Supreme Court

High Court Division

(Special Original Jurisdiction)

Present:

Mohammad Anwarul Haque J

AHM Shamsuddin Choudhury J

Shah Abdul Hannan and others …… Petitioners.

Vs.

Bangladesh, represented by the Secretary, Ministry of Energy and Mineral Resources, Government of Bangladesh, Bangladesh Secretariat, Segunbagicha, Dhaka and others.....Respondents.

Judgment

January 28, 2010.

Cases Referred to-

R vs. Secretary of State ex parte Duly (3 All ER 2001 page 433), Brahambari Purashava vs. Secretary, Ministry of Land Reforms (7 BLT AD 95), Moklesur Rahman vs. State 26 DLR (AD) 44, Secretary, Ministry of Finance vs. Masdar Hossain (2000 BLD (AD) 104) Bangladesh vs. Shafiuddin Ahmed, 50 DLR (AD) 27, Sk. Abdus Sabur vs. Record Officer, 41 DLR (AD) 30, Union of India vs. International Trading Company (5 SCC 2003 at 437), Tata Celular vs. Union of India (AIR 1996 SC 11), Sheikh Abdus Sabur vs. Returning Officers and others 41 DLR (AD) 30, Council of Civil Servants Union vs. Minister of State for Civil Service, (1985 AC 374), R vs. Criminal Injuries Compensations Board, ex-parte Lain 1967 2 QB 864, Blackburn vs. Attorney General 1971 2 ALL ER 1380, R vs. Foreign Secretary ex-party Rees Mo 99 1994 QB 552, R vs. Hampden, the Ship money Case 1637 3st Tr 825, Council of Civil Servants Union vs. Minister of State for Civil Service (1985 AC 374, Nissan vs. Attorney General 1970 AC 179, China Navigation Co. Ltd. vs. Attorney General 1932, 2 KB 197, Chandler vs. DPP 1964 AC 763), Hanratty vs. Butler 115 SJ), Gouriet vs. Union of Post Office Workers 1978 AC 435, Tata Cellular vs. Union of India (AIR 1996 SC 11) Delhi Bar Association vs. Union of India 13 S.C.C. (628), A. Satyanarayana vs. S. Puroshotham (2008 SCC 5 page 416), M. P. Oil Extractionvs. State of Madhya Pradesh (1997 7 SCC 592), Ugar Sugar Works Ltd. vs. Delhi Administration and others (2001 3 SCC 635), Union of India and another vs. International Trading Company and another (2003 5 S.C.C 437), Tata Cellular vs. Union of India (AIR 1996 SC 11), State of Maharashtra vs. Lok Shikshan Sanstha (AIR 1973 SC 588, N. Ramanath Pillai vs. State of Kerala AIR 1973 SC 2641, Sanjeev Coke Mfg. Co. vs. Bharat Coking Coal Ltd. (AIR 1983 SC 239), Maharastra SBOS vs. Paritosh (AIR 1984 SC 1543), Union of India vs. Cyanamid India Ltd. (AIR 1987 SC 1082), State of UP vs. UP University College Pensioners Association (AIR 1994 SC 2311), K Narayanan vs. State of Karnataka (1994 Supp (1) SCC 44), State of Rajsthan vs. Sevanivatra Karmachari Hitkari Samity (1995 2 SCC 117), Federation of Railway Officers Association vs. Union of India (AIR 2003 SC 1344), Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation (1948 1K B 223), Education Secretary vs. Tameside Council (1977 AC 1014), R vs. Ministry of Defence, ex-parte Smith, (1996 QB 517), (Lazarus Estates Ltd. vs. Beaseley 1956 1QB 702), Jaichand vs. West Bengal (AIR 1967 SC 483), (Shearer vs. Shield 1914 AC 808)

Lawyers Involved:

Abdur Razzaque, with Imran Siddique, Ehsan Siddique, and M. Belayet Hossain, Advocates - For the petitioners.

Dr.Kamal Hossain, with Dr. Sharif Bhuiyan, and Tamim Hossain, Advocates -For the respondent no. 3.

Murad Reza, Additional Attorney General, with Md. Abdus Salam Mondal, Deputy Attorney General, Md. Razik-Al-Jalil, Deputy Attorney General, Mrs. Amatul Karim, Assistant Attorney General, Sk. Saifuzzaman, Assistant Attorney General, and Bahauddin Ahmed, Assistant Attorney General-For the respondent no.1.

Writ Petition No. 3507 of 1998.

Judgment

AHM Shamsuddin Choudhury J.- It was over a decade ago, some four people of national notoriety, filed the instant Writ Petition with a view to secure an order to prevail over the government to have an energy policy drafted through the Parliament.

2. The Term of the Rule

Their petition succeeded to engender a Rule in following terms:

"Let a Rule Nisi issue calling upon the respondents to show cause as to why they should not be directed to evolve and formulate a National Strategy Policy through Parliament ensuring appropriate participating interest for the State in all future Production Sharing Contracts prior to leasing out all the remaining 15 blocks at a time, including block Nos. 3, 5, 6, 7 and 8, in relation to which letters of intent have been issued and or such other or further order or orders passed as this Court may seem fit and proper."

3. Facts as averred

The petitioners in their endeavour to portray a comprehensive scenario of the state of affairs that have been in prevalence, surrounding gas and mineral resources exploration, existence of alleged improprieties therein and the practices other developing countries have been adhering to, figured lengthy and detailed averments in their pleading, summarised version of which are reproduced below in narrative form.

4. The petitioners' resolve to move this Division, engaging Article 102 of the Constitution, owes its origin to a round table discussion that took place on 5th September, 2005. That roundtable was participated by people of different walks, having expertise on the relevant fields, all of whom, arrived at a consensus that Production Sharing Contracts, entered into by the government may not be conducive to public interest. Following that congregation, the executive committee of a body, named "Centre for Human Rights," at it's meeting dated 15th September 1998, authorised the petitioners to proceed with appropriate action to protect public interest and the Republic's natural resources and hence, this petition.

5. Being ignited by the zeal of the members of the said "Centre for Human Rights," the petitioners, with a commitment to secure economic and social justice for all, filed the instant public interest litigation, *probono publico*. It is the petitioners' honest and sincere desire to protect public property under Article 21 of the Constitution, that drove them to embark upon this path.

6. History of Gas Exploration as Stated

Detailing the history of oil exploration in Bangladesh, the petitioners stated that this can be divided into four periodic phases, the first one being between the period from 1910 to 1933, the second one being between 1951and 1971, the third one extending over the years between 1972 and 1996 and the last one, having began in 1996, is in continuity.

7. While the first phase ended in fiasco, the second resulted in the discovery of 8 gas fields. It is the third phase, which followed our liberation in 1971, that received required impetus with the emergence of the Bangladesh Oil, Gas and Mineral Corporation, "Petrobangla" for

short, with an aim to promote and regulate exploration, production and distribution of petroleum. 0ff-shore drilling by six international oil companies, IOC for short, under contractual terms based on sharing of produce, henceforth referred to as PSC, heralded the period that began in 1974 and ended in 1978, within the third phase period. From the beginning of 1080's, exploration was targeted on liquid hydrocarbon and in 1986 Crude oil was discovered in Sylhet.

8. During the third phase (1972-96) Petrobangla discovered ten gas fields, while the foreign companies unearthed three. During the fourth, i.e. the current phases, all of the 23 blocks, spread over the whole country, were exposed to the foreign companies for exploration.

9. During 86 years, beginning in 1910, 20 gas fields, 18 being in the mainland and 2 off-shore, have been discovered, where gas reserve, as estimated, stand at 23.093 Trillion Cubic Feet, TCF for short, out of which 13.737 TCF can be extracted. So far 2.856 TCF have been extracted, leaving behind 10.881 TCF intact. The over enthusiastic remark that Bangladesh is floating on gas and oil is misleading.

