIRN on 10.9.2010 provided the details of the proposed transaction to ONGC, the operative portion of which reads as follows:

â .. the Transaction is a sale of shares in Cairn India Limited, rather than an assignment of any Participating Interest under the various Production Sharing Contracts (PSCs) and Joint Operating Agreements (JOAs). We believe that the various pre-emption rights under each of the JOAs only apply when there is an assignment, by a party to that PSC, of part or all of that party's Participating Interest.

However, in this case, as the contract with Vedanta Resources Plc is at shareholder level of Cairn India involving sale of shares â there is no change to the Participating Interest in any of the PSCs to which the Cairn India Group is party. Consequently, under the terms of the relevant PSCs and JOAs, no pre-emptive right or requirement for ONGC consent, as claimed in the Letter, is triggered by the Transactionâ .

Consequently, CAIRN took up the stand that various pre-emption rights under each of JOA will apply only when there is an assignment, by a party to a PSC, of its PI in part or full. According to CAIRN, under the proposed transaction, there will be no change to the PI in any of the PSCs to which CIL groups is party and, consequently, under the terms of the relevant PSCs and JOAs, no pre-emptive right or requirement for ONGC's consent would be triggered by the transaction, as claimed by ONGC.

7. ONGC again wrote a letter dated 21.10.2010 requesting CAIRN to provide copies of all agreements and other arrangements entered into between CAIRN and Vedanta in relation to the proposed transaction, including, without limitation, the value assigned to PI in each PSC, to enable ONGC to decide on its future course of action.

8. CAIRN vide its letter dated 29.10.2010 provided a copy of the share purchase deed for the proposed transaction and reiterated its position that the provisions of the JOA do not apply in respect of the proposed sale of shares in CIL.

9. ONGC, later, sought the opinion of the Solicitor General of India, who vide his letter dated 5.10.2010 opined that the Government of India's consent would be required as the acquisition of majority stake and consequent change in control of CIL would amount to an indirect transfer of the PI.

10. The Government of India, it may be noticed, had signed 28 PSCs in respect of pre-NELP exploratory blocks prior to the implementation of NELP. Under the terms of such PSCs, depending on the bargain amongst the parties, statutory levies (royalty and/or cess) on the entire production of oil and gas, including on the share of other partners, are to be borne by National Oil Companies, who are sole licensees in respect of the PEL/ML under those contracts. In view of the above contractual provisions, ONGC has been paying royalty and/or cess on the share of other partners in respect of above blocks awarded under the regime for pre-NELP exploratory blocks. Under the provisions of PSC of RJ-ON-90/1 Block, the cost incurred for petroleum operation is recovered as per the mechanism laid down in Article 14 of the PSC. Section 3.1.9 of the Accounting Procedure stipulates that the royalty payments shall be allowable as "Cost Oil" without further approval of the Government. ONGC, then, vide its letter dated 14.7.2010 proposed to CEIL, the Operator of the Block, to include "Royalty" as "Recoverable Cost" in the calculations of entitlement interest submitted by the Operator to the Operating Committee vide letter dated 1.7.2010. CEIL, however, took up the stand that the same was not cost recoverable.

11. ONGC Board in its 215th meeting held on 29.1.2011 considered the issue regarding treating royalty as cost recoverable and the option of ONGC going for acquisition of the stake in CIL. Board, after taking into account the offered rate of Rs.405/- per share (including non-compete fee of Rs.50/- per share), vis-à-vis internal assessed value of Rs.290/- per share, decided that the following recommendation be forwarded to the Ministry of Petroleum and Natural Gas (MoPNG) for their consideration:

i. Acquisition cost offered by Vedanta to CAIRN for the proposed transaction of sale of the shares of CIL is much above the ONGC evaluated value of the proposed transaction. Therefore, ONGC does not find merit in the acquisition on commercial considerations. ii. To request MoPNG for allowing the recovery of royalty being paid by ONGC for entire crude oil produced from RJ-ON-90/1 block as "Cost Oil" from the total revenue accrued from the block. ONGC may further request MoPNG to decide on the CAIRN Vedanta deal, only after reaching an agreement in this regard between the parties and iii. ONGC, being the licensee and also a participant in the Block, has the right to ensure that the operator has the necessary credentials in carrying out E&P activities.

12. Apart from the above issue, there was a dispute between CEIL and CEHL, parties to the Rajasthan Block and Union of India and ONGC as to the liability of Cess under the PSC for the Rajasthan Block, and CEIL and CEHL had initiated arbitration proceedings in respect of the same. Consequently, CEIL and CEHL were paying their part of the Cess under protest.

