IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO. 5665 OF 2020

Federation of all Maharashtra Petrol Dealers Association ...Petitioner
vs.
The Union of India & Ors. ...Respondents

WITH

PUBLIC INTEREST LITIGATION (STAMP) NO. 31337 OF 2019

Bharat Petroleum Corporation Ltd. (Refinery)
Employees Union & Ors. ...Petitioners
vs.
Union of India, through the Secretary, Ministry
of Petroleum and Natural Gas & Ors. ...Respondents

WITH

PUBLIC INTEREST LITIGATION (STAMP) NO. 4444 OF 2020

Petroleum Employees Union (PIU) & Ors. ...Petitioners
vs.
Union of India, through the Secretary, Ministry
of Petroleum and Natural Gas & Ors. ...Respondents

WITH

ORIGINAL SIDE

PUBLIC INTEREST LITIGATION (LODGING) NO. 04 OF 2020

Suresh Yashwant Pawar & Ors. ...Petitioners
vs.
Union of India & Ors. ...Respondents

....

Mr. Navroz H. Seervai, Senior Advocate, a/w. Mr. Mustafa Doctor, Senior Advocate, Ms. Rishika Harish, Mr. Rahul Dwarkadas, Mr. Joran Diwan and Mr. Nutash Kotwal, i/b. Veritas Legal, for the Petitioner in WP(ST)/5665/2020.

Mr. Ramesh Ramamurthy, a/w. Mr. Saikumar Ramamurthy, for Petitioner in PIL(ST) 31337/2019, PIL(ST) 4444/2020 and PIL(L) 4/2020.

Mr. Anil C. Singh, Additional Solicitor General, a/w. Mr. Nikhil Sakhardande, Senior Advocate, Mr. Aditya Thakkar and Mr. D.P. Singh, for

Respondent Nos. 1 and 2-UOI in WP(ST)/5665/2020 and for Respondent Nos. 1 and 3 – UOI in PIL(ST) 31337/2019.

Mr. Anil C. Singh, Additional Solicitor General, a/w. Mr. Nikhil Sakhardande, Senior Advocate, Mr. Aditya Thakkar and Mr. D.A. Dube and Mr. D.P. Singh, for Respondent Nos. 1 and 3-UOI in PIL(ST)/4444/2020.

Mr. Anil C. Singh, Additional Solicitor General, a/w. Mr. Nikhil Sakhardande, Senior Advocate, Mr. Rui Rodrigues, Mr. Aditya Thakkar, Mr. Parag Vyas and Mr. D.P. Singh, for Respondent Nos. 1 and 3-UOI in PIL(L)4/2020.

Mr. Darius Khambata, Senior Advocate, a/w. Mr. Tushar Hathiramani, a/w. Mr. Darshan Mehta and Ms. Shrusti Dalal, i/b. Dhruve Liladhar & Co., for Respondent No.3 in WP(ST)5665/2020, for Respondent No.2 in PIL(ST) 31337/2019, PIL(ST) 4444/2020 and for Respondent No.4 in PIL(L) 4/2020.

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CORAM: S.C. GUPTE &
MADHAV JAMDAR, JJ.

DATE : 12 NOVEMBER, 2020.

JUDGEMENT: (Per S.C. Gupte, J.)

. These four petitions primarily challenge the decision of Union of India of in-principle disinvestment of its shareholding in Respondent No.3 - Bharat Petroleum Corporation Ltd. ("BPCL") under a strategic disinvestment policy. The petitions also raise a connected issue concerning validity of repeal of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. The first petition (Writ Petition (Stamp) 5665 of 2020), which is treated as a lead petition for the purposes of this order, has been filed by Federation of all Maharashtra Petrol Dealers Association, whose objects include safeguarding common cause of persons connected with distribution of petroleum products. The connected petitions, PIL (Stamp) No.31337 of 2019 and PIL (Stamp) No.4444 of 2020, are filed by two

petroleum employees unions representing the employees of BPCL. These petitions have been filed principally as public interest litigations and not to represent the private interest of employees of BPCL, who are likely to be affected by the impugned executive decision of the Union. The Petitioners in the fourth petition claim to be public spirited individuals espousing the cause of public interest in the matter of strategic disinvestment of the Union's stake in BPCL.