10. Petrobangla operates it's petroleum activities through 8 companies and Bangladesh Petroleum Exploration Company, BAPEX for short, is the exploration wing of Petrobhangla. It discovered 10 out of 13 gas fields during the post independence era, by drilling 19 wells at a success rate of 1.9:1, while the foreign companies discovered 8 fields in the mainland by drilling 27 wells and 2 off-shore fields after drilling 9 wells, at a success rate of 2 25:1 on-shore and 4. 5:1 off-shore. Bangladeshi concerns exhibited a higher success rate in exploration compared to the IOCs, though no large oil field has yet been discovered. BAPEX's cost of discovery is relatively lower compared to those of the IOCs. There are 3 gas transmission and distribution companies, namely, Titas Gas Transmission and Distribution Company, Bakhrabad Gas System Limited and Jalalabad Gas Transmission and Distribution System Ltd., who supply gas, produced by two companies of Petrobangla, named Bangladesh Gas Field Company Ltd. and Sylhet Gas Field Company Ltd., to power plants, fertilizer factories, industrial and commercial concerns and household consumers.

11. Petrobangla is also involved in mineral exploration and is presently working for Boropukuria Coal Mine Development Project and Maddhapara Hard Rock Mining Project.

12. Daily gas production stands at 793 Million Cubit Feet, which derive from 36 wells in 9 fields. According a report 80% of the total supply is consumed by power and fertilizer producers. The country is not in a position to cope with ever increasing demand for gas.

13. After the creation of 23 blocks in mid 90's, at the first round, 8 blocks had been given to 5 foreign companies named (1) Occidental Exploration of Bangladesh Ltd. (2) Cairn Energy and Holland (3) Sea Search Bangladesh BV (4) Rexwood Oakland J V and (5) United Meridian.

14. In the second round, Bangladesh, the respondent no.1, issued Letters of Intent to foreign companies, named, (1) Enron Oakland (2) Shell & Cairn (3) Unocal & Triton, Pangac OMV.

15. The respondent no.1 and 3 have slowed down or suspended BAPEX's exploration activities in the pretext of financial constraint, though the respondent no.3 has adequate income from gas marketing, which, is against public interest and public policy. Petrobangla, with the credit of discovering 10 out of 18 fields, is best qualified for exclusive blocks to be reserved for it's exploration and if the fields were reserved for Petrobangla, discoveries would have remained exclusively within the Republic's ownership. Experts opined that at least blocks no.9, 10 and 11 should have been set apart for BAPEX.

16. Petrobangla came into being with the coming into force of Petroleum Act 1974. Malaysia also established it's National Oil Company, named, "Petronas"- under it's legislation titled

Petroleum Development Act 1974. Having received government patronage during the preceding 24 years, Petronas has emerged as an internationally reputed company with operation in 14 countries. It has been granted 15% Carried Interest Participation by the State, meaning, 15% shares are reserved for it out of all PSCs, Malaysia enters into with overseas companies. Petronas is also vested with full authority to negotiate the terms in all profit sharing contracts, whereas in Bangladesh BAPEX and Petrobangla have been reduced to a state of no more than a public relations organization for the state.

17. Scores of other countries have been following PSC scheme with international companies. Under this pattern the host nation receives at the delivery point, a certain percentage portion of available production known as "Royalty Oil," while a certain percentage point is reserved for the contractor, representing the cost incurred in carrying out the operation, known as "Cost Oil", The third portion goes to the tax people from the contractor, known as "Tax Oil." The residue, known as "Profit Oil," is divided between the contractor and the state party.

18. In Bangladesh PSCs no Royalty Oil is handed to Bangladesh, tax on behalf of the contractor is paid by Petrobangla and Bangladesh's share in "Profit Oil" is less than that received by the host countries in Malaysia and Indonesian PSCs.

19. Under the PSCs entered into with Occidental and Cairn Energy, share of Oil received by Bangladesh is very meagre. PSCs normally keep provisions, known as 'National Economic Interest' provision, aimed to boost the host country's economic interest, which provision is absent from the PSCs, respondent nos.1 and 3 executed. Our existing PSC's being incapable of serving national interest, should be amended in line with PSC's entered into by other developing countries. Albeit tenders have been invited from foreign companies, no policy decision has been adopted designating the quantity that should be reserved for posterity, pointing out the areas that would be preserved to avoid possible environmental hazards like that triggered disaster in Magur Chara. Bangladesh PSCs also suffer from the potential threat that may spring from compulsive over production, when such production would not be warranted, only in order to pay the contractors cost. Bangladesh's competence to supervise activities of the overseas companies remain questionable, as it failed to do so to prevent Magur Chara catastrophe. Bangladesh PSCs also contain no stipulation to enable transfer of technology to Bangladesh or for the training of it's personnel. Compulsory gas purchase provision for domestic use in the PSCs will pose a serious threat to our production and economy, stipulation requiring Petrobangla to remain obligated to purchase gas to which the contractor is entitled to under this contract, should the contractor elect to sell it's share of gas at the domestic market, which means that Bangladesh would be compelled to pay in Dollars at international price, even if BAPEX may discover at a convenient location sufficient gas for domestic need, which could be used at a relatively lower price. Newspaper reports have it that before invested money is realised, the government would pay as "Cost Oil" to two foreign companies under the existing PSCs a total of U.S. $ 483 million, which they will retain as profit. Bangladesh has to pay U.S.$ 83.3 every year, which, as indicated by the Finance Minister, will be too heavy a burden for the country to shoulder. As suggested by many, Bangladesh's obligation under it's PSCs to pay enormous sum by way of "Cost Oil" as well as to pay prices to buy the gas, will push the country to a situation of economic duress of unbearable proportion. The government, for reasons best known to it, have kept the PSC documents concealed, in breach of the principle of transparency and national interest and, have been consistently failing to address the issues the newspaper reports have been putting forward.

20. Notwithstanding Petrobangla's huge contribution to the exchequer, it is being kept away from the PSCs in the pretext of it's financial inability and the Shahbajpur Gas Field, discovered by BAPEX in 1995 is, reportedly, in the process of transfer to the foreign contractors for development without preserving BAPEX's right in the deal, which right could enable BAPEX to mobilize funds for further exploration by itself. Terms of the PSCs are incongenial to our interest, particularly in relation to environmental issues as evidenced by the Magurchara devastation. No insurance money has been obtained for Bangladesh and, on the contrary the cost of exploration was substantially enhanced by including the cost for sealing off the well, though enquiry committee is learnt to have attributed the blame on the contractor's negligence.

21. It is apprehended that unplanned deals with foreign companies may lead to over production and consequential drying up as happened in Nigeria. As time would pass by, gas production would accelerate, creating huge surplus after meeting demand and without obligation as the contractors' part to utilize excess production for value addition on it's own account for cost recovery. The concession under the second round bid may turn out to be burdensome for our economy, particularly because of "Cost Oil" buy back provision. The respondents' reported move to proceed with negotiation with a view to allocate all the blocks to IOCs in the second bid may force us to export gas to the neighbouring countries through pipelines, plunging us to a state of vacuity in generating electricity, which, because of absence of other means of production at present and in the foreseeable future, is and will be largely dependent on natural gas. A wise and thrifty policy, resembling that taken up by the United States to conserve oil in Alaska, is the need of the day as reckless use will land us to a situation of power bankruptcy.

22. Absence of gas export provision through pipeline in the Petroleum Act 1974 or the Energy Policy 1996, is designed to protect value addition policy as well as to boost employment through consumption by domestic industries and services. If gas dries up through excess production, pipeline exports, Bangladesh would find itself in grievous predicament and be constrained to import it from abroad.

23. Gas scarcity is already taking it's toll on the power sector, causing substantial economic loss, which will remain in progression. At the moment only 2-3% of the populace enjoy the privilege of using gas for household purposes. Only 14% of them have access to electricity and hence, in no way can our national interest be served by exporting gas at this stage. National interest would be irretrievably compromised if gas are exported to India, as reports pouring in suggest, without taking account of domestic need and without sound reason for violating restrictions in the energy policy and the Model PSC on pipeline exports, notwithstanding that we do not posses enough gas for export at this stage.

24. A book titled "Upstream Oil and Gas Agreement" published by Sweet & Maxwell, authored by Prof. Bernard Taverns, emphasizes that PSCs signed by Bangladesh are unfavourable to itself and that Indonesia, the primordial nation in the PSC scheme, preserved through legislation for it's national company "Petromina", favourable terms, to allow it to boom. Egypt followed the suit, when she entered into a PSC with a Japanese Company-Syria, Peru, the Philipines and Libya also toed the same trail.