13. ONGC received a letter dated 16.8.2011 from CEIL in which it was stated that the Government of India vide its letter dated 26.7.2011 had granted a conditional consent for the proposed sale of shareholding to the extent of 51% to 60% in CAIRN India Ltd. by CAIRN Energy Plc to Vedanta Resources Plc in respect of the NELP and pre-NELP blocks. The Government of India, however, insisted that CIL and its affiliates shall provide No Objection Certificate (NOC) obtained from their consortium partners. MoPNG granted the approval for the proposed transaction on the following conditions:

a) "Parent financial and Performance Guarantees furnished by CAIRN Energy Plc in pursuance of relevant applicable Article(s) of abovementioned 7 NELP PSCs and 3 pre-NELP PSCs, shall be substituted by Parent Financial and Performance Guarantees to be furnished by Vedanta Resources Plc. which needs to be

acceptable to the Government and should be in a form and substance set out in the PSC.

b) Vedanta Resources Plc to guarantee that the technical capability of CAIRN India is and shall be kept undisturbed and ensure continued production of oil and gas as per approved Field Development Plan (FDP) from time to time. In case Vedanta Resources Plc. fails to perform as guaranteed then GOI shall be entitled to stipulate additional conditions, as deemed fit, including change in operatorship of blocks.

c) Vedanta Resources Plc. Also shall give an undertaking that they shall ensure adherence to the approved field development plans and work programs.

d) Cairn India and its affiliates shall provide the No objection certificate (NOC) obtained from their consortium partner(s) for each abovementioned blocks (except for Ravva (PKMG- 1) and CB-OS/2 blocks) for the proposed transaction under the respective PSCs.

e) Necessary approval from other regulatory bodies such as SEBI, on the proposed transaction to be obtained and submitted by Vedanta Resources Plc.

f) Necessary Security Clearance from Ministry of Home Affairs in favour of the assignee i.e. Vedanta Resources Plc. to acquire the shareholding shall be obtained and submitted by the said assignee.

g) In respect to RJ-ON-90/1 block, the parties, CAIRN India Ltd., CAIRN Energy Pty Limited (CEIL), CAIRN Energy Hydrocarbon Ltd. (CEHL) and any other affiliate company of CIL and Vedanta Resources Plc. and any other affiliate company of Vedanta Resources Plc. shall agree and give an undertaking that Royalty paid by ONGC is cost recoverable by ONGC as contract costs, as per the provisions of PSC.

h) In respect to RJ-ON-90/1 block, CAIRN Energy Pty Limited and CAIRN Energy Hydrocarbon Ltd. shall withdraw the arbitration case relating to dispute raised by them on payment of Cess under the PSC.

14. CIL, later, by its letter 15.9.2011 informed ONGC that based on the result of postal ballot by their shareholders, the Board of Directors of CIL has passed a Resolution for acceptance of the conditions (g) to (h) mentioned earlier with regard to cost recovery of royalty and dropping of arbitration proceedings on Cess.

15. ONGC had, earlier, forwarded the entire details to SBI Caps vide their letter dated 1.6.2011 for a detailed financial valuation/analysis of the viability of ONGC entering into the said transaction and SBI Caps validated the financial valuation carried out by ONGC. SBI Caps valued Cairn India's offer under various scenarios. Considering CIL's valuation under the MC approved production profile of 175 kbopd, its valuation worked out to be US\$ 6948 million and the share price if Rs.165. Details of production capex, opex, crude oil reads as follows:

Case-I	As per Approved JV case for Brent Crude Price of US\$100/bbl	and WACC of 12%, Cess Rs.2626.50/MT	MC Approved JV	PSC Term	case - Peak	Recoverable Reserves	Production 175
(MMBLS)	kbopd	Capex	US\$	Million	Opex	US\$	Million
CAIRN INDIA Share Price	Rs/Share	2020	372	4625	2467	6414	153
		2025	458	4625	3434	6768	161
		2040	579	4625	6027	6948	165

16. SBI Caps also worked out valuation of CIL based on futuristic estimated production profile keeping other assumptions i.e. price, royalty rate, cess, WACC same as above. It was opined, under the most likely case, i.e. production profile of 228 kbopd which includes EOR also, the NPV of CIL valuation till 2040 works out to be \$10695 MM and the share price is Rs.254. The details of Production, CAPEX, OPEX, Crude Price considered are as under:

CIL-Likely Case

Case-IV As per 2P CIL Production cases for Brent Crude Price of US\$100/bbl and WACC of 12%, Cess Rs.2626.50/MT CIL Profile â PSC Term Peak Production Recoverable Reserves (MMBBLs) 228 kbopd Capex WF+EOR US\$ Million Opex US\$ Million NPV US\$ Million CAIRN INDIA Share Price â Rs/Share 2020 737 6055 5482 9820 234 2025 902 6055 7234 10483 249 2040 1037 6055 10550 10695 254

17. It was also noticed that, in the High Case, where production profile of 257 kbopd was estimated considering 2P profile with WF including EOR, Barmer Hill and estimated production from 20 other small fields also, the economic valuation of the CIL is \$12239 MM and the share price is Rs.291. The details of Production, CAPEX, OPEX, Crude Price etc. considered are as under:

CIL-High Case

Case-IV As per 2P CIL Production cases for Brent Crude Price of US\$100/bbl and WACC of 12%, Cess Rs.2626.50/MT CIL Profile â PSC Term Peak Production Recoverable Reserves (MMBBLs) 228 kbopd Capex WF+EOR+ US\$ Bh+20 Small Million Fields Opex US\$ Million NPV US\$ Million CAIRN INDIA Share Price â Rs/Share 2020 811 7618 6664 1272 268 2025 998 7698 8818 11985 285 2040 1167 7698 12922 122239 291

18. The Royalty paid on behalf of CEIL & CEHL which has been recovered for the period since inception till September, 2011 and from 1.10.2011 to 30.6.2012 is as under:

IRJ-ON-OP-1 100% 70% Royalty since inception till 784,833,924 549,383,747 Sep 11 Royalty from Oct 11 to 602,140,130 421,498,091 June 12 Total 1,386,974,054 970,881,838

19. SBI Caps, therefore, on the basis of the above given statistics, opined that under the highest profile case with base assumptions, the value of these shares works out to Rs.291/- and even considering higher CAPEX (130% incremental) and lower OPEX (-30% total) and increase in crude price from US\$ 100/bbl to US\$ 110/bbl, the value of share increases to Rs.328. Amongst the various scenarios, it was opined that the value of shares is maximum at Rs.331, considering CAPEX at 100% and OPEX at 70%, with crude price at \$110 per bbl. In both the scenarios, the value of share remained below the offered rate of Rs.355.

20. We notice that the above report of the SBI Caps was placed before the 109th Project Appraisal Committee meeting held on 27.9.2011, wherein after detailed deliberations, the PAC resolved for consideration and approval of the ONGC Board that ONGC might not exercise its pre-emptive rights with reference to the offer made by CAIRN and its associates to Vedanta and its associates, for the proposed transaction of sale of shares of CIL at the rate of Rs.355/- per share as the same was more than the value estimated by SBI Caps. It further resolved that the NOC to the proposed transaction be granted to CAIRN with a condition that CAIRN, Vedanta and their associates should enter into an agreement with ONGC to protect ONGC's interest so that royalty and cess in respect of block RJ-ON-90/1 would be binding on Cairn, Vedanta and their future assignees etc. in alignment with MoPNG direction dated 26.7.2011.

21. ONGC Board then met on 27.9.2011 and, after due consideration of the Agenda item, the recommendations of the PAC as well as presentation made by M/s SBI Caps, approved the proposal and passed the following resolutions:

â RESOLVED that ONGC may not exercise its pre-emptive rights with reference to the offer made by CAIRN and its associates to Vedanta and its associates, for the Proposed Transaction of sale of shares of CIL at the rates of Rs.355/- per share as the same is more than the value evaluated by SBI CAPs.

RESOLVED FURTHER that NOC to the Proposed Transaction be granted to CAIRN and its associates for the five blocks as mentioned in Para 5 above with a condition that CAIRN, Vedanta and their associates

should enter into an agreement with ONGC to protect ONGC's interest so that royalty and Cess are binding on CAIRN, Vedanta and their future assignee etc.

RESOLVED FURTHER that CMD, ONGC be and is hereby authorized to finalize the draft agreement/letter and Company Secretary, ONGC be and is hereby authorized to sign the agreement/letter on behalf of ONGC.

22. The Cabinet Committee of Economic Affairs (CCEA), as already indicated, had on 30.6.2011 given its approval to CEIL for selling its Indian unit to Vedanta subject to the new owner agreeing to share royalty and pay oil cess on mainstay Rajasthan oilfields. Union Cabinet also, on 24.1.2012, gave its final approval to London-based mining group Vedanta Resources Plc's acquisition of a majority stake in Cairn India for \$8.48 billion. It was noticed that Cairn and Vedanta had complied with all the pre-conditions stipulated by the Government of India and ONGC and the transaction between them stood concluded.

ARGUMENTS

23. Shri Prashant Bhushan, learned counsel appearing for the petitioner, questioned the decision of the Government of India in giving clearance to CAIRN-Vedanta deal, without ONGC exercising the RoFR, but for which it was submitted that the State Exchequer would have benefited to the tune of Rs.1,00,000/- crore rupees. Learned counsel submitted that petrol and natural gas is held by the State in public interest and cannot be given away without due exercise of power and discretion guided by clear and cogent policy, because the natural resources should not be subject to private ownership or private commercial exploitation. Reliance was placed on the judgments of this Court in M. C. Mehta v. Kamal Nath & Others (1997) 1 SCC 388, Meerut Development Authority v. Association of Management Studies and Another (2009) 6 SCC 171 and Centre for Public Interest Litigation and Others v. Union of India and Others (2012) 3 SCC 1.

24. Shri Bhushan submitted that the Government has unlawfully granted extension to Cairn India Limited for carrying out exploration activities beyond the period framed by the Rajasthan Block PSC, which has been commented upon by the Comptroller and Auditor General (CAG).