2. The predecessor of BPCL was Burmah Shell Oil Storage and Distributing Company of India Ltd. ("Burmah Shell"), which was incorporated in England in the year 1928, and was carrying on the business of distribution and sale of petroleum products in India. On 24 January 1976, Union of India, by an act of parliament known as the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 ("Burmah Shell Acquisition Act"), acquired the right, title and interest of Burmah Shell's undertakings in India on and from the appointed date, which was 24 January 1976. The Burmah Shell Acquisition Act *inter alia* reserves the Central Government's right to direct, by notification, vesting of the right, title and interest and liabilities of Burmah Shell in a Government Company instead of continuing to vest in the Central Government. Around the same time, Union of India also acquired one Burmah Shell Refineries Ltd., which was also a foreign company carrying on oil refining business, and vide a notification of Ministry of Petroleum dated 24 January 1976, directed vesting of the right, title, interest and liabilities of Burmah Shell in the newly acquired company. The name of this company was changed first to Bharat Refineries Ltd. and subsequently to its current name, Bharat Petroleum Corporation Limited (BPCL), on and from 1 August 1997. That is how BPCL came to own the right, title, interest and liabilities of Burmah

Shell. In 2002, the Union Government, by exercise of its executive powers, sought to disinvest its shareholding in BPCL and another Government Company by the name of Hindustan Petroleum Corporation Limited (HPCL), which had vested in it the right, title, interest and liabilities likewise of another foreign company by the name of ESSO, which was acquired by Union of India by another acquisition Act, namely, ESSO (Acquisition of Undertakings in India) Act, 1974. The executive decision of the Union to disinvest its shareholdings in these two companies was challenged before the Supreme Court by one Centre for Public Interest Litigation. The Supreme Court, in the case of **Centre for Public Interest Litigation vs. Union of India**[1], *inter alia* held that the Union Government could not disinvest its shareholding, vide an executive action, in either of the two companies without the repeal or amendment of the respective acquisition Acts, under which the respective undertakings were acquired by the Union. By the Repealing and Amending Act, 2016 (Act No.23 of 2016), the Union of India *inter alia* repealed the Burmah Shell Acquisition Act. The Repealing Act received Presidential Assent on 9 May 2016. The Repealing Act does not contain any saving clause in respect of any provisions of the Burmah Shell Acquisition Act. On 20 November 2019, the Cabinet Committee of Economic Affairs, headed by the Hon'ble Prime Minister, granted its in-principle approval for strategic disinvestment of the Union Government's shareholding in BPCL along with transfer of its management and control to a strategic partner. On 7 March 2020, BPCL, in pursuance of the in-principle approval referred to above, published an advertisement and released Preliminary Information Memorandum (PIM) to assist buyers in evaluating the acquisition of the Union's shareholding in BPCL and submitting an Expression of Interest (EOI). The original date for

1 (2003) 7 Supreme Court Cases 532

receipt of EOI was extended from time to time due to the prevailing pandemic of Covid-19 and presently, stands at 16 November 2020.

3. The principal submission of the Petitioner in its challenge in the present petition is that the original business and undertaking of Burmah Shell, acquired through an Act of parliament and vested in BPCL by a notification in pursuance of that Act, cannot be disinvested without specific legislative approval for such disinvestment from the parliament. Relying on the Supreme Court judgement in the case of **Centre for Public Interest Litigation**, the Petitioner submits that the original acquisition being under an Act of parliament, without the parliament having given its approval for disinvestment either by repeal or amendment of the Burmah Shell Acquisition Act, it is not legally possible for the Union Government to disinvest its shareholding in BPCL. It is submitted that the Repealing Act, to the extent it repeals Burmah Shell Acquisition Act, does not amount to such parliamentary approval for disinvestment. The Petitioner challenges the Repealing Act on the ground that the Repealing Act does not constitute a legislative mandate for disinvestment, without which, under the law stated by the Supreme Court in **Centre for Public Interest Litigation**, such disinvestment is not legally possible.

4. Though the petition raises several grounds concerning the validity of the Repealing Act, such as the same being arbitrary and contrary to Article 14 to the extent it classifies Burmah Shell Acquisition Act as an obsolete act warranting a repeal as also suffering from non-application of mind being without due deliberation by the Parliament of the effects of repeal, etc., Mr. Seervai, learned Senior Counsel appearing for the Petitioner, restricts his case to the principle of law enunciated by the

Supreme Court in the case of **Centre for Public Interest Litigation** (supra). The only submission of Mr. Seervai in support of his challenge, both to the executive decision of the Union Government of strategic disinvestment in BPCL and the repeal of Burmah Shell Acquisition Act, is that the executive decision as well as the Act of repeal is contrary to the law stated by the Supreme Court in that judgement and both are void accordingly. Mr. Seervai does not dispute that the Court cannot go into application of mind by parliament in its legislative business or behind the legislation to see the reasoning of legislature behind it, or examine steps prior to the enactment of the legislation. Mr. Seervai also accepts the principle that the Court will always begin with the presumption of constitutionality of the legislation. Insofar as the policy decision of in-principle disinvestment is concerned, Mr. Seervai also accepts that the policy of the Government is not *per se* open to challenge but that such policy can be challenged only to the extent of its illegality. It is Mr. Seervai's case that the policy decision in the present case is open to challenge, because the same is against the law stated by the Supreme Court in **Centre for Public Interest Litigation** (supra) and, to that extent, involves an illegality.