25. India has also, following Malaysian lead, ensured upto 30% participating interest for the government in any gas or oil field. China, following Indonesian footstep, reserved for it's national concern exclusive right to search for and exploit petroleum in conjunction with foreign companies. These reveal that all the developing countries set apart special provisions to enable their national body to groom well to be able to take over on future dates, yet Bangladesh has remained in solitude, albeit commendable contribution our national body marked. It is learnt that Petrobangla's proposal to the respondent no.1 for Carried Interest Participation in Malaysian model, has been turned down.

26. In issuing letters of intent to the IOCs, policy of honesty, reasonableness, fairness have not been adhered to. No recognised person, specialising in the fields of geology, energy, or law has been inducted into the negotiation process where four secretaries to the government, barren of any knowledge in any of the subject apposite to the matter, are steering the process. Allegations of clandestine maneuvering, incessant lobbying and weighty intervention by powerful people are ripe. Relevant documents have been kept away from the sight of the Parliamentary Standing Committee.

27. The petitioners fortified their averments emphasising that they are not opposed to PSCs with overseas companies, but want the deals to be pro-active to the national interest, to the principle of transparency, and to be immune from extraneous pressure. They believe all the blocks should not be leased en-masse, simultaneously under the PSCs, leasing process should be synchronized with the demand at home, all the existing PSCs should be opened up for fresh negotiation and be amended to suit national interest, "Tax-Oil" "Royalty-Oil" and "Carried Interest Participation" provisions should be inserted into the PSCs and Letters of Intent, already issued, should be declared unlawful, certain areas should be reserved for BAPEX /Petrobangla's exploration, pending comprehensive assessment of the country's proven and potential reserves. Parliamentary involvement before execution of the PSCs should be made compulsory and refrainment from exportation through pipeline until and unless broader consensus is reached through public debate, should be assured, formulation of a national policy through the Parliament, addressing all the concerns expressed on the issue of management of oil and g as resources of the country, should be expedited.

28. The respondents fiercely contested the Rule and filed affidavit and supplementary affidavits-in-rebuttal to dispel the contention the petitioners put through. According to the respondent no.1, the purported facts put forward for consideration through the writ petitioner are so highly contentious that they cannot be resolved without examination of evidence, not possible in a judicial review proceeding. The subject matter of the writ petition falls within the exclusive domain of the government policy, arrived at after due consultation, and is not, therefore, amenable to judicial review. The Executive Organ of the State is entrusted with the job of conducting day to day affairs of the State, inclusive of the duty to arrive at commercial contracts, with which the Judicial Organ would not interfere, save where breach of Constitutional or statutory provision is manifest, which is not the case. The Parliament has plenary power to enforce the executive's accountability and hence, the subject matter is beyond judicial reviewability. It is not true that the PSCs entered into are not conducive to public interest, the Government Policy has been formulated after much consultation to strike a right balance between the interests of the nation on the one hand and the state of constriction resulting from our technological and resource constraint on the other. High financial risk involved in Petroleum exploration is also an irresistible factor that the respondents are to take account of. The government is continuously reviewing it's policy in the energy sector in order to keep pace with the growing energy needs arising out of economic development, changing environmental consideration, volatile global energy market and other developments. This Division should not interfere with the matter since the issues involved require extensive and indepth survey over factual, scientific and financial data and technical know-how, for which the constitutional responsibility lies with other branches of the state. Different persons may relish different views on the policy the government has been cruising through, but it cannot be interfered with unless one of the grounds justifying intervention is substantiated. No meaningful or specific direction can be given by a Court in a policy option in the matter of gas and oil exploration. The relief the petitioners sought are vague and elusive. It is not correct that the PSCs are not in concord with public interest, there is no specific indicator in the petition to depict how public interest has been bartered. Natural resources, especially oil and gas become national resources only after they are discovered. Merely speculative opinion that a country may have certain resources may not be conjunctive with reality. Endeavour is required to translate

speculation into reality and such endeavour imports very large degree of risk of investment and hence, by opting for the PSCs to explore fields for oil and gas in a large scale, instead of continuing with the exploration on our own at a slow pace, employing hard earned public/ tax payers money, public interest as well as resource identification has been ensured, which will on one hand release resource of the government for infrastructure development, and on the other hand strengthen the energy base of the country much faster. There are experts who hold views different from those cited by the petitioners. By releasing government's limited resources for use in social, educational, health and poverty alleviation sector, rather then utilizing it for a high risk venture like gas and oil exploration, scope of the government's effort towards ensuring social justice will be widened. Gas exploration involve large and risky capital investment. Often a large scale exploration survey end without even any drillable location. Even when the entrepreneurs do have locations for drilling, they may end up with dry holes that have no oil and gas, which means after considerable expenditure of time, effort and money, there may be nothing to recoup the investment and it is only fair that the entrepreneurs should have some incentive to be encouraged to put their money at stakes, which incentive, lies in the recovery of cost, once commercial amount of oil and gas shall have been discovered and developed. This process is now time-tested and widely used. It is not true that the respondents have been in violation of their duties and constitutional mandates, the respondents are strictly following the provisions in Petroleum Act 1974, and the Petroleum Policy and Energy Policy. It is not true that the executive has failed to perform it's obligation under Article 144. While success achieved by Bangladesh Oil, Gas and Mineral Corporation (BOGMC) (Petrobangla) is laudable, it has to be borne in mind that their success in discovering 9 out of 19 was the outcome of 25 years of protracted efforts and some gas fields discovered by them had to be abandoned, which means that the level of activities or reservation by BOGMC cannot, for the growing need of gas for power generation or fertilizer production be worthy of it, and, hence, opting for PSCs to accelerate the exploration activity is an acceptable alternative that can meet the volume of exploration required to ensure continuity in the supply of energy. It has also to be remembered that our own exploration activity was largely funded by bilateral assistance, which sources have dried up in the recent years as the donor agencies are diverting their fund to infrastructure, health and social service sectors. It is only natural that operative cost of the indigenous company in a developing country will be lower than that of an international contractor as the cost scenario are widely different as salary structure, overhead cost, related expenses are all very low compared to those in the developed countries. The overriding situation is that hardly any fund is now available from the government for such risky ventures. Such assistance, which were available for these activities, are no longer on the table. The level of exploration needed cannot be sustained by any indigenous company. The petitioners have ignored a very vital point by assuming, post facto, that all exploratory wells will necessarily discover gas and, failed to consider the basic aspect of risk factor and to reckon that resource assessment cannot be made on the basis of a single well, as it would require extensive appraisal work before development costing massive investment. Because of the resource constraints the activities of BAPEX have been slow and the claim that the respondent no.3 has adequate earning to sustain the risky exploration, is not based on correct information. Major part of the earning from gas sector has to be retained by the government for using the same in social sectors, like education, health, infrastructure etc., which sectors do not have any source of revenue of their own. If, as suggested, BOGMC uses the proceeds from it's gas business for risky exploration, the government will not be able to espouse any social welfare activity. National interest will not be served if some blocks are reserved for BAPEX, who would not have enough resources to carry on exploration at the desired level and speed. The respondents have stroked to protect the national interest and to enhance the technical competence of BAPEX by guaranteeing it's participation in these blocks in particular, and in all future blocks as would be appropriate. No economic model can be replicated as the objective and subjective conditions vary from