25. Shri Mukul Rohatgi, learned senior counsel appearing for the respondent, assisted by Shri R. R. Sasiprabhu explained to the Court in detail the main features of PSC dated 15.5.1995 as well as the transaction entered into between Cairn and Vedanta. Learned senior counsel pointed out that ONGC has, inter alia, pre-emptive rights in relation to Cairn-UK's PI under various agreements with the Government of India and ONGC, and that Cairn UK and/or its affiliates required consent of ONGC, besides other governmental approval to consummate the proposed transaction. Cairn UK took up the stand that the transaction was only a sale of shares of CIL rather than assignment of any PI under various PSCs and JOAs and that there would be no change to PI in any of the PSCs in which Cairn India group was a party. ONGC had two disputes in RJ-ON-90-1 block, between ONGC and CEIL/CEHL which had huge financial implications for ONGC with regard to royalty and cess. Further, there was another dispute under the PSC on the issue of liability of cess. CEIL and CEHL took the stand that they were not liable for payment of cess and hence had initiated arbitration proceedings in London against Union of India and ONGC. All these issues were placed before the ONGC Board on 29.1.2011 and also on 27.9.2011 and after due consideration of the Agenda item and noticing the presentation made by SBI caps, finally decided to go for the proposed transaction between Cairn UK and Vedanta UK. Learned senior counsel submitted that the above decision was taken by ONGC in public interest and taking into consideration its financial implications and on-going disputes between ONGC and CEIL/CEHL.

26. Learned senior counsel also submitted that the Courts have consistently restrained from interfering with economic decisions and that wisdom and advisabilities of economic policies are ordinarily not amenable to Judicial Review. Reference was made to the judgment of this Court in Balco Employers' Union (Regd.) v. Union of India and Others (2002) 2 SCC 333, Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Ltd. and

Another (2011) 1 SCC 640 and Life Insurance Corporation of India v. Escorts Limited and Others (1986) 1 SCC 264.

27. Shri Siddharth Luthra, learned Additional Solicitor General appearing for the Union of India, submitted that the ONGC Board forwarded its request to MoPNG to ensure that royalty for Rajasthan Block be treated as cost recoverable. MoPNG on 26.3.2011 submitted the recommendations before the Cabinet Committee for Economic Affairs (CCEA) for decision of the Cabinet Committee on the issue of proposed transaction between Cairn-Vedanta. CCEA referred the matter to the Group of Ministers (GOM) and GOM on 25.11.2011 recommended grant of approval based on certain conditions. Union of India took the stand that there was no commercial viability for ONGC to purchase CIL share at the value being offered by Vedanta. Shri Luthra submitted that this decision was taken by ONGC in public interest and after taking into consideration all commercial and technical aspects of the matter and that this Court, in exercise of its powers under Article 32 of the Constitution of India, shall not interfere with the economic decision taken by the Union of India and ONGC.

28. Shri Ritin Rai, learned counsel appearing for the third respondent, referring to the reply affidavit filed on 3.10.2012, explained the circumstances under which the transaction was entered into by it with Vedanta. Learned counsel submitted that the third respondent is not a party to any of the PSCs and, prior to the completion of the transaction, had taken all reasonable steps to ensure that CEIL and its subsidiaries comply with all applicable laws and contractual obligations in India.

29. Shri Harish Salve, learned senior counsel appearing for the fourth respondent, submitted that it was up to the competitive bidding operator who was granted the right to explore the oil and natural gas making huge investment and that exploration costs would be recoverable only if oil was discovered. Shri Salve pointed out, initially, Shell had 100% IP in the PSC, but it failed to make any commercial discovery even after investing US\$ 9 million and, then, CAIRN took up the challenge. Learned counsel submitted that Cairn gave up two of its rights to secure government permission, that is, it had agreed to make royalty cost recoverable and withdrew its claim that the burden of cess would be borne by the Government of India. Learned senior counsel submitted that assigning of a PI is a well defined concept and, referring to the judgment of this Court in *Vodafone International Holdings v. Union of India* (2012) 6 SCC 613, learned senior counsel submitted that the transfer of a share does not result in transfer of underlying assets. Learned senior counsel submitted that various decisions taken in this case either from the side of Union of India, ONGC or by respondent nos. 3 and 4, were commercial decisions based on which the parties have acted and this Court, sitting in its jurisdiction, shall not interfere with such commercial decisions. Referring to the report of CAG, learned senior counsel submitted that this Court shall not place any reliance on the report of the CAG and grant any relief to the petitioner based on the CAG report, since in case of any dispute between the Ministry and CAG, that is to be resolved by the Parliament and not this Court, sitting in this jurisdiction under Article 32 of the Constitution of India.

DISCUSSION

30. The question that falls for consideration in this case is whether this Court sitting in this jurisdiction is justified in interfering with a complex economic decision taken by a State or its instrumentalities in the absence of violation of any statutory provision or proof of mala fide or on extraneous and irrelevant considerations.