5. Mr. Anil Singh, learned Additional Solicitor General, appearing for the Respondent Union and Mr. Khambata, learned Senior Counsel appearing for BPCL, whilst opposing the petition, question the locus of the Petitioner to challenge the Act of repeal and the decision to disinvest, besides urging the grounds of delay and suppression against the Petitioner. Mr. Seervai defends his locus on the ground that operators of retail dealership whom his client represents form an integral part of the fuel distribution system in the country and are to that extent stakeholders of BPCL. Though there is some substance in the objections of learned Counsel

for the Union and BPCL to the Petitioner's locus, since there is no legal wrong involving injury to a judicially enforceable or legally protected right so far as the Petitioner is concerned, we are of the view that this controversy need not detain us further, for the Petitioner also asserts its alternative capacity in public interest and, in any event, we are also hearing companion public interest litigations involving the same arguments. We are also not impressed with the grounds of delay (the deadline for the EOI being yet to expire) or suppression (the allegedly suppressed communication of the Petitioner to IOC and HPCL being wholly distinct and independent of the subject matter of the present petition). We would rather deal with the merits of the controversy straightaway.

6. With these prefatory observations, let us examine the Petitioner's challenge in the present case. Mr. Seervai contends that when the Union Government decided to disinvest by a mere executive action, the matter was brought in challenge before the Supreme Court in the case of **Centre for Public Interest Litigation**. According to Mr. Seervai, the principle of law stated by the Supreme Court in the case of **Centre for Public Interest Litigation** is that an undertaking acquired by a statute and vested in a Government company can only be disinvested by a statute, whether by way of repeal or amendment. Learned Counsel submits that what is meant by this principle of law is that one cannot simply repeal an Act and then bring about disinvestment but that the repeal itself must be in order to disinvest. In other words, learned Counsel submits, there must be a parliamentary approval to disinvestment and not a mere Act of repeal followed by an executive decision to disinvest. Mr. Seervai also supports his arguments on the basis of three separate instances, where the Union Government understood this to be the law. Firstly, he refers to a brochure

issued by the Ministry of Finance on 3 February 2004 detailing implementation of budget announcements for the year 2003-2004. Learned Counsel submits that in this brochure, the Ministry accepted the position that disinvestment in the oil sector PSUs, including BPCL, was halted because of the Supreme Court ruling "that companies acquired through Acts of parliament cannot be disinvested without parliamentary approval". The second is the instance of disinvestment of the shareholding of Union of India in NEPA Ltd., which was also a public sector enterprise. Learned Counsel submits that despite the fact that NEPA Ltd. was not established or acquired by any nationalization or acquisition statute, the disinvestment bill in respect of NEPA Ltd. introduced in the parliament had, in its statement of objects and reasons, taken up a position that "approval of parliament is necessary for changing the public character of the company as it was held by the Supreme Court in the **Centre for Public Interest Litigation vs. Union of India**". Learned Counsel submits that even the NEPA report records the view of the Ministry of Law and Justice that in the light of the Supreme Court judgement "whenever character of a company changes from a Government company to a non-Government company, the approval of the parliament has to be obtained". Learned Counsel submits that the NEPA report also accepts that any parliamentary approval for disinvestment must be an informed approval and not a routine technical approval; the parliament should be informed through financial memorandum of relevant particulars such as (i) valuation of assets and liabilities and (ii) bearing, if any, of such disinvestment over the consolidated fund of India in terms of cash outgo, waiver of dues, etc. Learned Counsel submits that in case of the instant disinvestment, no such material has been placed before the parliament for repeal of the Act. The third instance referred to by Mr. Seervai concerns the decision of Union of

India for disinvestment in Tyre Corporation. Learned Counsel submits that in case of Tyre Corporation, which was also a public undertaking, a bill known as Tyre Corporation of India Ltd. (Disinvestment of Ownership) Bill, 2007 was introduced in parliament in November 2007, notwithstanding the fact that Tyre Corporation was not nationalized or acquired by any Act of parliament. Relying on these instances, Mr. Seervai submits that an informed parliamentary approval to disinvestment had to precede any strategic disinvestment by the Union Government of its controlling stake in the company together with transfer of management.