country to country depending on the location, national resources etc. Malaysia is a country of only 22 million people having an area about 4 times that of Bangladesh. The natural resources area of the country is very wide. It is not solely dependent on gas for energy as we are. The current phase of Malaysian oil and gas industry is supported by it's private sector and hence we cannot attain in our first attempt what Malaysia have achieved in 25 years. We are nevertheless incorporating clauses regarding technology transfer, local employment and local inputs and are now incorporating new features like Carried Interest, which indicate that we are moving in the right direction. It is not true that Petrobangla and BAPEX have been reduced to a public relation organisation. In fact they are key players in the PSC operation. The respondent no. 3 prepared a new version of the model PSC, enclosed, to be used in new round of bidding and new model reflects many improvements on the 1997 model PSC, which was based on the experience gathered over the last round of bidding as well as the evolving international practice in relation to PSCs. The 2008 PSC model has been published by the respondent no. 3 and has been made available to the public who can procure a copy from the office of respondent no.3 in the printed form. The 2008 PSC imposed very strict obligation upon the contractors requiring them to conduct all petroleum operations in a diligent, conscientious and workmanlike manner in accordance with the applicable laws and the generally accepted engineering standards in the petroleum industries round the globe, by paying due regard to the requirement of conservation, safety to life, property, crops, fishing, fisheries, navigation, protection of the environment, prevention of pollution, etc and also by adapting schemes for the development of expertise and training of Bangladeshi personnel at all positions, including administrative, technical and management positions and, to arrange for the systematic transfer of technology, know-how and experience to Petrobangla, and to compensate Petrobangla in case of any damage or expense if caused by inefficient, careless or negligent activities of the contractors. This PSC do not contain any provision for export of natural gas by pipeline. It is not true that the government has opened up all the blocks at a time; only 8 blocks were awarded in the 1993 round and the final award is contingent upon protracted negotiation and in effect the block award will be in phases and only when the government is satisfied that such award would be beneficial to the country. Potential gas deposit cannot be reserved unless it is proved as usable resource and till such time that we know what could be the usable gas reserve of the country. There is no way any future plan or strategy may be formulated. The government Policy does have inbuilt safety valve in limiting production of gas to maintain the reserve. Keeping gas reserve for posterity depends on volume of gas reserve we have or shall discover in future. We cannot under produce and stagnate the economy just to keep reserve unutilized for posterity, which, at that time, may not prove fruitful. The idea of area preservation to avoid accidents or environmental hazard is not well founded. What is required to avoid accidents is strict adherence to the regulations in all operations. Attacking the payment procedure in foreign currency for cost recovery and profit sharing in the PSCs and for gas purchase are based on misinformation or even may be motive oriented. We pay for imported oil in the U.S. Dollar and hence it is not comprehensible why payments in foreign currency for PSCs cost recovery and purchase should evoke any concern. If we stop the PSCs for the sake of saving foreign exchange, we shall have to increase our energy import by a large amount, which will entail foreign exchange drainage of even bigger proportion. It is not true that the policy lacks transparency or is disregardful to national interest. It has not specified by the petitioners as to how the terms of PSC are against national interest. There are adequate safety features and these are continuously improved. The case of Moulvibazar incident, though unexpected and undesirable, is an occupational hazard and the company concerned shall have to pay adequate compensation for their negligence. It is not true that the cost of the company has been increased following the accident. On the contrary the company will not be allowed any cost recovery for control, such as relief well drilling, and compensation for the damage incurred. The petitioners' contention that the gas production would go up by the year 2008, was grossly misleading. It

is evident that the current level of gas production is alarmingly insufficient and the capability of BAPEX alone is not enough to address the situation in the short and the medium terms. The industrial and power sector of the country are already suffering from the acute gas shortage resulting in a crisis in the overall economic development of the country and the welfare of the citizens. The gloomy scenario in gas distribution as reflected in the media report dated on 15th November, 2009, suggesting that a decision to ration gas distribution in Dhaka is on the card, exposes the grim scenario. The government had to take a decision against any new gas connection due to acute shortage. Such shortage of gas can only be remedied if the process for exploration of gas and oil, both onshore and offshore, can be resumed and carried on unhindered involving IOCs and BAPEX.

29. The hypothesis of importing gas from Central Asia is without any basis. If and when Bangladesh shall have to import gas, decision to do so shall be taken by exploring such aspects as availability, affordability and competitive price and such hypothetical import could be from Myanmar and Thailand as well. Given the fact that our gas resource needs expansion, we had to opt for PSCs having found it to be the best choice, without burdening the public exchequer. Currently prevailing power shortage is primarily due to the weak power infrastructure. If necessary action is not taken right now to discover adequate gas reserve, we shall definitely face power shortage of perilous magnitude or be thrown to a situation that would require us to pay very high tariff for imported fuel based power. The countries mentioned as having usable PSCs were all petroleum producers long before the respective government took over to stimulate the petroleum operation. This has been a tempting factor to allure the IOCs to involve themselves in the exploration activities in those countries of proven oil resources even at less favourable terms. PSC models of those countries also underwent major transition over the years, and the pattern being currently practiced, is the result of many years of experience. The respective countries also have different setup for petroleum operation, whereby the operating agencies enjoy virtual autonomy of operation and ownership to resources. In contrast, Bangladesh had no track record of commercial oil deposits and, gas not being a trading commodity until very recently, major IOCs were hardly interested to invest in an uncertain area as Bangladesh was. The PCSs are signed jointly by the government represented by the Ministry of Energy and Mineral Resources and BOGMC and the Contractors. Blind imitation of any other country's PSC is not prudent in the context of Bangladesh. The allegation that the government made no attempt to safeguard the national interest and acted under economic duress are baseless and counter productive and as such deplorable. It is not true that the public has been kept in dark about the PSCs. The Parliamentary Committee has the authority to ask for and investigate into any matter pertaining to the PSCs under their jurisdiction. By conceding that they are not against PSCs as such, the petitioners agree that the government has been following the recognised method in this regard. The allegation of yielding to pressure are rhetoric only. All blocks are not being awarded simultaneously. It should be noted that any award shall have an incubation period of at least 5-7 years before that block can, if at all, become productive. There is no provision for re-negotiation of any contracts on a unilateral basis. Comprehensive assessment of country's oil and gas potential demand that the country be explored systematically without wasting time. Keeping areas reserved for Petrobangla, or BAPEX will not produce any benefit to the nation. Notification of PSCs to the Parliament before signing is not required under the current law. The gas resources are being managed well by the concerned agencies, The government is fully aware of the sovereign right over the national resources and that is why it has retained the control on the resources by way of the PSCs, instead of awarding the blocks through outdated royalty system. The Executive is exercising its power to secure the best possible terms within the available options and that is why the PSCs have been taken up to accelerate the pace of exploration for energy and the petitioners have conceded that they are not as such against the PSCs. The petitioners have failed to specify how the executive

has failed to secure economic and social justice or to suggest how a better process may be followed to achieve it. They have cited examples from various countries without considering their attendant historical, political and economic scenario. It is easy to theorise or indulge upon rhetoric, but concluding a commercial agreement involving massive risk of capital investment involves consideration of practical aspect. Wherever, one wish to have something done for them by others, certain concession has to be made. We have two options: (1) to continue our own exploration in a very slow pace, utilizing our very limited public resources, and thereby seriously undermining the social welfare activities undertaken by the government or (2) to accelerate the pace of exploration through PSCs, concluded under the best possible terms available under the current national and global scenario. BAPEX is currently operating two drilling rigs for exploration and extraction of Petroleum. Another rig is in the process of arrival. Long terms plan for further development of BAPEX is not an answer to the pressing current need for gas that the country's economy needs in the short terms. Due to the order of injunction, passed by this Court, all activities relating to gas and oil exploration in the onshore areas have remained suspended for about 8 years and in the offshore areas such activities were suspended about 5 years ago, which have had a serious negative impact upon the usable stock of gas in the country. Bangladesh has a proven gas reserve of approximately 15 Trillion Cubic Feet (TCF) of which 8.37 TCF has already been extracted, leaving a remaining proven reserve of 6.64 TCF. Given the rising demand for gas due to the increasing population and industrialization, this reserve may be sufficient for upto the year 2011 only with heavy strain on the system and the industrial sector. If new gas reserves are not discovered through entering into new PSCs on an urgent basis, the industrial and the power sectors will be starved of gas, they can not survive without. The democratically elected Parliament of the country has constitutional mandate and power to ensure the accountability of the executive organ of the State by requiring the concerned Ministries to respond to their questions and concerns. A direction in the nature of mandamus directing the Government to evolve a national policy through Parliament ensuring appropriate participating interest for the State in future production sharing contracts, is outside the scope of judicial function.