31. The Government had initially the exclusive privilege of exploration of mineral ore resources in India. The Parliament felt the need to provide for the regulation of oil fields and for the development of mineral resources and enacted The Oil Fields (Regulation and Development) Act, 1948 (Act 53 of 1948) and later The Petroleum and Natural Gas Rules, 1958 were framed for the regulation of petroleum operations and the grant of licenses and leases for exploration and development of petroleum in India. The Rules provide for the grant of exploration licenses and mining leases in respect of lands vested in State Government by that State

Government with the previous approval of the Central Government, and ONGC had been duly granted an exploration license to carry out exploration operations in association with other companies in the concerned area.

32. The Government of India, ONGC and Shell on 15.5.1995 entered into a PSC in respect of the Rajasthan Block RJ-ON-90/1 for the exploration and exploitation of crude oil and natural gas, details of which have already been stated in the earlier part of the Judgment. The Rajasthan Block, which is the subject matter of the present writ petition, was offered in the 4th round of pre NELP (New Exploration Licensing Policy) by competitive bidding mechanism which culminated in the execution of PSC Contract on 15.5.1995. Shell was a party to the agreement to the PSC dated 15.5.1995 and even after seven years of Contract Shell could not make any commercial discovery, though large amounts were invested between 1999 and 2003. Consequently, it had to transfer its Participating Interest (PI) to CEIL and CEHL. The following chart produced by ONGC would give a broad picture of the share holding of the various companies prior to transfer and after its transfer:

[pic]

33. The above chart will indicate that CEIL and CEHL, subsidiaries of Cairn, have succeeded Shell as parties to the PSC and together they became holder of 70% of the PI and later Vedanta Resource Ltd. purchased CEIL's shares through CAIRN.

34. CEIL is a company incorporated under the laws of India and listed at Bombay Stock Exchange and National Stock Exchange. Cairn Energy is incorporated under the laws of (UK) and listed in London Stock Exchange and the majority share-holders in CEIL having a 64.2% equity stake in it through its wholly owned subsidiary, Cairn UK Holdings Limited. Upon acquisition of 50% of the Shell's interest under the contract CEIL became the operator under the operating agreement w.e.f. 1.1.2000. Cairn later announced on 16.8.2010 a disposal of its substantial shareholding in CEIL to Vedanta. ONGC had reviewed the various agreements signed by Cairn and/or its affiliates with the Government of India and inter se with ONGC as one of the participating companies in various oil blocks/fields. ONGC had pre-emptive rights in relation to participating interest of Cairn and/or its affiliates. Under the various agreements with the Government of India and ONGC and Cairn and/or its affiliates required consent of ONGC besides other governmental approval to consummate the proposed transaction. The various decisions taken by the ONGC and the Government of India subsequently, as well as steps taken by the ONGC referring to SBI Caps of its financial implications has already been noticed in the earlier part of this Judgment.

35. The question whether the CEIL, the operator of the block has to include Royalty as recoverable cost and whether it is commercially viable for the ONGC to exercise its RoFR were elaborately considered by the ONGC Board in its various meetings held on 29.1.2011, 27.9.2011. The Board after due deliberations and considering the offered right at Rs.405/- per share vis-à-vis the internal assessed value of Rs.290/- per share, noticed that acquisition stake offered by Vedanta Cairn for the proposed transaction of sale of shares of CEIL was much above the ONGC evaluated value of the proposed transaction, and hence was not advisable for the ONGC to acquire shares. Further there was an ongoing issue/dispute relating to cost recovery of Royalty being paid by ONGC for the entire crude oil producing field RJ-0A-90/1 block pursuant to provisions of accounting procedure of PSC. Further there was a dispute between CEIL and CEHL and ONGC as to the liability of cess under the PSC for the Rajasthan Block. CEIL and CEHL had initiated arbitration proceedings in respect of the same. It was noticed that a large sum, running into several million US \$ would have been payable by ONGC had CEIL and CEHL were successful in the arbitration. Now due to the various agreements/decisions taken by the Union of India and ONGC, the arbitration against Union of India and ONGC in relation to the cess was withdrawn since the Government of India and ONGC had accorded their consent for the deal with Cairn and Vedanta. Further CEIL and its affiliates had also agreed to treat royalty paid as cost recoverable by ONGC as contract costs. ONGC had already derived financial benefit to the tune of US \$970,881,838 towards royalty paid by it till June 2012 and would continue to derive similar

benefits during the currency of the contract i.e. upto 2020.

36. We notice the decision taken by the ONGC not to exercise its RoFR was taken after an elaborate and due deliberations. The report of SBI Caps, after making a detailed financial analysis also supported the decision taken by the ONGC. The decision to grant no objection to the transfer of shares of CEIL from Cairn to Vedanta was also on the basis that the proposed share price of share was at Rs.355 per share, was well in excess of its intrinsic value as were evaluated by SBI Caps. SBI Caps report evaluated each share of CEIL at Rs.291 with the highest production profile under normal circumstances. It was concluded that even considering various other scenario makes possible value at Rs.331 per share.