7. Let us consider whether the judgement of the Supreme Court in **Centre for Public Interest Litigation** (supra) states the law as Mr. Seervai suggests it does. But before we do so, we must make it clear that in doing so, it is wholly irrelevant to consider what view the Union Government has taken of the judgement. The three instances cited by Mr. Seervai do not take us anywhere. Even if the Union Government had taken a particular view of the judgement earlier, whilst disinvesting in other public enterprises such as NEPA Ltd. or Type Corporation, it is really of no significance for our purposes. Any such view is not even binding on Union of India, let alone this Court. The principle of **contemporanea expositio** is applied in the matter of interpretation of law, though less so now than earlier and restricted anyway to subordinate legislation by the executive, and not for the ratio of any court judgement.

8. In **Centre for Public Interest Litigation** (supra), what was called in question was the decision of the Union Government to sell majority of shares in two public sector oil companies including BPCL to private parties without parliamentary approval or sanction. The decision

was said to be contrary to, and violative of, the provisions of the respective acquisition Acts including the Burmah Shell Acquisition Act. It is important to note that the acquisition Acts were very much in force when the question was considered by the court. The petitioners before the court were not opposed to the policy of disinvestment; what they were challenging was the manner in which that policy was being given effect to. Their whole case was that the object of the acquisition Acts was vesting of oil distribution business in the State so that it subserves the common general good; if the Government went ahead with the proposed disinvestment, the oil companies including BPCL would cease to be Government companies; and that would be contrary to the object of the concerned enactments. The petitioners accepted that it was open to the Government to disinvest; but it could not, according to them, do so without first changing the law, namely, the acquisition Acts, either by repealing the enactments or by making appropriate changes by way of amendments in the enactments. The Supreme Court agreed with the petitioners. The court noted at the outset that it was no doubt true that the two companies were Government companies and instrumentalities of the State; they could enter into contracts among other things, but the question was whether this power was circumscribed by any statute either expressly or by necessary implication. The court then went on to notice the preamble to the acquisition Acts and their salient provisions, including Section 3 and 4, which made the provisions for actual acquisition and matters incidental thereto, and Section 7, which *inter alia* enabled the Central Government to direct by notification the right, title and interest and liabilities of the acquired undertaking (Burmah Shell, for example) to vest in a Government company instead of continuing to vest in the Central Government. The court then observed that when these provisions required vesting of the undertaking in

the Government or a Government company, it could not mean that they enabled the same being held by any other person, particularly in the context of the object of the Acts, namely, ownership and control of distribution and marketing of petroleum products in India by the State or Government company so as to subserve the common good. In other words, the limitation on the powers of the Government envisaged by the Supreme Court was nothing but the statute of acquisition itself, which mandated control and management of the acquired undertaking by the Government or a Government company and by no one else. The Supreme Court decision in **Centre for Public Interest Litigation** was, thus, in its own words, based "on the statutes with which we are concerned". On the language of the statutes, the court held, it was not permissible to the Government to disinvest its controlling stake in BPCL or HPCL by exercising its executive powers; it had to either repeal the statutes or amend them so as to make such disinvestment permissible.

9. The Supreme Court judgement in **Centre for Public Interest Litigation**, accordingly, by no means rules that disinvestment in a Government company is possible only through a statutory enactment or with parliamentary approval. It does not even support Mr. Seervai's case that an undertaking acquired through an Act of Parliament and meant to vest in the Union or a Government company cannot be disinvested except through parliamentary approval. The ratio of the judgement is that if an undertaking is acquired through an Act of parliament and is required to vest in the Union or its company under that law, the same cannot be disinvested so long as the law requiring such vesting is on the statute book; that statute would have to be suitably amended so as to enable the Union to disinvest its controlling stake or change the public character of

the undertaking, or the statute would have to be repealed altogether.

10. The parliament has repealed the Burmah Shell Acquisition Act by Act No.23 of 2016. The effect of such repeal is that as of today and for our purposes, it is as though the statute never existed. Absent the statute of acquisition, there is no legal impediment for disinvestment by the Union of its controlling stake in BPCL. As we have noted above, the only illegality involved in the executive action of disinvestment, according to the law stated by the Supreme Court in **Centre for Public Interest Litigation** (supra), was the limitation found in the statute of acquisition for changing the public character of the undertaking. Once that limitation goes away, the Government is clearly within its rights, just like any other ordinary shareholder, to sell its shares or even its controlling stake. Strategic sale of its stake is a matter of its own policy and, as Mr. Seervai fairly accepts, the Government cannot be faulted merely for adopting one particular policy rather than the other. No doubt since it is the State and thus bound by the Constitutional principle against arbitrariness enshrined in Article 14 in the matter of even its policy, but at least the Petitioner herein does not press any such case of arbitrariness. We shall, however, consider the challenge under Article 14 together with the other challenges to the State action when we deal with the case of the other companion petitioners.