30. Assertion averred in the affidavit-in-opposition filed by the respondent no.3, are more or less in similar terms.

31. Over and above those averred by the respondent no.1, this respondent came up with some additional assertions, which are narrated below:

An inevitable escalation in the demand for gas would necessitate increased exploration and establishment of new gas market, which acts can not be termed as contra-national interest. Petrobangla never tried to provide or circulate over optimistic or speculative information about the oil and gas resources. Expectation that the "national interest saving clauses", inserted in the contracts, would attract indigenous private sector business to come forward, had so far proved futile, as domestic business houses are keen to act as local agents, or subcontractors of the IOCs, rather than to take on the responsibility as the principal. Payment of Royalty Oil "is not of universal practice, and is not an inherent factor in Bangladesh where the objective condition are diametrically different from those countries which can nourish the idea of 'Royalty Oil". Most of the PSC subscribing countries are essentially oil producing ones, where lesser investment yields larger productivity, a factor that easily allures contractors, whereas exploration of gas alone is very cost incentive and, hence Bangladesh scenario can not be equated with the recognised oil producing countries. Compulsory gas purchase from the IOCs under the PSCs are not mandatory in all PSCs, but had to be inserted in a few selected ones only because of prevailing riskful situation as to investment. Gas production is controlled by national demand. We may be plunged to a situation where even the IOCs under the PSCs may not be able to supply enough to meet our demand. A massive gas input will become necessary if the national power and fertilizer

industries can spread their wings to reach major part of the population. At the moment only a small fragment of the populace have access to it. Any operation in its' early stage face teething problems, Bangladesh can not be different. Skilled manpower is not created overnight. Petrobangla is trying to overcome these problems by enlarging the supervision structure and by training people. It is unfortunate that Petrobanglas' recent ventures pertaining to reorganization of supervision activity, cost control and work plan has not been taken notice of by the petitioners. Transfer of technologies can only be meaningful if local entrepreneurs come forward to develop. This has, so far, not happened, without any fault on respondents' part. Petrobangla itself is gaining skills, but that is not enough. Expertise must be extended to others as well. These contracts are not public domain ones; documents containing these contracts are not public documents, but people related to the business or having authorsation can have access to them. It is surprising that the petitioners having alleged that these documents are kept secret, were, nevertheless, able to procure them, leaving one to wonder how they had access to them if they were kept in Alibaba's Cave. It is interesting to note that the so-called public concern is being voiced only since the last year or so, whereas the first PSC was executed in early 1995. The assumption that the 2nd round will naturally result in discovery of gas in all the blocks, is very simplistic. If that can be taken for granted, there would be no risk in exploration. In any case, with the second round, still in its cot, it is too conjecturous to assume that any of the companies will discover or develop a new find by 2005.

32. Tying development planning with IOC's production has been misinterpreted. What actually is being considered is that the companies shall have to explore and/or develop market for their portion of cost/ profit gas as pipeline export is not allowed. If such development can be materialised, that would accelerate the pace of economy so that new demand for gas will be met by the IOC produces. There is no such thing as surplus production rather the demand will drive the production level. The claim that new discovery may, by 2005 yield 3466 MMCFD a day is speculative, a figment of imagination or wishful thinking. If there could indeed be such a level of discovery, we could have an easy ride for a long term plan for our gas resources. The petitioners seem to be obsessed with cost oil/gas oil and buy back provision" in the PSCs without taking into consideration that such provision is not mandatory and this is not common to all the PSCs and will not find a place in the second round. They are getting concerned without familiarising themselves on the whole truth, and have been failing to dive deep into the matter before labeling charges against the respondents.

33. Fields discovered some years back are in the aging process and getting frail. In fact some, production has already come to an end altogether. There is a need to accelerate the pace of exploration to sustain current and future production levels.

34. By an order dated 3rd December 2001, this Division, allowed an amendment application the petitioners preferred, wherefor the prayer part is now to be read as follows:-

Wherefor it is prayed that your Lordship may be pleased to issue a Rule Nisi asking the respondents to show cause as to why they should not be directed to-

(a) Evolve and formulate a national Strategy Policy through Parliament ensuring appropriate "Participating Interest" for the state in all the future Production sharing contracts prior to leasing out all the remaining 15 blocks at a time including blocks number 3,5,6,7 and 8 in relation to which letters of Intent have been issued and not to export any gas in violation of the terms the Production sharing contracts.

(b) Pending disposal of the Rule, the respondent No.1 and 3 are restrained from signing any further Production. Sharing Contracts and exporting natural gas through Pipelines

(c) Further or other relief's.

35. A couple years subsequent to the passage of the Rule, the petitioners successfully filed an application to this Division, which resulted in the issuance of an order requiring the respondents to refrain from entering into any PSC over the residual blocks and not to enter into or sign any contract for and/or to allow any export of Natural Gas violating any of the terms and conditions as set down in the Production sharing Contracts, already signed and executed, for a period of 3 months. This period was, however, extended from time to time, and is still in force, subject however to a subsequent order this Division passed on 13th July 2006, at the instance of the respondents, placing the respondents at liberty to start and/or continue to proceed with the bid for exploration in the sea area of Bangladesh and sign production sharing contract in accordance with the law.

36. As the Rule matured for hearing, Mr. Abdur Razzak, the learned Advocate appearing for the petitioners, agreeing that it is a policy matter of the government, nevertheless, contended that there is no authority to proclaim that policy based decisions enjoy total inoculation from judicial review. According to him the authorities of unimpeachable preponderance suggest otherwise. With overwhelming emphasis Mr. Razzak submitted that policy decisions can be placed under judicial microscope. He went on to submit that the National Energy Policy was framed in 1996 and it was framed by the executive, not by the Parliament. It is his case that Articles 144 and 145 of the Constitution put the government in a fiduciary relationship to the citizenry and the government has not acted in the manner a trustee ought to. He submitted that Article 145(2) entitles the petitioner to have recourse to Article 102. He cited five situations where this Division can set it's foot to examine the legality, propriety or righteousness of a policy based decision and they are where the policy decision is (1) *mala fide*, (2) *ultra vires*, (3) arbitrary, (4) unreasonable or (5) unfair. Submitting that the policy decision as adopted by the government is arbitrary unreasonable and unfair, Mr. Razzak took us through the facts at length ,averred in the petition and drew our attention to the differences that conspicuously exist between our PSCs and those gestated by other gas/oil producing countries. To substantiate his claim as to our competence to interfere in policy matters, Mr. Razzak relied on the ratio expressed in the cases of ***R –v- Secretary of State exparte Duly (3 All ER 2001 page 433), Brahambari Purashava –v- Secretary, Ministry of Land Reforms (7 BLT AD 95), Moklesur Rahman –v- State 26 DLR (AD) 44***. He also reminded us of the Appellate Division's decision in ***Secretary, Ministry of Finance –v- Masdar Hossain (2000 BLD (AD) 104)*** to lend support to his contention that there is nothing to stop us from chanelling a direction to the Parliament to frame policy. According to Mr. Razzak absence of national policy or even presence of a flawed policy would allow the respondents to resort to discriminatory arbitrary and unreasonable action. Although Article 145 does not contain a mandate in the same way Article 133 does, the earlier Article, says Mr. Razzaque, contemplates guidelines nevertheless. There is nothing in the draft energy policy to be in semblance with what are there in the Malaysian one. There is no "Carried Interest". He did concede that the PSCs are the practice that are followed universally and that he is not opposed to it, pointing out, however that the terms of PSCs entered into by Bangladesh are not national interest friendly.

37. There is no participation of the local economy in our PSCs. According to him export of gas through pipeline will have disastrous consequences. He also sounded warning on the "buying back" term in the PSCs, nurturing the view that the matter should be discussed at length in Parliament, which should, then formulate policy after procuring experts opinion.

Dr. Kamal Hussain's Preferment.

38. Dr. Kamal Hossain, the learned Senior Counsel, appearing for the respondent no.3, on the other hand came up with a diametrically different contention, placing substantial dimension to the theme that a government policy matter deserves insulation from judicial scrutiny. He went on to say that no direction can, in any event, be channeled by this Court

on any of the respondents, let alone on the Parliament, requiring any of them to frame any policy. That, submitted Dr. Hussain, would be tantamount to transgression upon the realm of the other Organs of the state. Relying on the case of ***Bangladesh –v- Shafiuddin Ahmed, 50 DLR (AD) 27***, he contended that Article 133 of the Constitution confers power and not duty to legislate, no Court can direct the Parliament to legislate, or the President to frame rules. Policy in existence at the moment, contain detailed guideline as to how PSCs should be arrived at, and what terms should be embodied therein. They are in wholesome conformity with the nation's interest. He took us through Annexure-1 to the supplementary affidavit, which is indeed the model PSC formulated by Petrobangla in 2008. The concept of PSCs was first mooted in 1966 by Indonesia. A Policy decision, said Dr. Kamal, is for the executive government, which is responsible and accountable to the Parliament and ultimately to the electors at large. The present PSC model is of the 5th generation. This Court cannot, said Dr. Kamal Hossain, micromanage the government's function. According to him the Policy, as framed and followed, is of impeccable propriety and veracity, free of any vice like arbitrariness, unreasonableness, malafide, or unfairness. It is, submitted Dr. Hussain, also not *ultra vires* either the Constitution or any statute. It is a product of accomplished virtues.

