

**62.** We are, therefore, of the view that as long as the decision with respect to the allocation of spectrum licenses is untouched, this Court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the **2G Case**. For the purpose of this stage of argumentation, it needs little emphasis, that we have the jurisdiction to clarify the ratio of the judgment in **2G Case**, irrespective of whether we actually choose to do so or not. Therefore, the fact that this Reference may require us to say something different to what has been enunciated in the **2G Case** as a proposition of law, cannot strike at the root of the maintainability of the Reference. Consequently, we reject the preliminary objection and hold that this Reference is maintainable, notwithstanding its effect on the ratio of the **2G Case**, as long as the decision in that case qua lis *inter partes* is left unaffected. Therefore, we are convinced that the observations in Paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in the **2G Case**, is to be alienated only by auction and no other method.

**81.** Thus, having come to the conclusion that the **2G Case** does not deal with modes of allocation for natural resources, other than spectrum, we shall now proceed to answer the first question of the Reference pertaining to other natural resources, as the question subsumes the essence of the entire reference, particularly the set of first five questions.

**82. The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum.**

**106.** Such being the constitutional intent and effect of Article 14, the question arises - can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14 of the Constitution of India? We would unhesitatingly answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. Article 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language.

**116.** Learned counsel for CPIL argued that revenue maximization during the sale or alienation of a natural resource for commercial exploitation is the only way of achieving public good since the revenue collected can be channelized to welfare policies and controlling the burgeoning deficit. According to the learned counsel, since the best way to maximize revenue is through the route of auction, it becomes a constitutional principle even under Article 39(b). However, we are not persuaded to hold so. Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. “Common good” is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the “common good” and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Article 39(b).

**119.** The norm of “common good” has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government. Revenue maximization is not the only way in which the common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximization is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary consideration to developmental considerations.

**120.** Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies- Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term ‘distribution’, suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on

the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction.

**132.** It was also argued that even if the method of auction is not a mandate under Article 14, it must be the only permissible method, due to the susceptibility of other methods to abuse. This argument, in our view, is contrary to an established position of law on the subject cemented through a catena of decisions.

**135.** Therefore, a potential for abuse cannot be the basis for striking down a method as *ultra vires* the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelization, “winners curse” (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licenses for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called *ultra vires* for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximization is a priority. Therefore, neither auction, nor any other method of disposal can be held *ultra vires* the Constitution, merely because of a potential abuse.

**145.** Mr. Subramanian Swamy also brought to our notice a Report on Allocation of Natural Resources, prepared by a Committee, chaired by Mr. Ashok Chawla (hereinafter referred to as the “Chawla Committee Report”), which has produced a copious conceptual framework for the Government of India on the allocation and pricing of scarce natural resources viz. coal, minerals, petroleum, natural gas, spectrum, forests, land and water. He averred to observations of the report in favour of auction as a means of disposal. However, since the opinion rendered in the Chawla Committee Report is pending acceptance by the Government, it would be inappropriate for us to place judicial reliance on it. Besides, the Report conducts an economic, and not legal, analysis of the means of disposal of natural

resources. The purpose of this Reference would be best served if this Court gave a constitutional answer rather than economic one.

**146.** To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are *ultra vires* and *intra vires* the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

**147.** Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

**148.** In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as *ultra-vires* the constitutional mandate.

**149.** Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of

natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.

**150.** In conclusion, our answer to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances.

**151.** As regards the remaining questions, we feel that answer to these questions would have a direct bearing on the mode of alienation of Spectrum and therefore, in light of the statement by the learned Attorney General that the Government is not questioning the correctness of judgment in the **2G Case**, we respectfully decline to answer these questions. The Presidential Reference is answered accordingly.