11. That leaves the only other point urged by Mr. Seervai against the legality of the repealing Act. As we have noted above, principally his challenge in this behalf has also been premised by Mr. Seervai on the judgement of the Supreme Court in **Centre for Public Interest Litigation**. Mr. Seervai submits that a bare repeal of the acquisition Act is not good enough; the repealing Act must express or reflect an informed

parliamentary approval to disinvestment as per the law stated in that case. The case of **Centre for Public Interest Litigation**, in the first place, does not support any such proposition. It simply talks about repeal or amendment of the acquisition Act which would have the effect of removing the statutory limitation on the powers of the Union to disinvest and not which must be informed by an express parliamentary approval for disinvestment, informed or otherwise. Secondly, and more importantly, any such inquiry, contrary to Mr. Seervai's professed caution against inquiring into the motives of the parliament behind enacting a statute, would perforce have us inquire into precisely that. A repeal is but a repeal; it removes from the statute book an enactment which had held the field until then; and it does so in a manner as though the statute never existed. The courts cannot thereafter question the motive behind such removal – whether such removal was simply on the ground that the original statute had become obsolete or whether such removal was actually informed by the parliament's tacit approval of a possible disinvestment which may follow as a result of the repeal. Much less would it be open to the courts to fault the legislation itself or parliament's wisdom behind it on the ground that it ought to have been informed by such approval or that the parliament did not apply its mind to the aspect of such approval or the effects, including a possible disinvestment, which might follow it. It is not open to courts to scrutinize the legislative process in that manner.

12. Though it is not really necessary for us to inquire into the legislative process, we may nevertheless, for keeping the record straight, note that there is no indication that the aspect of possible disinvestment on the part of the Union and change of public character thereby of the undertaking of BPCL were not brought to the notice of the parliament or

were not available to its members. The Law Commission, in its 251st Report on "Obsolete Laws: Warranting Immediate Repeal" (Fourth Interim Report), had, whilst making a recommendation for repeal of the Burmah Shell Acquisition Act, observed as follows :

> "The purpose of this Act has been served insofar the nationalisation of the concerned entity was concerned. The Act does not contain provisions of the management of the nationalised entity. Hence, this Act does not serve any continuing purpose with respect to the nationalised entity. As a matter of abundant caution, a study of all the nationalisation Acts should be done before with a view to consider repeal of these Acts. If necessary, a suitable savings clause should be inserted in the repealing Act."

Even the PMO report made an explicit observation concerning the proposed repeal of the Burmah Shell Acquisition Act that "the repeal of the aforesaid Act might send out signals …..of impending disinvestment in the oil and gas sector, which has remained a contentious issue". In the premises, it cannot possibly be suggested that the consideration of a resultant possibility of future disinvestment by the executive was not before the parliament when it enacted the repealing Act. Not only this possibility, but even the idea of an appropriate measure of a saving clause to avoid such possibility was very much within public domain (in the form of 251st Report of the Law Commission), when the parliament repealed the Burmah Shell Acquisition Act.

13. Accordingly, there is no merit in the Petitioner's challenge either to the repealing Act or to the executive decision of in-principle disinvestment by the Union Government.

14. Coming now to the companion petitions, where some of the points not pressed by Mr. Seervai in his petition are urged by the concerned

Petitioners as matters of public interest, it is important to note at the outset that none of these points could possibly be urged to challenge the repealing Act for the reasons discussed above. The challenge is based on undesirability of the possibility of disinvestment keeping in mind its consequences in matters of State policy or their non-consideration by the parliament. As we have observed above, no legislative enactment can be challenged either on the ground of undesirability or non-application of mind. The only available challenges to an enactment by a legislature are on the grounds of *vires* of the enactment, that is to say, lack of legislative competence on the part of the legislature, and violation of a fundamental right. There is no case here of want of legislative competence and as for breach of a fundamental right, Mr. Ramamurthy for the Petitioners has been unable to point any. Mr. Ramamurthy submits that consequent to the repeal (and disinvestment following such repeal), rights of poor consumers to LPG and kerosene subsidies, rights of medium, small and micro enterprises including women entrepreneurs to compulsory purchase from them in a certain percentage points, rights of war widows and physically handicapped persons of preference in allotment of petrol pumps, gas agencies and kerosene distributorship, and rights of SC, ST and OBCs and physically handicapped of reservation in jobs would be lost unto them. These rights are not fundamental rights. Any reservation made by the State in the matter of employment or allotment of State largesse may be constitutionally justified, but it cannot be said to be constitutionally mandated as a matter of fundamental right. There is no fundamental right to any reservation, though particular reservations may be permissible under the Articles providing for fundamental rights. Just as the State may, if it so chooses, make any permissible reservation, it would be perfectly legitimate for it to not make, or withdraw an already made, reservation.

Accordingly, no case is made out in the companion petitions for challenging the repeal Act.