Mr. Murad Rezza's Contention.

39. Mr. Murad Reza, the learned Additional Attorney General appearing for the respondent no.1, added that Masdar Hossain's case is the only exception to the general rule and norm that this Court would not and indeed, can not pass a direction upon the Parliament to legislate because our Constitution, founded on the doctrine of Separation of Power, has left legislative power to the exclusive domain of Parliament, save limited Ordinance making power of the President. He relied on the ratio that come out from the case of ***Sk. Abdus Sabur –v- Record Officer (41 DLR (AD) 30)*** to lend support to his contention. According to him 'Masder Hossain' exception was propelled by the fact that a congenital mandatory direction in the Constitution itself, remained unadhered to for decades together. Mr. Reza reiterated the theme that this Division cannot interfere with a government policy matter unless such a matter is infested with unreasonableness, unfairness, arbitrariness, or is *ultra vires* or *male fide*. He went on to say that nothing like these are apparent on the face of the records. He also submitted that issues based on facts as well as technical nitty-gitty cannot be examined by this Court in it's jurisdiction under Article 102 of the Constitution. Mr. Reza continued with the submission that a Policy is in fact in existence and the latest one has been enriched by years of experiment. He cited the cases of ***Union of India-v-International Trading Company (5 SCC 2003 at 437), Tata Celular- V- Union of India (AIR 1996 SC 11),*** the case of ***Sheikh Abdus Sabur –v- Returning Officers and others 41 DLR (AD) 30***, to fuel his submission that it is not for the court to determine whether a particular policy is fair or whether a policy or a policy based decision is consistent with public interest. In his vision there is nothing whatsoever to display any of the factors in the policy or its' application that would justify our interference.

The Issues to be Resolved.

40. The issues we are to address are (1) whether, in view of a number of questions the petition has necessarily engendered, which questions require analysis of some factual and technical anecdote, this petition is maintainable, (2) whether we can interfere with a government policy matter, pertaining to exploration of gas and petroleum and direct the government to make a policy that would be consistent with the petitioners' aspiration, (3) whether we can direct the Parliament to frame Policy.

41. There is least doubt that the petition has raised a myriad of fact based questions, resolution of which would involve examination of evidence, not possible in a writ proceeding. That said, however, it is true, equally well, that some important legal questions

have also been raised through the petition, which require attention. We are, hence, inclined to proceed to dispose of those points of law, albeit existence of some disputed questions of fact. The first issue is thus resolved in the petitioners' favour.

This finding necessitates us to address the other issues.

42. Article 143 of the Constitution ordains that in addition to any other land or property lawfully vested, all minerals and other things of value underlying any land of Bangladesh, all lands, minerals and other things of value underlying the ocean over the continental self of Bangladesh and any property located in Bangladesh that has no rightful owner, rest on the state.

43. Article 144 commands that the executive authority of the Republic shall extend to the acquisition, sale, transfer, mortgage and disposal of any property, the carrying on of any trade or business and the making of any contract.

44. Article 145(1) provides that where a contract or a deed is made or executed in exercise of the executive authority of the Republic, neither the President nor any other person making or executing the contract shall be personally liable in respect thereof, but this Article shall not prejudice the right of any person to take proceeding against the government.

English Crown Prerogative and Policy Matters under Our Constitution.

45. Contents in all the Articles, cited above, are, broadly, the replica of the power the Crown in the United Kingdom enjoys by virtue of Crown Prerogative. The Prerogatives vested in the Crown are part of the English Common Law, under which all minerals, treasure troves, i.e. things of value lying underneath the soil, sea bed, sea-shores within the territorial boundary, including the continental self and anything not owned by any individual, i.e. where the concept "*bona vacantia*" applies, belong to the Crown. Under the prerogative power it is the Crown that enjoys exclusive authority to enter into any agreement to lease, mortgage or in any other manner dispose of or deal with any property the Crown owns.

46. When the Crown exercises prerogative power in respect to overseas matters, including execution of any contract with a foreign country, declaration of war or peace, relationship with a foreign country, such actions are designated as "Acts of State." Although in the olden days Prerogative Powers were exercised by the Monarch, the development of the doctrine of Convention has virtually stripped the Monarch of that power as Prerogatives are now exercised by the Ministers in the name of the Crown, in the same way in our system it is the cabinet that exercises all the executive powers under the Constitution in the name of the President. Policy matters in Britain are necessarily integrated with Prerogative Powers and hence British authority on Prerogative based cases have relevance to government policy based cases in our jurisdiction.

47. The question as to whether action taken by the government in exercise of Prerogative Power in Britain, and power exercised in other common law oriented countries like Bangladesh under such provisions of the Constitution which resemble the Crown Prerogative, which may quite aptly be designated as "Constitutional Prerogative," are judicially reviewable, have, for ages remained a legal hot potato. Until recently the judicial authority in the UK remained caged in the domain of inconsistency.

48. Breakthrough in the UK has been heralded by a couple of cases, during last couple of decades, the latest one being the celebrated case of ***Council of Civil Servants Union-v-Minister of State for Civil Service***, popularly known as the ***GCHQ case (1985 AC 374)***. Through that decision, the House of Lords dismantled the taboo that prevailed to insulate Prerogative actions from judicial review generally. The change of trend, however, became visible as early as in 1967, when the Court of Appeal found no reason why a body set up by

Prerogative should not be amenable to judicial scrutiny. ***(R –v- Criminal Injuries Compensations Board, ex-parte Lain 1967 2 QB 864)***

49. In ***GCHQ case*** he House of Lords unequivocally rejected the Crown's contention that an action pursued under a Prerogative Power is not susceptible to judicial review, expressing that the controlling factor in determining whether the exercise of the power was subject to judicial review was the justiciability of it's subject matter, rather than whether it's source was prerogative.

50. **Lords Scarman, Diplock and Roskil** expressed that powers exercised directly under the Prerogative are not, by virtue of their Prerogative source, automatically immune from judicial review. If the subject matter of a Prerogative Power is justiciable, then the exercise of the power is open to judicial review.

51. What transpires from GCHQ decision is that the primordial question is not whether the source of the power is or is not Prerogative, but whether the subject matter itself is justiciable. The house of Lords furnished illustrations of some subject matters which are not justifiable for the reasons that they are of such nature as not to be amenable to judicial review. As Lord Roskill observed "Courts are not the place wherein to determine whether a treaty be concluded or the armed forces be disposed in a particular manner, or Parliament dissolved on one date rather then another." The House of lords furnished a catalogue of subject matters that are not justifiable; they include treaty with foreign countries (***Blackburn-v- Attorney General 1971 2 ALLER 1380, R-v-Foreign Secretary ex-party Rees Mo 99 1994 QB 552***), conferment of Honours, dissolutions of Parliament, declaration of war and peace, decision as to whether national danger exists (***R-v-Hampden, the Ship money Case 1637 3st Tr 825***), restricting entry of aliens into the country, disposition of the armed forces, appointment of ministers, defence of the realm (***Council of Civil Servants Union-v- Minister of State for Civil Service (1985 AC 374***).

52. Previously, i.e. prior to the decision in ex-parte Lain, supra, the view was that while it is open to the court to determine the question of existence and extent of prerogative ***(Nissan-v- Attorney General 1970 AC 179)***, traditionally they have had no power to regulate the manner of it's exercise. (***China Navigation Co. Ltd. –v- Attorney General 1932, 2 KB 197, Chandler –v- DPP 1964 AC 763), Hanratty –v- Butler 115 SJ), Gouriet –v- Union of Post Office Workers 1978 AC 435***).