37. The Union of India also endorsed the decision taken by the ONGC after due deliberations. The matter was finally placed before the Cabinet Committee of Economic Affairs, which placed the matter before the Group of Ministers and Group of Ministers on 27.5.2011 granted its approval, based on certain conditions. The same was conveyed to the parties and the Vedanta Resources conveyed its acceptance to the conditions imposed by CCEA. Cairn also indicated to ONGC that CEIL Board had also accepted the conditions imposed upon it and that the cess arbitration, which had been initiated by Cairn against ONGC was also withdrawn.

38. We notice that the ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economical factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives.

39. Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal. This Court in State of M.P. and others v. Nandlal Jaiswal and others (1986) 4 SCC 566 referring to the Judgment of Frankfurter J. in Morey vs. Dond 354 US 457 held that "we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any straight jacket formula." In Metropolis Theatre Co. v. State of Chicago 57 L Ed 730 the Supreme Court of the United States held as follows:

"The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void."

In Life Insurance Corporation of India v. Escorts Ltd. and others (1986) 1 SCC 264 this Court held

"that the Court will not debate academic matters or concern itself with intricacies or trade and commerce. The Court held that when the State or its instrumentalities of the State ventures into corporate world and purchases the shares of the company, it assumes to itself the ordinary role of shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholders and there is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder."

In Liberty Oil Mills and others v. Union of India and others (1984) 3 SCC 465, this Court held that expertise in public and political, national and international economy is necessary, when one may engage in the making or in the criticism of an import policy. Obviously, courts do not possess the expertise and are consequently, incompetent to pass judgments on the appropriateness or the adequacy of a particular import policy.

In Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, this Court held as follows:

It is neither within the domain of the courts nor the scope of 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 the 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. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to trial and error as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.

In Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited And Another (2011) 1 SCC 640, this Court held that economic and fiscal regulatory measures are a field where Judges should encroach upon very wearily as Judges are not expert in those matters.

This Court in Bhavesh D. Parish and Others v. Union of India and Another (2005) 5 SCC 471, took the view that, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all. In Centre for Public Interest Litigation and Another v. Union of India and Others (2000) 8 SCC 606, this Court held as follows:

20. It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations levelled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral consideration alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants.

40. The MoPNG on 26.7.2011 conveyed to Cairns UK and its affiliates and Vedanta UK that the Government of India was pleased to grant its consent for the Cairn -Vedanta -- subject to fulfilment of the certain conditions i.e. they had to give an undertaking that in the royalty paid in the ONGC was cost recoverable by ONGC as contract cost and to withdraw the arbitration case relating to cess. The dispute on royalty and cess was bothering ONGC for quite some time and ONGC was facing a claim running into several million US Dollars in an arbitration proceeding in London. Union of India and ONGC, in their wisdom could make Cairn agree to those conditions, it gave an undertaking that in the royalty paid in the ONGC would cost recoverable by ONGC as contract cost and to withdraw the arbitration case relating to cess. Union of India and ONGC, in their wisdom could make Cairn agree to those conditions which was clearly a business commercial decision taken with good intention, since the fate of the arbitration proceedings could not be predicted. ONGC also in its business prudence decided not to go for shares in CEIL, first of all it was equated at a very high premium, secondly it guaranteed no return either in the way of dividend or any other profits. Further, it might lead to huge liability of investment and with a minimum work programme and the remaining PSC's help by CEIL

which involved exploitation operations with no guarantee of any commercial discovery. The result of CEIL and its affiliates agreeing to treat royalty paid by ONGC as cost recoverable by ONGC as contract cost, and ONGC has derived benefits to the tune of US \$ 970,881,838 towards royalty paid by till June 2012 and would continue to derive similar benefits till the currency of the contract i.e. till June 2020.

41. Consequent to the agreement dated 30.11.2011, ONGC received Rs.5000 crores approximately towards CEIL and CEHL's share of royalty for the period from 29.8.2009 to 30.7.2012 besides CAIRN and Vedanta agreeing to pay their share of royalty and cess in future involving huge financial implications.

42. ONGC in its wisdom decided not to acquire any shares of CEIL at a high premium of Rs.335 per share plus Rs.50 per share as not to compete fee, which would have come to ONGC at a hefty cost of 4.44 billion US \$ about Rs.6,20,600 crores rupees, i.e. even if ONGC had exercised its ROFR it would be a 30% share holder of CEIL and the control of CEIL would have, in any event, remained with Cairn and Vedanta which would have then altogether 50% in CEIL, in other words, with the acquisition of 30% shares in CEIL, State of Rajasthan Block would remain unchanged and hence ONGC could not have got any increase in shares in the profits much-less any increase in profits by 40%.

43. We are of the view that on facts, as well as on law, the ONGC and the Government of India have taken a prudent commercial and economic decision in public interest. We are not prepared to say that the decision is mala fide or actuated by any extraneous or irrelevant considerations or improper motive.