15. When it comes to the executive decision of the Union Government to disinvest, different considerations may, however, apply. No doubt, disinvestment of controlling interest of the State in a Government Company to encourage privatization and competition is a measure of socio-economic reform and a matter of economic policy of the incumbent Government. As the Supreme Court noted in **Rustom Cavasjee Cooper vs. Union of India**[2], whilst considering the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, it is not for the court to consider the relative merits of different political theories or economic policies. This maxim would apply to even executive actions of the State as much as it does to an enactment made by the parliament or a State legislature. But there is a difference. As the Supreme Court noted in **BALCO Employees' Union (Regd.) vs. Union of India**[3], the executive decision may not be placed on as high a pedestal as legislative judgement insofar as judicial deference is concerned. Though the scope for judicial interference even in matters of executive decisions may be limited, yet there are well-recognized parameters within which, and the extent to which, such decisions are amenable to judicial review and we shall presently consider them.

16. The case of **BALCO Employees Union** (supra) is an authority for the scope of judicial review in matters of policy decisions, and in particular, economic decisions, and, fortunately for us, it is in the very context of disinvestment in a public enterprise controlled by the

2 (1970) 1 SCC 248
3 (2002) 2 Supreme Court Cases 333

Government. Bharat Aluminum Company Ltd. ('BALCO') was a Government of India undertaking registered under the Companies Act, 1956, just as BPCL is in our case. As part of efforts of successive Central Governments to disinvest some public sector undertakings, the then Government had constituted a Public Sector Disinvestment Commission. The commission made a recommendation for part sale of Government equity in BALCO, particularly, 51% or more, to a strategic buyer along with transfer of management. The Cabinet Committee on Disinvestment approved this proposal. After involving a Global Advisor, brought in through a competitive process, 'Expression of Interest' was called for from prospective buyers. Following Expressions of Interest by about eight buyers, and after their analysis by the Global Advisor, three buyers were identified; asset evaluation of BALCO was made; and drafts of Shareholders' Agreement and Share Purchase Agreement were prepared and discussed with bidders and finalized. Financial bids were thereupon invited and the L-1 bidder identified and finally, the Cabinet Committee approved/accepted its bid. At that stage, writ petitions were filed by employees of BALCO before three different High Courts. These petitions were in course of time transferred to the Supreme Court. The very first question which the Supreme Court framed in these petitions for its consideration was : Whether the executive decision of disinvestment was amenable to judicial review and if so, within what parameters and to what extent.

17. In **BALCO Employees Union** (supra), after noting its earlier ruling in **State of M.P. vs. Nandlal Jaiswal**[4], which dealt with the policy decision of the State to grant licence for construction of distilleries for

4 (1986) 4 SCC 566

manufacture and supply of country liquor, and the admonition given by Frankfurter J. in **Morey vs. Doud**[5] for judicial restraint in matters of legislative judgement, the Supreme Court quoted the following observations in **Nandlal Jaiswal**:

> "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 strait-jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive. 'The problem of government' as pointed out by the Supreme Court of the United States in Metropolis Theatre Co. v. State of Chicago.
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> > 'are practical ones and may justify, if they do not require, rough accommodations, illogical, it 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'.
>
> The Government, as was said in Permian Basin Area Rate cases, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution."

The Supreme Court also went on to consider its several rulings on the subject. It quoted from its judgment in **M.P. Oil Extraction vs. State of M.P.**[6] the following observations:

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5 354 US 457 : 1 L Ed 2d 1485 (1957)
6 (1997) 7 SCC 592

> "Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India."

The Court, then, came to a categorical conclusion in the following words:

> "46. It is evident from the above that it is neither within the domain of the Courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our Courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical."

18. In particular reference to the disinvestment challenged in **BALCO Employees' Union**, this is what the Supreme Court had to say:

> "47. Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. 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 limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed."

The Court further observed as follows:

> "The policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time may no longer be so. The Government has taken a policy decision that it is in public interest to disinvest in BALCO. An elaborate process has been undergone and majority shares sold. It cannot be said that public funds have been frittered away. In this process, the change in the character of the company cannot be validly impugned. While it was a policy decision to start BALCO as a company owned by the Government, it is as a change of policy that disinvestment has now taken place. If the initial decision could not be validly challenged on the same parity of reasoning, the decision to disinvest also cannot be impugned without showing that it is against any law or mala fide."