53. The legal position in our part of the world does not reveal any divergence.

The generalized argument that Constitutional attributes, powers, functions, and immunities in the nature of Government Prerogative, particularly those dependent upon policy matters, are not in any event, reviewable, has not been able to attract favour from the superior Courts in the sub-continent. Here, just as the English Courts have done in *ex parte* Lain, supra, and finally in GCHQ, the Courts have struck a balance between the two extremes. While rejecting the inflexible version that matters dependent upon policy decisions are never susceptible to judicial review, the Courts came up with a middle of the path theory, subscribing to the moderating view that they would not generally interfere with policy based decision, but would not take it as a rule of thumb. So in ***Tata Cellular –V- Union of India (AIR 1996 SC 11)*** the Indian Supreme Court held that the principle of judicial review to scrutinise the exercise of contractual power by the government would apply to prevent arbitrariness or favouritism, but there are inherent limitations in exercise of that power as the government is the guardian of the finances of the state. The same Court also held that it would step in if it is apparent that the policy decision under challenge suffers from any of the maladies such as (1) unreasonableness (2) arbitrariness (3) unfairness (4) being ultra vires any statute or any provision of the Constitution (5) being tainted with bad faith or malafide consideration. So was held in the case of ***Delhi Bar Association-v-Union of***

India 13 S.C.C. (628). In the Indian Supreme Court in ***A. Satyanarayana –v- S. Puroshotham (2008 SCC 5 page 416)***, held that the Courts would interfere in policy matters on ground of arbitrariness, irrationality, unreasonableness. It may be worth reminding here that **Lord Diplock** in ***GCHQ case*** ordained that the courts would interfere if the decision reveals illegality, irrationality and procedural impropriety.

54. In ***M. P. Oil Extraction-v-State of Madhya Pradesh (1997 7 SCC 592)***, the Indian Supreme Court expressed " unless a policy decision is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is violative of any Constitutional or statutory mandate, Courts' interference is not called for. The executive authority of the State must be held to be within it's competence to frame a policy for the administration of the State. Policy decision is in the domain of the executive authority of the State and the Courts should not question the efficacy or otherwise of such policy so long as it falls within the Constitutional limitation and does not offend any provisions of the statute."

54. In ***Ugar Sugar Works Ltd.-v-Delhi Administration and others (2001 3 SCC 635)***, the Supreme Court of India expressed, "It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with policy decisions unless such policy framed, could be faulted on ground of mala fide, unreasonableness arbitrariness, unfairness."

55. In the State of Punjab-v-Ram L Bagga & others (1998 SCC 117), the Indian Supreme Court reiterated the ratio of the decisions in above cited cases, expressing that Government Policy is not normally justiciable, the exceptional cases being those which reveal malafide, arbitrary, ultra vires action.

56. In ***Union of India and another-v-International Trading Company and another (2003 5 S.C.C 437)***, the Supreme Court of India observed that policy decisions taken on public interest would not be open to judicial scrutiny if taken in good faith and reasonably. The same court in ***Tata Cellular –v- Union of India (AIR 1996 SC 11)*** held, "The duty of the Court is to confine itself to the question of legality. It's concern should be:

1. Whether a decision making authority exceeded its' powers;

2. Committed an error of law;

3. Committed a breach of the rules of natural justice;

4. Reached a decision which no reasonable tribunal would have reached;

5. Abused its' power."

57. The Indian Supreme Court in ***State of Maharashtra -v- Lok Shikshan Sanstha (AIR 1973 SC 588***, emphasised the need to normally refrain from interfering with State Policy so long as fundamental rights and rules of natural justice are not breached. In ***N. Ramanath Pillai –v- State of Kerala AIR 1973 SC 2641***, that Court expressed that where exigencies of administration required alterations in establishment of new departments, and there was no colourable exercise of power by the State, there was no question of bias or mala fides in regard to it, the Courts would not interfere.

58. Similar view was expressed in ***Sanjeev Coke Mfg. Co. –v- Bharat Coking Coal Ltd. (AIR 1983 SC 239)***. Refusal to intervene was marked on the ground that the distribution between public, private and joint sectors and the extent and range of any scheme of nationalization are essentially matters of State Policy which are inherently inappropriate subject for judicial review. Scales of justice are not designed to weigh competing social and economic factors, in which matters legislative wisdom must prevail.

59. In ***Maharastra SBOS-v-Paritosh (AIR 1984 SC 1543)***, the Supreme Court came up with a commendable view, stating the Court should not examine merits and demerits of the

policy laid down by the Rule-Making Body, as the Courts power of scrutiny is limited to the question as to whether the Regulations fall within the scope of the Regulation making power.

60. In ***Union of India-v-Cyanamid India Ltd. (AIR 1987 SC 1082)***, the Indian Supreme Court was quite obstinate in observing that price fixation is not the function of the Court and the Court is not concerned with the policy or the rates, but reserves jurisdiction only to enquire whether relevant consideration have gone in or irrelevant consideration have been kept out in determining price.

61. In ***State of UP-v-UP University College Pensioners Association (AIR 1994 SC 2311)***, the Supreme Court of India put it on record that a policy decision is not subject to judicial review unless it is unreasonable or against public interest and in ***K Narayanan-v-State of Karnataka (1994 Supp (1) SCC 44)***, the same Court expounded that a policy decision taken by the government is not liable to judicial interference unless the Court is satisfied that the Rule Making Authority has acted arbitrarily or in violation of fundamental rights guaranteed by the Constitution.

62. In the ***State of Rajsthan-v-Sevanivatra Karmachari Hitkari Samity (1995 2 SCC 117)***, the Supreme Court of India held that the wisdom in a public policy matter of the government is not justiciable unless such a policy decision is wholly capricious, arbitrary and whimsical, thereby offending the rule of law or any statutory or Constitutional provision.

63. In ***Federation of Railway Officers Association-v-Union of India (AIR 2003 SC 1344)***, the Supreme Court's observation went a long way to lay down the principle in conspectus. It stated that in a Policy decision of the Government, the Courts' power is limited. Unless the policy decision or action is inconsistent with the Constitution and the laws, or arbitrary, or irrational, or reflects abuse of power, the Court will not interfere.

64. Public Trust Doctrine.

The Supreme Court of India in MC Mehta –v- Kamal Nath (1996 (6) Scale (SP) 10(1), came out with a mile stone decision to expound the fullest import of the English Common Law doctrine of Public Trust, holding that the Public Trust Doctrine in the English Common Law extended only to certain traditional use, such as navigation, commerce and fishing, while the American Courts had expanded the concept of Public Trust to a larger dimension and that the Indian Legal System, based on English Common Law, includes Public Trust Doctrine as a part of it's jurisprudence, expressing "The state is the trustee of all national resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use ,cannot be converted into private ownership."

65. Principles enunciated in the above cited decisions, stemming from English, Indian, and our own jurisdiction, can be succinctly summed up in following terms-

(1) The archaic English notion that actions taken under Prerogative Powers are not judicially reviewable is no larger sustainable for there are cases which can be put under judicial microscope and in the same way, in our jurisdiction , it can not be said to be a rule of thumb that all policy oriented powers, derived from the Constitution, resembling Crown Prerogative in English law, are necessarily beyond the reach of judicial apprising.

(2) So far as a governmental Policy matters are concerned, there is no hard and fast rule against judicial interference. Interference will however be warranted sparingly, if a particular instance divulges unreasonableness in the Policy or Policy making process, arbitrariness, capriciousness whimsicalness, bad faith, *mala fide*, procedural impropriety,

breach of any statutory or Constitutional provision or of any fundamental right as secured by the Constitution.

(3) The Government stands in a fiduciary relationship to the citizens in respect to the property the state owns.

65. Can We Pass a Direction on Parliament: Montesquieu's Separation of Power and the Doctrine of Trichotomy in Our Constitution.