C A G Report

44. The petitioner has placed considerable reliance on the Comptroller and Auditor General (â CAGâ) Report. Some of the comments in the CAG Report were highlighted by counsel appearing for the petitioner to contend that the declaration of fresh discoveries during the appraisal/development phases within delineated discovery/development areas amounted to irregular extension of exploration activities, which is not in consonance with the terms of the PSC.

45. The petitioner has also sought a direction to CAG/Government of India to calculate the alleged losses from payment of 100% royalty and cess by ONGC before the Cairn-Vedanta deal and for a direction to ONGC/Government to recover the excess royalty paid by ONGC from Cairn India.

46. CAG may be right in pointing out that public monies are to be applied for the purposes prescribed by Parliament and that extravagance and waste are minimized and that sound financial practices are encouraged in estimating and contracting, and in administration generally.

47. We have come across several instances where considerable reliance has been placed on the CAG Report and projecting it as gospel truth. Let us examine the role of the CAG under our Constitutional scheme.

48. The Comptroller and Auditor General (â CAGâ) is appointed under the provisions of Chapter 5 of the Constitution of India. Article 149 provides thus:

â Article 149. Duties and powers of the Comptroller and Auditor General â The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by the Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or excisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.â

49. The CAG earlier functioned under the Government of India (Audit and Accounts) Order, 1936 as adopted by the India (Provisional Constitution) Order, 1947, which was repealed by Section 26 of the Act of 1971. The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 was enacted by the Parliament in the year 1971. Section 10 of the Act states that in relation to the Government, the CAG shall compile the accounts of the Union and the States. The CAG on the basis of these accounts, prepares the annual accounts which are submitted to the President of India or the Governor of the State or the Administrator of the Union Territory. The audit of the Union and the States is under Section 13 of the Act. The scope of the audit extends to the audit of all expenditure so as to ascertain whether the monies shown in the accounts as having been disbursed were legally available for such disbursement and whether the expenditure conforms to the authority which governs it. The CAG has to satisfy himself that the rules and procedures designed to secure an effective check on the assessment, collection and proper allocation of revenue are being duly observed under Section 16. The CAG also has to examine decisions which have financial implications including the propriety of the decision making.

50. The Reports of the CAG are required to be submitted to the President, who shall cause them to be laid before each House of Parliament, as provided under Article 151(1). In relation to the States, reports are submitted to the Governor, who shall cause them to be laid before the Legislature of the State, as per Article 151(2) of the Constitution. When reports are received in the Parliament, they are scrutinized by the Public Accounts Committee (PAC). The PAC is established in accordance with Rule 308 of the Rules of Procedure and Conduct of Business in Lok Sabha. The function of the PAC is to examine the accounts of the Union and the report of the CAG. The PAC shall be principally concerned whether the policy is carried out efficiently, effectively and economically, rather than with the merits of government policy. Its main functions are to see that public monies are applied for the purposes prescribed by the Parliament, that extravagance and waste are minimized and that sound financial practices are encouraged in estimating and contracting, and in administration generally. The PAC also has the power to receive evidence, the power to send for persons, papers and record and can receive oral evidence on solemn affirmation. Once the report is prepared, the report of the PAC is presented to the House.

51. Durga Das Basu in Commentary on the Constitution of India 8th Edition 2009 at page 6058 says:

that the Public Accounts Committee is to examine the report of the Comptroller and Auditor General, in order to satisfy itself on certain points:

Firstly, it has to verify that the moneys shown in the accounts as spent have actually been spent for the purpose for which Parliament granted them.

Secondly, it has to satisfy itself that the moneys granted by Parliament have been spent by the Government within the scope of the demands. This means that no expenditure should exceed the amount granted without fresh parliamentary approval, nor should the grant be appropriated for a new service not contemplated in the demand. Even if there is a surplus of a grant under one vote, it cannot be appropriated to another vote without sanction of Parliament.

The exercise of this function gives the Committee a comprehensive power of survey over the entire scheme of expenditure of the government as well as the administration. Though the Committee has nothing to question the policies of the government, it has to scrutinise the implementation of the policies through its review of the expenditure. Both in England as well as in India, it has been acknowledged that the present function includes a criticism of extravagant or wasteful expenditure of public money, in general, and in this connection, it is entitled to point out the weak points in the administration of the departments concerned, and also to ensure that proper action has been taken against delinquents guilty of irregularity or breach of the rules, though it has no power to enforce its comments by any direct administrative action.

Thirdly, the audit of the accounts of the State corporations is another important function entrusted to the Public Accounts Committee. Its importance is increasing with the ever-expanding State activity in the sphere of industry and enterprise.

52. In this connection it is useful to refer to the practice of the PAC, as set out in a note found in the website of the Lok Sabha which states as follows:

Selection of Subject for Examination:

As the work of the Committee is normally confined to the various matters referred to in the Audit Reports, and Appropriation Accounts, its work normally starts after the Reports of the Comptroller and Auditor General on the accounts of the Government are laid on the Table of the House. As soon as the Committee for a year is constituted, it selects paragraphs from the reports of the Comptroller and Auditor General that were presented after the last selection of subjects by the Committee for in-depth examination during its term of office.

Assistance by Comptroller and Auditor General

The Committee is assisted by the Comptroller and Auditor General in the examination of Accounts and Audit Reports.

!

Calling for Information from Government

The Committee calls for, in the first instance, background note and advance information from the Ministries/Departments concerned in regard to subjects selected by it for examination.

!

Evidence of Officials

The Committee later takes oral evidence of the representatives of the Ministries/Departments concerned with the subjects under examination. !

Report and Minutes

The conclusions of the Committee on a subject are contained in its Report which, after its adoption by the Committee, is presented by the Chairman to the Lok Sabha. Minutes of the sittings of the Committee form Part II of the Report. A copy of the Report is also laid on the Table of Rajya Sabha. The Reports of the Committee are adopted by consensus among members. Accordingly, there is no system of appending minute of dissent to the Report.

53. Action Taken Reports (ATRs) are then required to be made out by the ministries. Speaker has the power to issue directions under the rule and procedure. Direction 102 requires the Government to, as early as possible, furnish the PAC with a statement showing the action taken on the recommendations of the PAC report. The Parliament has before it not only the report of the CAG, the report of the PAC in the first instance drawn up after hearing the view of the ministries, the Action Taken Report including the replies of the Government and the further comments of the PAC on the replies of the Government.

54. We have referred to the report of the CAG, the role of the PAC and the procedure followed in the House, only to indicate that the CAG report is always subject to scrutiny by the Parliament and the Government can

always offer its views on the report of the CAG.

55. The question that is germane for consideration in this case is whether this Court can grant reliefs merely placing reliance on the CAG's report. The CAG's report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for the Parliament to decide whether after receiving the report i.e. PAC to make its comments on the CAG's report.

56. We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective ministries have to offer on the CAG's report. The ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues. For instance, we cannot as such accept the CAG report in the instance case.

57. Article 2.6 of PSC permits extension of the exploration period for three years from the end of the seven year period prescribed in Article 2.2. The period extended in pursuance to Article 2.6 expired on 14.5.2005. The CAG, it is seen, has assumed that any exploration carried out beyond the period was beyond the provision of PSC. Article 2.6 specifically contemplates extension of the exploration phase pursuant to the terms of the PSC. The last part of Article 2.6 to Article 2.9, however, permits further extension of the exploration period for a period of 30 months, therefore, it is factually and legally incorrect to suggest that any exploration carried out beyond 14.5.2005 was beyond the provision of PSC. CAG views on that aspect cannot be accepted.

58. In such circumstances, we find no merits in the writ petition which was filed without appreciating or understanding the scope of the decision or the making process concerning economic and commercial matters which gives liberty to States and its instrumentalities to take appropriate decision after weighing advantages and disadvantages of the same and this Court sitting in this jurisdiction, as already indicated, is not justified in interfering with those decisions, especially when there is nothing to show that those decisions are contrary to law or actuated to mala fide or irrelevant considerations. The writ petition, therefore, lacks merits. Hence, the same is dismissed.

â lâ lâ lâ lâ lâ lâ lâ lâ lâ lâ lâ !..J.

(K. S. RADHAKRISHNAN)

â lâ lâ lâ lâ lâ lâ lâ lâ lâ lâ lâ !..J.

(Dipak Misra)

New Delhi,

May 09, 2013

RAJASTHAN BLOCK (PSC)

Shell

100%

Participating Interest (PI)

Government of India

ONGC

(Back in Right)

Cairn Energy India Pvt. Limited (CEIL)

50% PI

Cairn Energy Hydrocarbons Limited

(â CEHLâ) 50% PI

ONGC

(30% Participating Interest)

(back in)

Cairn Energy India Pvt. Limited (CEIL)

(35% Participating Interest)

Cairn Energy Hydrocarbons Limited (CEHL)

(35% Participating Interest)

After the transfer of PI, Cairn made Commercial Discovery. Thus as per PSC the Participating Interest was distributed as under:

CAIRN India Limited (CIL)

Listed in India â Promoted by

CAIRN UK Holdings Limited

Listed in London & Wholly Owned Subsidiary of

CAIRN Energy PLC UK (CAIRN)

Listed in London

Vedanta Resource Ltd.

Listed in London

Proposed to purchase 50-60% of CIL shares

Directly from CAIRN Energy PLC UK

Thereafter Vedanta purchased:

10% from Cairns Plc. On 11.06.2011

10.4% from Petronas

8.1 % through open offer by Sesa Goa (subsidiary)

Total 28.5%

Remaining 30% were sold after September, 2011

+

+

Both companies are Wholly Owned Subsidiaries of

15.05.1995