19. With the parameters and extent of judicial review thus made clear, let us now focus on the facts of our case to see if the Union's executive decision of disinvestment in our case can be faulted on any of the principles set out above. Mr. Anil Singh, learned Additional Solicitor General, has taken us through the whole process adopted by the Union Government. Relying on the Union Government's reply, and particularly, paragraphs 4A and A (Pg918), paragraph B (Pg 920), paragraph 11 (Pg 928), paragraph 33 (Pg 947), paragraph 37 (Pg 952), paragraph 39 (Pg 953), paragraph 50 (Pg 954), paragraph 52 (Pg 958) and paragraph 54 (Pg 959) of the Affidavit in Reply dated 14 October, 2020, he summerises Union of India's case thus:

> "1. "Strategic disinvestment" implies the sale of substantial portion of the Government shareholding of a Central Public Sector Enterprise (CPSE) along with transfer of management control.

2. Government has mandated Niti Aayog to identify Central Public Sector Enterprises (CPSEs) for strategic disinvestment. Niti Aayog makes assessment of CPSEs for strategic disinvestment on the basis of criteria of national security, sovereign functions at arm's length, and market imperfections and public purpose. Profitability/loss of the CPSE is not among the relevant criteria for disinvestment.

3. The ongoing strategic disinvestment of BPCL is in accordance with the extant procedure of the Government, as detailed below.

4. Recommendations of NITI Aayog are brought before the Core Group of Secretaries on Disinvestment (CGD). CGD takes into consideration inputs from the administrative ministry, Niti Aayog, DIPAM, and other relevant ministries such as Department of Legal Affairs, Department of Public Enterprises, Department of Corporate Affairs, etc.

5. Where CGD recommends strategic disinvestment of a CPSE after detailed deliberations, DIPAM brings before the Cabinet Committee on Economic Affairs (CCEA) that matter for "In Principle" approval for Strategic disinvestment of CPSEs.

6. Once the CCEA accords "In Principle" approval for Strategic disinvestment of a CPSE, it follows two stage auction process.

7. The process is spearheaded by a multilayered decision making at the level of InterMinisterial Group (IMG) [chaired by Secretary, DIPAM and Secretary of the Administrative Ministry and comprising of Senior officers of the rank of Secretary to Government of India from 9 different Ministries/Departments]. The proposals made by CGD at every stage are brought for the approval of the Group of Ministers, termed as the "Alternative Mechanism" (AM), which comprises of the Finance Minister, Minister of Road Transport & Highways; and Minister of the respective Administrative Department. Independent External Monitor consisting of Ex Chief Justice of India, Ex CAG of India and Ex CVC is constituted to oversight the strategic disinvestment process and they are being apprised of the process time to time and their suggestions are taken into consideration.

8. CCEA has given 'in-principle' approval of strategic disinvestment of BPCL on 20/11/2019.

9. The Government of India is proposing a strategic disinvestment of

> its entire shareholding in BPCL comprising of 1,14,91,83,592 equity shares along with transfer of management control to a strategic buyer. This does not include BPCL's equity shareholding of 61.65% in Numaligarh Refinery Limited ('NRL')."

20. The foregoing material clearly indicates that the impugned disinvestment decision, as of now only at an "in-principle" stage, has already undergone an elaborate process of consideration at the hands of experts and key Government functionaries. Further steps for actual disinvestment would also involve a thorough consideration and robust checks and balances and further expert inputs. The policy decision of acquiring the undertakings of Burmah Shell was based on a particular economic theory and socio-economic policy. The Union of India then considered it to be in public interest. Those considerations have made way for new considerations, informed by a new economic theory and socio-economic policy of efficiency improvement in the market place and consumer benefit resulting from making of the current oligopoly of petroleum producers and marketers competitive through a private or non-government player. The present governing dispensation is well within its powers to take such decision. The successive Governments have over the last few years moved in the direction of privatisation. Niti Ayog, which is an expert body of economic policy advisors to the Union, has made a comparative assessment of Central Public Sector Enterprises for strategic disinvestment and identified BPCL as an ideal candidate for it. Whilst overruling the representations of the Ministry of Petroleum and Natural Gas to the Country, the Niti Ayog noted as follows:

> "(i) The oil marketing companies are profitable entities in a state controlled oligopoly that has a significant investment cycle ahead. Indian Oil Corporation, the largest, controls about half the market, with BPCL and HPCL controlling a quarter each.

> Despite deregulation of oil retail, attempts over the past decade of private enterprise to compete have been unsuccessful. Pricing at the pump has moved much closer to market since the last time private sector participated. It would vastly improve efficiency in the market place and provide benefit to consumers if the oligopoly became more competitive with the material presence of a private sector participant that would compete to enhance its share while bringing best practices to the industry. As HPCL is owned by ONGC in a vertical integration strategy and Indian Oil may be too large for the market to absorb. NITI Ayog's analysis suggests that BPCL would be the ideal participant to consider for privatization.
>
> (ii) It was also noted that business activities of BPCL are not in 'priority' sectors and appropriate policy intervention can enable private sector to play a role in implementation of Government flagsheet programmes.
>
> After detailed deliberations, it was recommended that all of GoI equity holding in BPCL should be strategically disinvested along with transfer of control, as per the approved procedure."

The recommendations of Niti Ayog were deliberated by the Core Group of Secretaries on Disinvestment (CGD). The CGD, after taking into account various inputs from expert bodies and different ministries, recommended strategic disinvestment in BPCL. The Cabinet Committee on Economic Affairs (CCEA) thereafter accorded approval to "in-principle" disinvestment. All this can only lead to a conclusion that the policy decision is an informed decision; it cannot be termed as an arbitrary or capricious decision; and it does not offend any constitutional or statutory provisions. If that is so, it is no remit of this Court to interfere with it in its writ or PIL jurisdiction.

21. Mr. Ramamurthy raises the very same points, which he urged in support of his challenge to the repealing Act, to fault the Niti Ayog recommendation and the Union Government's decision based on it. He

submits that the Niti Ayog as well as the Government has not considered the issues affecting subsidies, reservations for various socially and economically disadvantaged segments such as SC, ST, OBCs, physically handicapped, SME and women Entrepreneurs, etc. In the first place, we are today at the stage of "in-principle" approval of disinvestment; the nitti-gritties of operational needs including implementation of specific Government programmes catering to other policy issues are yet to be assessed and formulated. Some of the issues raised by Mr. Ramamurthy belong to these aspects. Secondly, and at any rate, there is no concrete challenge formulated as of now based on violation of any fundamental or constitutional right of the Petitioner or members of public whose interest they champion. There is no fundamental or constitutional right for insisting on continuation of the Union's strategic stake in BPCL. As submitted by Mr. Khambata, learned Senior Counsel for BPCL, subsidies are a matter between the Government and the consumers; these may well continue whatever be the character of BPCL, whether public or private. As for reservations for MSMEs, women entrepreneurs, physically handicapped and war widows, apart from the fact that they are operational matters yet to be assessed and formulated, there is no fundamental or even statutory right to insist on any such reservation and, in any event, these are all incidental fall-outs and the economic policy itself can never be faulted on their basis. Same goes for the extant job reservations in favour of SC, ST, OBCs in BPCL as a Government company which would be lost after a change in its public character as a result of disinvestment. Whilst dealing with similar points raised in **BALCO Employees' Union** (supra) concerning rights of employees, the Supreme Court held that if abolition of a post pursuant to a policy decision did not attract the provisions of Article 311 of the Constitution, on the same parity of reasoning, the policy of

disinvestment could not be faulted if, as a result thereof, employees lost their rights or protection under Articles 14 and 16 of the Constitution. The Court held that the existence of rights of protection under Articles 14 and 16 could not possibly have the effect of vetoing the Government's right to disinvest. In any event, these are, at best, some negative aspects of the policy. They anyway have to be contrasted and balanced with the positives of the policy such as consumer benefit due to competition in the oligopoly and overall benefit to the economy, not to speak of the immense value which may be unlocked as a result of disinvestment and become available to the Government for its programmes and policies. And, after all, as we have already noted above, the Government is the best judge of such balancing act. As for the allegation of non-application of mind to these aspects, there is no such case. Some of these aspects have already been considered and some would be by way of "appropriate policy intervention", as Niti Ayog itself has hinted, towards "implementation of Government flagship programmes". These aspects could well be addressed by the Union Government even whilst framing the Shareholders' Agreement and Share Purchase Agreement. Some of these aspects really concern business continuity, employee protection and incidental matters. In fact, Government of India, as part of Preliminary Information Memorandum For Inviting Expression of Interest For Strategic Disinvestment of Bharat Petroleum Corporation Limited, has specifically provided (Clause No.5.3) that Confirmed Selected Bidder (CSB) could be required to undertake certain obligations. Clause No.5.3 is reproduced hereinbelow:

> "5.3 Lock in of shares and other restrictions :
>
> The CSB could be required to undertake certain obligations relating to certain matters, such as, employee protection, asset stripping, business continuity, lock-in of the shares acquired in the Proposed

> Transaction, and/or shareholding of consortium members in the Investment Vehicle. These conditions, and those relating to the respective responsibilities and liabilities of the CSB and the consortium members (if any), shall be specified in the RFP/SPA."

22. Mr. Ramamurthy also cursorily refers to some aspects of valuation of BPCL. As of today, there is no valuation on the table. That would obviously come after EOIs are received from prospective buyers. Any discussion in that behalf would be strictly premature today and we are, therefore, not indulging in it.

23. There is no merit, accordingly, in the challenge made even in the companion petitions.

24. All four petitions are accordingly dismissed. We make no order, in the facts of the case, of costs.

(MADHAV JAMDAR, J.) (S.C. GUPTE, J.)