Cogent and congruous reasons exist to support the notion of judicial restraint and slow pace of judicial interference in government Policy matters. Firstly our Constitution is largely founded upon the doctrine of Separation of Power, which was projected to the whole world by the French Philosopher Montesquieu, who, through his theory, based on the English Constitutional scheme, had us to believe that assimilation of all 3 kinds of power in one authority, would ensue tyranny. The Appellate Division in ***Sheikh Abdus Sabur –v- Recruiting Officer and others (41 DLR (AD) 30)***, lucidly elaborated this aspect of our Constitution. The Constitution has, as far as practicable, preserving however, the doctrine of "Checks and Balance," demarcated the boundaries for each of the three Organs of the State. So, the Supreme Court would not normally encroach upon the realm, the Constitution set apart either for the Executive or the Legislative Organ. An executive Policy matter, which the Constitution has assigned to the Executive, will not, hence attract judicial intervention unless one of legally justifiable reasons, narrated above, can be invoked. There is yet another reason which justifies this Division's reluctance to judicially review a governmental Policy matter. It is impossible on the part of this Division to meticulously arrive at a decision on the merit of a Policy: the judges are simply not equipped enough to shoulder this task without taking evidence from those who have the expertise or qualification: obviously no examination of evidence is possible in a judicial review process. A passage from the deliberation of **Lord Diplock** in ***GCHQ case***, *supra*, is quite mind blowing indeed. **Lord Diplock**, in pointing out judicial handicap in adjudicating upon the wisdom of Policy decisions, observed, "While I see no a priori reason to rule out irrationality as a ground for judicial review of a ministerial decision taken in the exercise of Prerogative Power, I find it difficult to envisage in any of the various fields …….. a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adopted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced, tend to exclude from the attention of the court, competing policy considerations, which, if the executive discretion is to be wisely exercised, need to be weighed against one another- a balancing exercise, which judges, by their upbringing and experience are ill qualified to perform."

66. So, to arrive at a proper adjudication on the instant case, we are required to see if the government Policy suffers from any infirmity as catalogued above. We are obviously not geared to dissect the wisdom or the virtues of the Policy.

67. It is not Mr. Razzak's case that no policy exists, neither is he opposed to PSCs. His complaint orbits round the proposition that the Policy has been framed by the Executive, while it should have been done by the Parliament, the existing Policy is not conducive to our interest and it does not reflect the modality contained in the PSCs of Indonesia, Malaysia and other countries, cited above. In our view these allegations fall far short of establishing a case of arbitrariness. As Dr. Hussain and Mr. Murad Reza, submitted, situation in every country must be judged by the attending circumstances prevalent therein.

Has Mr. Razzak succeeded to sway us to the synthesis that the Policy followed in Bangladesh is unreasonable?

68. Wednesbury Unreasonableness.

Unreasonableness, in the legal parlance, is not merely a phrase in English vocabulary, it is a term of art.

69. Although there have been many a decisions on unreasonableness, the one put forward by **Lord Green M.R.,** in the immortal case of ***Associated Provincial Picture Houses Ltd.-v-Wednesbury Corporation (1948 1K B 223)***, can quite aptly be termed as infinite for it has survived the test of time. In gist, a decision would be unreasonable in the Wednesbury sense if it is arrived at by taking into account extraneous factors at the cost of the factors that deserved consideration or, if "it is so unreasonable that no reasonable authority could ever have come to it." In ***Education Secretary –v- Tameside Council (1977 AC 1014***) **Lord Diplock** said that unreasonableness denotes conduct which no sensible authority, acting with due appreciation of its responsibilities, would have decided to adopt. In GCHQ case the same Law Lord made the theme more exacting by naming the test irrational, rather than unreasonable, connoting a decision which is so outrageous in it's defiance of logic or of accepted moral standard that no sensible person, who had applied his mind to the question to be decided, could have arrived at it. The Court of Appeal in ***R-v-Ministry of Defence, ex-parte Smith***, expressed that an unreasonable decision is the one which is beyond the range of responses open to a reasonable decision maker (***1996 QB 517***).

70. Now, as Professors Bradley and Ewing, in their book "Constitutional and Administrative Law, 15th edition, page 679, expressed, a judge may not, on judicial review, set aside an official decision merely because he considers that the matter would have been decided differently. Judicial review does not provide a right of appeal on the merits of the decision and hence, it is only in some deservant circumstances a decision many be set aside for unreasonableness and if this ground is taken, the court will have the difficult task of considering whether a decision, that is otherwise within the powers of the maker, may be struck off on ground of unreasonableness.

71. The Court of Appeal in ***R –v- Ministry of Defence exp smith***, *Supra*, observed that in human right cases, however, Court will be more prompt to intervene on ground of unreasonableness.

72. In the context of our economy and technological deficit, we are left with no choice but to embrace Production Sharing Contractors (PSCs). Even the countries with fast growing economy like China and India, have adopted it. Hence, no unreasonableness has been restored to by adopting the Policy of Profit Sharing Contracts. There is nothing whatsoever in the petitioners' averment to bring the policy making process or the policy itself, within the Wednesbury Principle or the principle **Lord Diplock** propounded.

73. Mr. Razzak says that the terms are not pro-national interest as are in Indonesia, Malaysia etc. We do not know, nor, in disposing of a writ petition, are we in a position to examine evidence to familiarise ourselves on such inquisition. As to whether the respondents took into account PSCs of those other countries, whether the contractors were agreeable to the terms contained in those PSCs, or whether circumstances prevailing in those countries are equitable with those in our country, are some of the questions, we are simply not accustomed to address. Neither can we, while adjudication upon a petition under Article 102, take evidence on these questions. Iterating **Lord Diplock's** expression, we would say that by our upbringing and experience, we are ill qualified to do the balancing exercise. As nothing is there to reveal that the respondents ditched intraneous circumstances and entertained extrinsic ones, or that the policy is so absurd that no person of wisdom would endorse it, we can not fertilise the idea that the government policy as to gas exploration, is tainted with unreasonableness in the Wednesbury sense.

74. Bad faith or fraud, as **Lord Denning** said, "unravels everything" (***Lazarus Estates Ltd.-v-Beaseley 1956 1QB 702***).

75. The Indian Supreme Court in ***Jaichand-v-West Bengal (AIR 1967 SC 483)*** in assigning broader meaning to the concept "mala fide" expressed that it's import is not confined to moral turpitude, but also extends to a situation where power is exercised for purposes alien to those the law intended.

76. In the instant case nothing on record shows any *mala fide* exercise of power in the factual (malice of fact in **Viscount Haldanes** definition (***Shearer-v-Shield 1914 AC 808***) or mala fide in the legal sense (malice in law in **Viscount Haldanes** theory, *supra*). There is no iota of evidence to establish a claim of bad faith in Lord Denning's phraseology either.

77. It is not the petitioners' case that the Government Policy eludes any statutory provision, though they claim that the respondents did not act in accordance with Articles 12, 21, 27, 114, 144 and 145. As to Article 13(a), i.e. the State ownership, read with Article 21, i.e. the duties of citizens and, public servants. As to Article 144 and 145, we are inclined to follow the ratio Indian Supreme Court expressed in ***M.C. Mehta-v-Union of India***, *supra*. Although that case was concerned with the State's duty to contain pollution, the Supreme Court elucidated the State's fiduciary duty as Public Trustees to it's citizens in respect to all natural resources and elaborated the State's duty as a trustee, to protect the natural resources.

78. The state's duty is essentially akin to that of a Trustee of a Public Trust, a fiduciary duty to act as protectors. The respondents will, as such, be amenable to our review only if it is divulged that they acted in a way which would have rendered them liable for breach of trust in a private law litigation.

79. Again the respondents have not been able to display anything of that sort on the face of this petition.

The second issue, thus, goes against the petitioner.

80. As to the 3rd issue, suffice will it to say that we can not, in the ordinary circumstances, in the context of Trichotomy of power, as envisaged by our Constitution, dictate the legislators as to their role qua legislators. They are only accountable to their over lords, the electors. Our jurisdiction to review the Constitutionality of legislations, including those by which the Constitution itself is purportedly amended, and the consequential power to set aside a legislation in an appropriate cases is one thing, while dictating Parliament to legislate in a manner to suit our wishes, is quite another. ***Masder Hussain case***, was obviously an extra-ordinary one, the ratio of which decision can not be boxed with the facts of this case. So, the third issue also is resolved against the petitioners, wherefor the petition is liable to fail on all counts.

81. This however, is not to say that we are abdicating our role as the Guardian of the Constitution or the Bastion of Fundamental rights. We would certainly interfere, without forgetting, however, that the Courts are only concerned with the legality of a policy decision- not its correctness or wisdom- even on policy or Prerogative like matters, if any of the derogatory factors, cited above, are present. No such factor being present in the instant petition, the same is destined to founder. The Rule is, hence, discharged without any order as to cost.

All interlocutory orders, issued earlier, are hereby vacated.

Mohammad Anwarul Haque J.- I agree.

This Case is also Reported in: