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G.D. ZALANI AND ANR. ETC. ETC.

v

UNION OF INDIA AND ORS.

FEBRUARY 2, 1995

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[B.P. JEEVAN REDDY, SUHAS C. SEN, JJ.]

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*Constitution of India—Arts. 298, 299 & 14—Malafides—Acquisition of advanced technology by Govt. Company—Held, that in the circumstances of the case not feasible to invite tenders—Consideration by Sub-Committee—Held, fair and proper consideration—No Malafides made out against MD—Administrative Law—Natural Justice*

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*Article 77—Articles of Association of HAL—Article 117—Rules of business by President—Held, directive can be issued by Govt. of India—The directive must be expressed in the name of the President and not by the President himself—Form not mandatory—Directive issued in the present case by Govt. of India proper—Held, other companies whose offers are rejected—Need not be given an opportunity of being heard.*

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The three appellants along with Max-GB (Respondent No. 4) had offered to collaborate with HAL, for the purpose of improving the quality and quantity of penicillin-G (Penn.G) and they had also offered to bring in foreign technology through their foreign collaborators.

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While there were four offers including that of the Respondent No. 5 (Max.GB) the Chairman & MD of HAL supported the offer of Max-GB. The Board of Directors considered the offers made by SPIC and PBG and rejected them, as the technology offered by them was not in any way superior to that of HAL.

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A sub-Committee was appointed to evaluate the other proposals in which the offers of SPIC and PBG were considered again, and their rejection was reiterated. The Sub-committee suggested that the Max-GB was the only offer left and it can be considered, keeping in view the financial parameters suggested by them. The Board of Directors then decided that minimum lease rentals payable by Max-GB should be Rs. 31.68 crores. The Chairman, HAL, then approached the Govt. of India

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stating that the amount of Rs. 31.68 crores was not agreeable to Max-GB

and that the Board resolution was not correct. The Govt. of India after obtaining the expert advice of Prof. M.M. Sharma issued a directive to HAL to enter into a MOU with Max-GB and the MOU was signed for an annual rental of Rs. 17 crores.

The appellants challenged the MOU by filing three writ petitions contending that the MOU was invalid for the reason that though they had offered to provide equally superior technology on more advantageous terms, their offers were rejected due to the bias of the Managing Director of HAL. It was also contended before the High Court that because of the malafides on the part of the Managing Director, HAL had to lease out its plant for a very low amount, that the Government/HAL should have called for tenders and that no one knew the terms of the contract since it was formed in a hush hush manner and that there was no transparency in their dealings. The High Court repelled all the contentions and dismissed the writ petitions.

On appeal, it was contended by the appellants that their offers were rejected due to the *malafides* on the part of the Managing Director of HAL; that there was no fair consideration of the offers made by the appellants; that the terms stipulated by Max-GB were not put to the appellants for ascertaining their response, that the lower rental accepted in the MOU is against the minimum amount stipulated by the Board of Directors of HAL; that the Managing Director was bound to have carried out the instructions instead he was trying to over reach them; that the power to give directives under Art. 117 of the Articles of Association of HAL is vested in the President alone and the Government of India was incompetent to issue the directive; and that the case of Torrent was not considered prior to entering into the MOU.

Dismissing the appeals the Court held

1. In the circumstances and on the present material, it cannot be said that the Managing Director of HAL was either actuated by malafides or that he was acting out of extraneous reasons. [813-F]
2. The complaint that there was no fair consideration of the offers made by the appellants cannot be entertained. [813-G]
3. So far as SPIC was concerned even when it was putting

A forward its proposals it was in the process of setting up a  
 plant of its own for manufacture of Penn-G and it was per-  
 ceived more as a competitor rather than as a probable partner.  
 Secondly, its technology was unproven and there was an ele-  
 ment of commercial risk. Rejection of its proposals by the  
 B Board cannot therefore, be held to be either no consideration  
 or mechanical rejection. [813-H, 814-A]

4. So far as P.B.G. is concerned, it did not disclose its foreign  
 partner in the first instance; it did so only later. Above all the  
 Board of Directors of H.A.L. were satisfied that the technology  
 C of their partner viz., Biotica of slovakia was no superior to the  
 one being employed by H.A.L. [814-D]

5. It cannot be said that the decision of the Board was not fair  
 nor can it be insisted that before rejecting the proposals of  
 SPIC and P.B.G. the Board of Directors ought to have ob-  
 D tained technical opinion or the opinion of an expert committee.  
 [814-E]

6. Once the Appellants, offers were found to have been rejected  
 rightly, they cannot be heard to complain on the amount of  
 lease agreed between H.A.L. and M.G.B. [815-B]

E 3. The present case is not a simple case of granting lease by auction  
 or tenders. The technology is kept as a guarded secret. H.A.L. was trying  
 to improve not only the quantum of production but also its quality and for  
 that purpose looking for an appropriate partner. In such cases all that  
 F needs, to be ensured is that the Government or the authority as the case  
 may be, has acted fairly and has arrived at the best available arrangement  
 in the circumstances. [815-H, 816-A-B]

G *Tata Cellular v. UOI*, (1994) JT 4 532. *Sterling Computers Ltd. v. M/s.*  
*M&N Publications Ltd. and Ors.*, [1993] 1 SCC 445 and *Churk Cement*  
*Mazdoor Sangh and Ors. v. State of U.P.*, AIR (1992) All. 83, referred to.

H 4. HAL is an instrumentality of Government of India. The expression  
 'President' in Article 117 of the Articles of Association of the Company  
 means Government of India. The form of the directive is not mandatory.  
 The directive is binding upon HAL and all its authorities. The giving of  
 H directive was an internal matter between HAL and the Govt. of India, and

there is no point in giving notice to appellants whose offers had been already rejected by the Board twice. It cannot be said that the M.D., HAL, was trying to over reach the Board in view of the Government directive for entering into the MOU with Max-GB. [817-B-E]

*Rai Sahib Ram Jawaya Kapoor and Ors. v. The State of Punjab*, [1955] 2 SCR 225 and *Shamsher Singh and Anr. v. State of Punjab*, [1975] 1 SCR 814, referred to.

5. The case of Torrent that they were not heard before entering into the MOU is because of the fact they were already in the process of selling up their own plant and also because its technology was that of Biotica of Slovakia which was already rejected in the case of the other appellant and no purpose will be served by asking for a reconsideration. Moreover, Torrent having entered the picture very late cannot complain of lack of full consideration. [817-G]

[The Court observed that if the MOU is approved by the Government of India in the present form or in the modified form, it is but in the interest of all concerned that the project is given a concrete shape without any further loss of time.] [818-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1251, 1252-53 of 1995.

From the Judgment and Order dated 5.10.94 of the Delhi High Court in W.P. Nos. 3181, 3161, 3160 of 1994.

K.K. Venugopal, V.Bhakru, Ms. Vijaylakshmi Menon, Ms. Anuradha Dutt, Ms. Rupali Chopra, and Kirat Rawal, for the Appellants. in C.A. No. 1251/95.

Kirat Rawal and Bharat Sangal, for the Appellant in C.A. No. 1252/95.

F.S. Nariman, Subhash Sharma and Ashok Mathur for the Appellant in C.A. 1253/95.

M. Chandrasekharan Additional Solicitor General, P.P. Malhotra, Ms. Niranjana Singh and Mrs. Anil Katiyar for the Respondent in No.1.

A K. Prasaran, P.K. Mullick and J.K. Das, for the Respondent No. 2.

Harish N. Salve, Sanjeev Puri, Ms. Meenakshi Grover, and N. Ganapathy, for the Respondent No. 3.

B A.K. Ganguly Adv., P.K. Mullick, and J.K. Das for the Respondent No. 4.

The Judgment of the Court was delivered by

**B.P. JEEVAN REDDY, J.** Leave granted.

C Hindustan Antibiotics Limited (H.A.L.) is engaged in the manufacture of several antibiotic drugs including Pencillin-G. It has a plant at Pimpri in the State of Maharashtra. Though the installed capacity of the plant is 1600MMM, it has been able to produce only 850MMU. H.A.L. is a Government company fully owned by the Government of India. There is another government company, I.D.P.L., producing the same drug. We are told that at present there is only one unit in private sector, Alembic, which is producing the said drug. The total production of Penn-G within the country is sufficient to meet only 45% of the country's total requirement. The remaining 55% is being imported. The price of the imported Penn-G is half the price at which the locally produced drug is sold.

E Penn-G is produced through complex fermentation under controlled conditions of strains of the fungus *Pencillium Notatum* and *Pencillium Chrysogenum*. It is stated that the companies all over the world have been trying to develop the strains to improve the quality and yield. H.A.L., which has been producing the drug in this country for over two decades, has also been trying to improve the strain as also the quality and yield of the said drug. From 1976 upto 1986, it was using the Filamentous Toyo Jozo Strains from Japan. Since the said technology became outdated, it switched over in 1986 to Pellety Strains from Panlabs Inc., U.S.A. Even so, the production could not exceed 55% of the installed capacity. For all these reasons, H.A.L. has been trying to devise ways and means to improve the production, quality and yield.

G H Gist Brocades of Holland (hereinafter referred to as 'G.B.') is the leading producer of Penn-G in the world. At present, it controls 20% of the world market. It has got plants in several parts of the world.

According to a Government of India publication "Technology in Indian Pencillin-G/V Industry" - a status report prepared under the national register of foreign collaboration (published in April, 1991) - Panlabs have developed strains capable of yielding above 60,000 units/ml within a relatively short period. Antibioticos of Spain has developed strains yielding 60,000 units/ml whereas G.B. are working at R&D level with strains capable of yielding above 80,000 units./ml. The production capability of most of the companies around the world is 60,000 units/ml. Only G.B. seems to be ahead. The said publication also states that most of the important information relating to pencillin technology is not published since the companies keep it a closely guarded secret.

As a result of the negotiations between H.A.L. and Max-GB (a company formed by G.B. and Max India coming together), a Memorandum of Understanding (MoU) was signed between H.A.L. and M.G.B. on June 20, 1994. The appellants in these three Appeals, viz., Torrent Gujarat Biotec Limited, SPIC and P.B.G. had also offered to collaborate with H.A.L. for the purpose of improving the quality and yield of Penn-G and to achieve the full installed capacity. Each of them had also offered to bring foreign technology through their foreign collaborators. Their offers were not accepted by the H.A.L. which entered into a MOU with M.G.B. on June 20, 1992 as aforesaid. Soon thereafter, these three appellants filed writ petitions in the Delhi High Court questioning the validity of the said MOU. Their case was that though they offered to provide equally superior technology and had indeed offered more advantageous terms to H.A.L., their offers were rejected mainly because of the bias on the part of the Managing Director of H.A.L., Sri A.K. Basu. It is alleged that Sri Basu was interested in having collaboration only with M.G.B. and with nobody else and for that reason he managed to see that the offers of all others are rejected. Different reasons were offered by Sri Basu to different parties who approached for such cooperation. He did not provide them the opportunity to inspect the plant of H.A.L. nor did he provide them the relevant information to enable them to formulate a specific offer. The *malafides* on the part of Sri Basu, it is alleged, are responsible for the impugned MOU whereunder the H.A.L. has agreed to lease out its plant and all other facilities for an annual amount of Rs. 17 crores to the proposed Joint Venture Company (J.V.C.) to be formed by H.A.L. and M.G.B., whereas the appellants were prepared to offer a lease amount far above the said figure. The *malafides* on the part of Sri Basu is evident from the fact that though the Board of Directors had stipulated a minimum lease amount of

A Rs. 31.68 crores, he flouted the said stipulation and agreed to a low figure of Rs. 17 crores. It is submitted that H.A.L. being a government owned corporation, is an authority within the meaning of Article 12 and that it was bound to consider all the offers received in a fair and impartial manner giving an equal opportunity to all competitors to give their bids and select the most suitable among them. This fairness has not been observed by the H.A.L. in arriving at the impugned MOU. Indeed, the submission is that the Government/H.A.L. should have called for tenders or offers on a competitive basis and selected the most suitable among them. This, it is submitted, is the requirement of Article 14. The impugned MOU has, however, been arrived at in a hush hush manner. Even today, nobody knows what are the terms and conditions of the said MOU except the lease amount. A public body cannot and should not adopt such a procedure, it is submitted. There should be transparency in its dealings which is woefully lacking in this case. Reliance is placed upon the decisions of this Court in *Tata Cellular v. Union of India*, (1994) J.T. (4) 532 and *Sterling Computer Limited v. M/s. M & N Publications Limited & Ors.*, [1993] 1 S.C.C. 445 as well as the decision of the Allahabad High Court in *Churk Cement Mazdoor Sangh & Ors. v. State of Uttar Pradesh*, AIR (1992) All. 88. The High Court, however, has repelled all the said contentions and dismissed the writ petitions.

F The case of the respondents\*, on the other hand, is that this was not a case where the government could have followed the practice of inviting the tenders. Such a procedure was just not possible in the circumstances. This was not a case of awarding a contract or a simple case of granting lease. It was a case where H.A.L. was trying to import the best technology in the world to achieve its installed production and to improve its quality and yield while at the same time reducing the cost of production so as to compete in the world market. With the liberalisation policy, there was an apprehension of import of Penn-G being placed on the O.G.L. (Open General Licence) in which case the H.A.L. would have been driven out of market because the cost of Penn-G produced by it is double the price of imported Penn-G. Hence the urgency. No foreign company was prepared to part with technology except by way of J.V.C. Each of the appellants have or proposed to have, a foreign company as its partner and each of them

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\* The respondents to the writ petitions in High Court and in these appeals are (1) Union of India represented by the Secretary to Ministry of Chemicals and Fertilizers, (2) H.A.L. (P) Ltd., (3) Sri A.K. Basu, M.D. of H.A.L. and (4) Max-G.B.

was offering the technology of its foreign partner H.A.L., however, found that G.B. is the world leader in the field that it has the best technology in the world and has a share of 20% in the world market. A tie-up with such market leader is bound to prove beneficial to H.A.L. Over the last several years, several Indian companies including the H.A.L. have been trying to obtain technology from G.B. but they failed. Only in the year 1993, did G.B. agree to the H.A.L.'s proposal for collaboration but only through its Indian partner, viz., M.G.B. The foreign collaborators of some of the appellants do not have technology comparable to G.B. and none of them have a sizeable share in the world market. According to the respondents, the position in 1993 is the following :

Company	Rating	% share of world's Production in 1993
Gist Brocades, Holland	I	20.0
Biochemic, Austria	II	11.5
Antibioticos, Spain	III	11.0
Beecham, UK.	IV	8.5
Bristol Myers, UK.	V	7.5
Synpac, U.K.	VI	6.0
Hoeschst, Germany	VII	5.0

It is stated further by the respondents that while SPIC offered the technology of Cipan, Torrent and P.B.G. offered the technology of Biotica of Slovakia. The technologies offered alongwith the facts relevant to each of these appellants was considered and their offers rejected by the Board of Directors of H.A.L. In the circumstances, the appellants cannot complain that their offers were not fully and fairly considered. The real reason for the appellants approaching the court is that they are afraid of being driven out of market if the proposed collaboration between M.G.B. and H.A.L. bears fruit. Because of their inferior technology, they will not be in a position to compete with the proposed J.V.C. and this is the real reason why they are out to scuttle the MOU between H.A.L. and M.G.B. In particular, it is stated that in the case of P.B.G. it did not even disclose the name of its foreign collaborator in the first instance and only much later did it indicate that its foreign collaborator was Biotica of Slovakia. The letter enclosed by them from the said foreign company was a vague one in



A the sense that it only expressed their willingness to cooperate with H.A.L. in providing technical know how subject to their inspection of H.A.L. facilities and satisfactory terms being negotiated between them. So far as SPIC is concerned, it is installing its own plant and the technology being adopted by it has been proved only at pilot plant level and not at commercial plant level; H.A.L. did not wish to experiment with this new technology. So far as Torrent is concerned, its tie-up is also with Biotica of Slovakia, whose technology was found to be inferior than G.B. It is stated further that notwithstanding such rejection, their offers were re-evaluated by H.A.L. at the instance of Government of India. Even on such re-evaluation, it was found that the collaboration with G.B. is more in the interest of HAL than collaboration with any of the appellants or their foreign collaborators. The allegations of bias and *malafides* attributed to Sri Basu are denied specifically.

D Before we deal with the contentions urged by the appellants, it would be appropriate to examine the relevant facts and to note how the offers of the appellants and the offer of M.G.B. were dealt with and processed by H.A.L.

E In August, 1993, the Managing Director of the H.A.L., Sri A.K. Basu, sought permission of the Government to visit Holland between August 30, 1993 and September 2, 1993 to discuss and finalise a MOU (Memorandum of Understanding) between H.A.L. and Max-GB with whose representative H.A.L. was having discussions. In this letter, the Managing Director set out the broad outline of the proposed J.V.C. between H.A.L. and M.B.G. while approving the visit, Government of India directed that Managing Director should not finalise the MOU or enter into any commitment. It directed that all the alternative proposals should be examined for their relative merits and advantages.

G In the meeting of the Board of Directors of H.A.L. held on 20th September, 1993, the Managing Director explained in detail the progress of Pencillin production and also gave a detailed account of the discussion he had with G.B. in Holland. He explained the salient features of the draft MOU proposed to be entered into with M.G.B. He stated that the technology to be obtained from G.B. would be the best in the world and that it is a lifetime opportunity for HAL to get this technology. He stated that H with little modification, the production of pencillin can be increased sub-

stantially. He placed before the Board a profile of the increased production and profitability with the induction of the M.G.B. technology. He also explained why the offer of Ranbaxy labs, who offered to bring in the technology of Hoescht, AG, Germany was not definite or acceptable. He pleaded for approval of the draft MOU between M.G.B. and H.A.L. The Chairman of the Board, however, expressed his opinion that since approval of the proposed MOU would require the approval at the highest level in the government, the company should formulate its proposal indicating the examination of available options including the possibility of direct tie-up for acquiring technology and participation. Accordingly it was decided to explore the available options. The Managing director was asked to obtain extension of time by a month for signing the proposed MOU with M.G.B.

At the meeting of the Board of Directors held on October 10, 1993, the Managing Director explained in detail the discussions the company officials had with Hoescht/Ranbaxy during their visit to Pimpri on 17th September, 1993. He explained that the foreign collaborators were not agreeable to transfer the technology on exclusive basis on the already agreed lumpsum, viz., on one million DM, and hence the agreement could not be finalised. The Board noted the statement.

The matter came up before the Board again on October 26, 1993. At this meeting, the Managing Director emphasised the need for upgrading the Pencillin technology and reiterated his opinion that technology of G.B. is the best in the world and that H.A.L. should not forego the opportunity of obtaining its technology. He indicated the high profits which H.A.L. would earn through such collaboration. The Managing Director also informed the Board about the discussions he had with the P.B.G. and expressed his opinion that right now the said group had no technology but that they would be able to arrange for the technology and would be getting in touch with H.A.L. by 27th November, 1993. The Managing Director further submitted that the officers of M.G.B. and others would be available by last week of November and that it is better that all these offers are evaluated by a sub-committees of the Board. Accordingly, the Board constituted a Sub-Committee consisting of S/Sri P.C. Rawal, N. Gopalan and Dr. P.K. Ghosh, Directors, to evaluate the proposals received.

At the meeting of the Board held on 5th December, 1993, the Managing Director informed the Board that though P.B.G. had earlier

A informed that they would get in touch with H.A.L. by 27th November, 1993 there was no response from them. He stated that P.B.G. had no proven technology to offer to H.A.L. At this meeting the Board noted that the need for Pencillin technology for the company was not considered by the Board earlier and the process for signing MOU was initiated by the  
B Managing Director without any approval of the Board. The Chairman stated that in addition to M.G.B., P.B.G. and Ranbaxy-Hoescht, another party, SPIC has also expressed interest in offering Pencillin technology to H.A.L. *The Board noted that SPIC is setting up a Pencillin plant with Cipan technology which is not no way superior to the technology presently employed by H.A.L. It was accordingly decided to reject the offer of SPIC.* At this  
C meeting the managing Director informed the Board that once H.A.L. gets top grade technology, the units of the other licencees within the country would become uneconomic and that is why they were trying to stall H.A.L. from getting the best technology. He also stressed the need for upgrading the present technology by H.A.L. and stated that with G.B. technology the production of H.A.L. will be doubled to 2000MMU in two years' time  
D without any need for further fermentors. The Board then decided that all interested parties be informed to submit their proposals by 20th December, 1993 and that no further time shall be granted. The date, 20th December, 1993 was later extended to 31st December, 1993, in the Board meeting held on 20th December, 1993. At this meeting (20th December, 1993) *the Board*  
E *rejected the offer of P.B.G. on the ground that the technology of Biotica of Slovakia offered by it was not superior to the technology presently employed by H.A.L.*

F At the Board meeting held on February 4, 1994 the Board was informed that the proposal of M.G.B. has been received. The Board directed that these proposals be sent for evaluation to the Sub-Committee appointed earlier.

G At its meeting held on 28th March, 1994, the Board was informed that SPIC and P.B.G. (whose proposals were rejected by the Board) have represented to the Government of India that they should be given a further opportunity of explaining their proposals whereupon the Government has directed the Board to give a further opportunity to the said two companies. Accordingly, the representatives of these two companies were heard by the Board which rejected both the proposals again. The Board then heard the  
H representatives of M.G.B. about their proposals. The representative of

M.G.B. did not agree to having 49% interest in the proposed Joint Venture Company (J.V.C.) and insisted upon equal sharing i.e., 50% each. A

By the date of the next Board meeting on April 28, 1994, the report of the Sub-Committee (which was appointed in the Board meeting dated October 26, 1993 to evaluate the proposals for upgradation of Pencillin technology) was received. It would be appropriate to briefly refer to the salient points in the report of the Sub-Committee at this stage. B

Pursuant to the directions of the Government, the Sub-Committee says, it looked into the following four issues also addition to the evaluation of the proposals of collaboration received from various parties. The four issues referred by the Government are : C

"(i) The need for obtaining technology for upgradation of the production capacities in the Pencillin Plant and whether the technology can be obtained directly rather than going through the process of a joint venture; D

(ii) Whether the technology indigenously would be adequate to achieve the objective of running HAL profitably;

(iii) In the event such a joint venture proposal as proposed by HAL management materialises, how best the interest of the employees can be protected; and E

(iv) Pencillin plant of HAL is a profit centre. Whether such a proposal for joint venture would leave HAL with non (profit making centres?)" F

The Sub-Committee held several sittings at which it heard a number of officials of H.A.L. and others. It found inter alia that the cost of production of H.A.L. is higher than I.D.P.L. which in the opinion of the Sub-Committee was totally unwarranted. It was of the opinion that by rationalising the cost of production and by carrying out other measures, H.A.L. would be in a position to earn substantial profits by itself without any tie-up with the foreign company. It also commented upon the failure of H.A.L., which is the pioneer and the largest manufacturer in the country, in not approaching the leading Pencillin manufacturers in the world directly for acquisition of technology and instead waiting for the Indian companies to enter into agreements with foreign technology sources and then H

A entering into discussion with these Indian firms for collaboration. The Sub-Committee stated :

B "59. As a result of the evaluation of the HAL's production efficiencies, the Sub-Committee is firmly of the view that there is tremendous scope for improvements and higher level for efficiency and cost reduction in the pencillin production operations of HAL even with the existing technology. It came as a surprise to the Sub-Committee that HAL which is the largest pencillin producer in the country, what to talk of comparing internationally, does not compare favourable with IDPL pencillin production operation insofar as raw material and utility costs are concerned. A draft on latest cost price study report for the year 1994-97 on pencillin first crystals production as prepared by BICP a copy of which could be had by 21st April, 1994 contain the actuals for the years 1992-93. In respect or raw materials costs per capital or pencillin-G production, HAL has been Rs.334 which is Rs. 73 higher than Rs. 261 spent by IDPL. For the utilities HAL spends Rs. 259 which is Rs. 69 higher than Rs. 190 spent by the IDPL. Even if HAL's cost of raw materials and utilities in the short term cannot be brought to the level of IDPL, in the year 1995-96 when the production of HAL is expected to be 1100 MMU it should be possible for HAL to attain improvements and cost reduction to achieve profit of Rs. 288 per Bu as examined above which should given the profit of Rs. 31.68 crores (at current sale price for Pen.G first crystal at a production level of 11000 MMU for HAL.)"

F The Sub-Committee then noted the fact that offers of SPIC and P.B.G. have been rejected by the Board which rejection was reiterated after re-hearing them pursuant to Government directions.

G The Sub-Committee also noted that since Ranbaxy has failed to submit its proposal within the time specified the only proposal left was that of M.G.B. After evaluating the proposal of G.B. and its offer of Rs. 13 crores rental per annum and after considering the potential of H.A.L. and its performance, the Sub-Committee expressed its opinion in the following words:

H "62. The Sub-Committee is of the opinion that the proposal of leasing out pencillin production facilities of HAL to JVC in which

both HAL and Max GB would have fifty per cent equity each should be decided by the Board keeping in view of the possibility of increasing production and productivity of pencillin operations in HAL without induction of new technology but by making improvements and achieving efficiency particularly in the areas of raw material consumption and utilities to substantial reduce cost. The acquisition of new technology if considered absolutely necessary and if the same is to be inducted through the methodology of the proposed JVC then the lease rental of the HAL's production facilities to be paid by the JVC should be computed keeping in view the financial parameters suggested by the Sub-Committee."

Now coming back to the Board meeting held on April 28, 1994, an elaborate discussion took place on the report of the Sub-Committee whereafter the Board took the decision which is recorded in the minutes. Paras 205.10.11. and 12 of the Minutes read as follows :

"205.10.11. After detailed discussion on the report of the Sub-Committee the Board agreed that the Company should go in for higher levels of production beyond 1100 MMU which can be achieved with the present technology and for which the costs could be reduced to the levels suggested by the Sub-Committee. It was decided that the Company should acquire technology for reaching a production level of 1800-2000 MMU without addition of more fermentors (except the two which are yet to be installed). It was also decided by the Board that the only available option of acquisition of the technology offered through the route of JVC as proposed by Max-GB with HAL having 50% equity each in the JVC be accepted but the lease rental payable by the JVC to HAL should be computed taking into account the profit of Rs. 31.68 crores at the level of production of 1100 MMU. To this, MD stated that this may not be acceptable to Max-GB and he felt that at best Max-GB may agree to the increase in the lease rental offer of Rs.13 crores by Rs. one or two crores. He stated that the lease rental of Rs. 13 crores had been found to be fully justified by the evaluation presented before the Sub-Committee. However, the directors of the Board except the MD agreed that lease rental of Rs. 31.68 crore as computed by the Sub-Committee should form the basis of the calculation as this level of profitability is achievable at 1100

A MMU production and with reduction of materials and utilities cost by Rs. 110 as suggested by the Sub- Committee.

B 205.10.12. The Board accordingly decided that the lease rental should be calculated at this assessed profitability of Rs. 31.68 crores and this should be adjusted to account for depreciation, proportionate interest on lease rental paid by HAL on leased assets in the Pencillin Plant and adjustment for the income tax liability. (Reference - para 44 of the Sub-Committee's report.)

C The Board authorised the MD to compute the lease rental as above and communicate to Max-GB the lease rentals that would be acceptable to HAL from the JVC and in due course inform the Board of their acceptance."

D The Managing Director of H.A.L., Sri Basu who did not agree with the Board Resolution aforesaid, addressed a letter dated May 3, 1994 to the Secretary, Ministry of Chemicals and Fertilisers. This is a very detailed letter enclosing several work sheets. After setting out his reasons in detail as to why the Board resolution stipulating a minimum lease amount of Rs. 31.68 crores is not appropriate - and after setting out the several advantages that would flow from the proposed J.V.C. between H.A.L. and M.G.B. - the letter concluded:

E "2.0 To conclude, the Sub-Committee's report has not taken into consideration the following :

(2) HAL's present technological limitations.

F (b) The opportunity at hand for HAL in particular and India at large in forming a Joint Venture between HAL and Max-GB.

(c) Future fluctuations in the pencillin pricing policy and the vagaries of price escalation of raw materials and utilities.

G (d) Also the calculations of profit and other parameters as contained in the report need to be verified as indicated earlier in this letter.

H It is, therefore, my request that the report may be got evaluated by you keeping in mind the points that have been raised by me."

After receiving the letter of the Managing Director aforesaid, the Government of India obtained the advice of Padmabhushan Prof. M.M. Sharma, Director and Head of the Department of Chemicals and Technology, University of Bombay. Prof. Sharma is a fellow of the Royal Society and also a fellow of the Indian Academy of Sciences. The judgment of the High Court refers to the substance of the opinion tendered by Prof. Sharma. Prof. Sharma is stated to have opined that the best technology for Penn-G in the world was with G.B. and that it was in the interest of H.A.L. as well as in the interest of the country to acquire that technology. He also opined that such first grade technologies in the frontier areas were just not available irrespective of their cost. He also approved the proposal of J.V.C. and was of the opinion that it was in the commercial interest of H.A.L. besides the national interest. It is after receiving this report that a "directive" under Article 117 of the Article of Associations was issued. The "directive" is contained in the letter dated June 20, 1994 addressed to Sri A.K. Basu, Managing Director, H.A.L. It directs H.A.L. to enter into a MOU at the earliest with the M.G.B. for establishing a J.V.C. The letter reads as follows :

"Sir,

I am directed to refer to your letter No. MD/IV/4010 dated the 3rd May, 1994 on the subject cited above and to say that the matter relating to the proposed collaboration between Hindustan Antibiotics Limited (HAL) and MAX-GB, a joint venture company of Max India and Gist- Brocades of Netherlands, for setting up of a joint venture in the existing plant of Hindustan Antibiotics Limited for manufacture of Pencillin, has been considered by the Government in the light of the position/issues raised in your above letter.

2. It has been decided with the approval of the Minister for Chemicals and Fertilisers to issue the following directive to Hindustan Antibiotics Limited in exercise of the power under article 117 of the Memorandum and Articles of Associations of Hindustan Antibiotics Limited;

(i)Hindustan Antibiotics Limited may enter into a Memorandum of Understanding (MOU) at the earliest with MAX-GB for establishing the proposed join venture, subject to final approval of the



A Central Government.

(ii) The lease rent to be paid to Hindustan Antibiotics Limited by the Joint Venture Company be negotiated immediately with MAX-GB by a committee comprising the Managing Director, Hindustan Antibiotics limited, the Joint Secretary and Financial Advisor, Ministry of Chemicals and Fertilisers, a part-time official, Director on the Board of Hindustan Antibiotics Limited and Shri Vinod Vaish, Joint Secretary to the Government of India in the Department of Chemicals and Petro-Chemicals and the agreed amount be incorporated in the Memorandum of Understanding.

C  
 Yours faithfully  
 sd/-  
 (C. Lal)  
 Dy. Secretary to the Government  
 of India."

D Pursuant to the aforesaid letter, a Committee as contemplated in Para 2(ii) thereof was constituted. The Committee held negotiations with the representatives of the M.G.B. and a MOU was signed on the same day stipulating an annual rental of Rs. 17 crores. On behalf of H.A.L. only the Managing Director, Sri Basu, signed witnessed by two officials of the  
 E H.A.L.

F At this Stage, going back a little, it may be stated that a Board meeting was held on May 25, 1994. At this meeting, the Managing Director brought to the notice of the Board the letter written by him to the Secretary, Ministry of Chemicals and Fertilizers. The Board took objection to certain statements made in the said letter. The Board was also critical of Prof. Sharma's expertise in antibiotic fermentation processes - indeed with the very consultation with him in the manner it was done.

G After the MOU was signed on June 20, 1994, the said fact was brought to the notice of the Board of Directors at its meeting held on September 6, 1994. The Board merely "noted" the fact.

H We are told that the Government of India has not yet approved the MOU. The respondents' counsel explained that this was because of the pendency of the writ petition in the High Court and these matters in this Court.

It would be noticed that there is no reference to Torrent Gujarat Biotech Limited in any of the Board Resolutions or in the Sub-Committee report. According to Torrent, they have obtained technology from Biotica of Slovakia and have set up a plant which according to them was to go into production by the end of 1994. Torrent says that it addressed a letter on April 12, 1994 to the Government of India expressing their interest in upgrading the technology of H.A.L. and in improving the production by investing Rs. 40-50 crores. It is stated that their offer was rejected by H.A.L. on May 21, 1994 and that thereafter its representatives met the Minister of State on June 3, 1994 and represented their case. On June 15, 1994, it is stated, the Minister of State asked the Managing Director of H.A.L. to consider Torrent's proposal. Its grievance is that without considering its case, the Managing Director entered into MOU with M.G.B. on June 20, 1994 in an unseemly hurry.

It would be evident from the facts narrated above that the Managing Director of H.A.L. Sri A.K. Basu was all out for a technological tie-up with G.B. and with no other. To start with, he sought the permission of the Government of India to go to Holland in August/September, 1993 to discuss and finalise the MOU with M.G.B. While permitting him to go and have discussion there, the Government of India instructed him not to enter into a MOU or to make any commitment since the Government was of the opinion that all the alternative proposals should be examined and a decision taken after examining the merits of each proposal. In the meeting of the Board of Directors of H.A.L. held on September 20, 1993, Sri Basu explained the advantages that will accrue from a tie-up with M.G.B. According to him, it was a lifetime opportunity for H.A.L. which it should not forego. This was his theme throughout in all the Board meetings. (Indeed, in one of the meetings, the Board of Directors found fault with Sri Basu for entering into negotiations with G.B./M.G.B. without its approval. It appears obvious that Sri Basu had taken the permission of only the Government of India for entering into negotiations with G.B./M.G.B. and informed the Board only after his visit to Holland.) Finally, when the Board of Directors decided on April 28, 1994 that the lease amount payable by the proposed J.V.C. (to be formed by H.A.L. and M.G.B. with 50% share holding each) should not be less than Rs. 31.68 crores per annum and instructed him accordingly, Sri Basu wrote a letter directly to the Secretary to the Government of India, Ministry of Chemicals and

- A Fertilizers setting out in detail why the Board resolution was not appropriate and why it is not realistic to accept lease amount at that level. It also appears probable that it was at his instance that the Government of India sought the opinion of an expert, viz., Prof. M.M. Sharma. After receiving the opinion of Prof. Sharma, the Government of India gave the
- B "directive" to H.A.L., addressed to Sri Basu on June 20, 1994, to enter into a collaboration agreement with M.G.B. in the form of a Joint Venture Company. For the said purpose, the Government of India itself constituted a Committee of three members including the Managing Director, Sri A.K. Basu. On that very day, i.e. 20th June, 1994, negotiations were held and MOU signed between H.A.L. and M.G.B. It does not appear that the
- C Board of Directors of H.A.L. was having any part in the negotiations or in the matter of or entering into the MOU with M.G.B. The MOU was signed by Sri Basu on behalf of the H.A.L. The alacrity with which MOU was signed on the very day on which the Government directive was issued also shows the deep interest the Managing Director had in collaboration with
- D M.G.B. *But* it is not possible to say beyond this. It is quite likely that Sri Basu was actuated by the best of intentions, that he was of bona fide belief that entering into a technological agreement with M.G.B. (which really meant technical collaboration with G.B. of Holland) was a lifetime opportunity for H.A.L. which it should not forego. It could also be that he was genuinely satisfied that since G.B. is the world leader and has the best
- E technology, it can deliver goods far better than any other foreign company. It is also possible that Sri Basu was for collaboration with M.G.B. for all the wrong reasons. *We are not able to say one way or the other.* The presumption is that being the Managing Director of H.A.L., he was acting in its best interests. This presumption is not displaced in this case. The fact
- F remains that G.B. is the world leader in Penn-G field. Its technology is one of the best if not the best. It has a 20% share of the world market and has got units all over the world. As against it, the three appellants (we are treating Torrent too on par with SPIC and P.B.G. though as a fact it was not in the picture at the relevant time, as stated hereinbefore) were offering
- G technology either of Cipan or of Biotica of Slovakia and the Board of Directors of H.A.L. was of the opinion that both of them were not acceptable - Cipan for the reason that its technology was not yet proved at the commercial production level and Biotica of Slovakia on the ground that its technology was no superior to the technology presently employed by
- H H.A.L. Among the seven world leaders mentioned hereinbefore, both

Cipan and Biotica of Slovakia are not to be found. Another Indian company, Ranbaxy (not writ petitioner or appellant before us) offered to obtain the technology of Hoescht (one of the seven world leaders) but it did not pursue its offer and failed to submit its proposals. This left only M.G.B. in the field, as stated by the Sub-Committee. In other words, there was, unfortunately not much of a choice. In this connection, it must be emphasised that rejection of Cipan and Biotica of Slovakia technology was not by Sri Basu, but by the Board of Directors - and that too not once but twice.

There is yet another fact. Most of these companies keep their processes and technology a guarded secret. More better the technology, more fervently it is guarded. And HAL needed a technology more superior to the one it was already having. Not only it was producing only 55% of its installed capacity, its cost of production was far higher than what it ought to be. It is true, cost of production could have been reduced to some extent by rationalising and streamlining the working methods (as pointed out by the Sub-Committee in its report) but the more important need was to increase the yield from the strains and achieve full capacity production. On account of efforts made over the years, production had increased to some extent but it was still way behind its installed capacity, i.e., full capacity production. Thus, it was not a case of merely leasing out a Government company but a case where the Government company was trying to obtain the best possible technology. In such matters, sights have to be set far into the future and arrive at a reasonable prognosis keeping in mind the best interests of the company. Floating of tenders may not have been a proper method to adopt in these circumstances. In any event, among the available technologies, not only has the G.B. the best technology, it was the only source available, the other having been rejected as already stated. Probably it is for this reason that the Government of India gave the directive on 20th June, 1994. In above circumstances and, on the present material, we cannot say that Sri Basu was either actuated by *malafides* or that he was acting out of extraneous reasons.

Next question is whether there was no fair consideration of the offers made by the appellants. So far as SPIC is concerned, even when it was putting forward its proposals, it was in the process of setting up a plant of its own for manufacture of Penn-G. For that reason, it was perceived more as a competitor rather than as a probable partner. Secondly, its technology was as yet unproven at commercial production level, which meant that

A there was an element of risk involved in adopting that (Cipan) technology. Rejection of its proposals by the Board - and not by the Managing Director, Sri Basu, as emphasised hereinbefore - cannot, therefore, be held to be either 'no consideration' or mechanical rejection. No *malafides* are attributed to the Board. In the circumstances, the complaint of not furnishing full information or not giving inspection of the H.A.L. plant cannot be said to be motivated or arbitrary. We do not also think it necessary to refer to the correspondence that passed between SPIC and Sri A.K. Basu - to which our attention has been drawn by Sri Raval - for the reason that rejection of proposals of SPIC was not by Sri Basu but by the Board of Directors. The board proceedings referred to hereinbefore do establish

B that Board was acting in its own independent judgment in these matters and was not being led away by the opinions of Sri Basu. So far as P.B.G. is concerned, it appears that it did not disclose the name of its foreign partner in the first instance; it did so only later. Moreover, the letter of Biotica of Slovakia, (P.B.G.'s foreign partner) was found to be vague.

C Above all, the Board of Directors of H.A.L. were satisfied that the technology of Biotica was no superior to the one being employed by H.A.L. Biotica of Slovakia is also not one of the world's seven leading manufacturers of Penn-G and, therefore, the Board thought that there was no point in pursuing the proposals of P.B.G. It cannot be said that it was not a fair decision nor can it be insisted that before rejecting the proposals of SPIC

D and P.B.G., the Board of Directors ought to have obtained technical opinion or the opinion of an expert committee. The representatives of these two companies were heard in person by the Board and their presentation fully noted and considered. More cannot be insisted upon as a matter of law or in the facts of this case. Now coming to torrent, it entered the picture quite late. Its foreign partner is the very same Biotica of Slovakia. (It needs to be stressed that each of the appellants, as also M.G.B., were offering the technology of their respective foreign partners and hence, the comparative merits of these foreign partners becomes relevant.) The complaint of not affording a proper opportunity to put forward their proposal made by Torrent, cannot, therefore, be entertained. Similarly, the argument

E of Sri K.K. Venugopal and Shri F.S. Nariman that the terms stipulated by M.G.B. should have been put to the appellants and their response ascertained before finalising the deal, is beside the point in the circumstances

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aforelated.

We may also point out that one other Indian company, Ranbaxy, (not

an appellant before us) offered in the first instance to bring in the technology of Hoescht - one of the seven leaders in the field - but it did not pursue its offer. It did not submit its proposals within time prescribed. A

In the circumstances, the only grievance of the appellants is about the lower rental of Rs. 17 crores being accepted in the MOU as against the minimum Rs. 31.68 crores stipulated by the Board of Directors of H.A.L. Firstly, once the appellant's offers/proposals are found to have been rejected rightly, they cannot be heard to complain of the amount of lease agreed between H.A.L. and M.G.B. Secondly, it appears that the Government of India was satisfied with Sri Basu's presentation and agreed with him that stipulation of Rs. 31.68 crores' rental was not feasible in the circumstances and that is why it gave the directive to him to enter into a MOU with M.G.B. "at the earliest" for establishing the proposed joint venture. The opinion of Prof. Sharma must also have weighed with the Government in deciding to go in for J.V.C. with M.G.B. participation. It should be remembered that the Board of Directors of H.A.L. had also decided to have a technological collaboration with M.G.B. It would have been a different matter if the Board of Directors had agreed with the recommendation of the Sub-Committee that there is tremendous scope of improving and achieving higher level of efficiency and cost reduction in the operations of H.A.L. itself with the existing technology and without obtaining any foreign technology and that the H.A.L. should first try that course. On the other hand, the Board decided in its meeting held on April 28, 1994 that H.A.L. should go in for technological collaboration with M.G.B. in the form of a J.V.C. Yet another fact is that negotiations with M.G.B. were held on June 20, 1994 not by Sri A.K. Basu alone but a Committee of three members of whom one appears to have been a member of the Sub-Committee as well. B  
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We must reiterate that this was not a simple case of granting of lease of a Government company, in which case the court would have been justified in insisting upon the authorities following a fair method consistent with Article 14, i.e., by calling for tenders. We agree that while selling public property or granting its lease, the normal method is auction or calling for tenders so that all intending purchasers/lessees should have unequal opportunity of submitting their bids/tenders. Even there, there may be exceptional situations where adopting such a course may not be insisted upon. Be that as it may, the case here is altogether different. G  
H

- A H.A.L. was trying to improve not only the quantum of production but also its quality and for that purpose looking for an appropriate partner. They went in for the best. It must be remembered that this technology is not there for the mere asking of it. All the leading drug companies keep their processes and technology a guarded secret. Being businessmen, they like to derive maximum profit for themselves. It is ultimately a matter of bargain. In such cases, all that need be ensured is that the Government or the authority as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances.

- C It is then submitted that when the Board of Directors had asked the Managing Director not to agree for a lease amount of less than Rs. 31.68 crores and to report back to the Board the lease amount which M.G.B. is prepared to pay, the Managing Director should have reported back to the Board instead of entering into a MOU for a lesser amount. It is submitted that the Managing Director was bound to and ought to have carried out the instructions of the Board. The Managing Director was trying to overreach the Board of Directors by several means, one of which was his letter dated May 3, 1994, it is submitted. In reply to this, it is pointed out by the learned counsel for the respondents that Sri Basu did write to M.G.B. on May 10, 1994 as directed by the Board but that the M.G.B. did not agree to the figure stipulated by the Board (vide M.G.B. letter dated May 17, 1994) and that both these letters were placed before the Board. be that as it may, once the Government directive was issued, all this controversy lost its relevance.

- F It is then argued that the power to give directives is vested by Article 117 in the President alone and that no such directive can be given by the Government of India. It is submitted that the Rules of Business framed by the President of India under Article 77 are relevant only in the case of executive power of the Union and that Article 117 of the Articles of Association of H.A.L. is no part of the executive power of the Union. Accordingly, it is submitted, the authentication of the said directive by the Deputy Secretary to the Government of India is equally incompetent. Now, the directive in this case is issued by he Government of India. The letter says that it was being issued with the approval of the Minister for Chemicals and Fertilizers. There is indeed no reference to the President at all. The question, however, is whether the President in Article 117 of the Articles of Association of H.A.L. means and refers only to the President

of India and whether it is a power to be exercised by the President personally? We do not think that it would be reasonable to construe Article 117 as suggested by the appellants. The President of India like the Queen of England is a Constitutional Head. See *Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab*, [1955] 2 S.C.R. 225 and *Shamsher Singh & Anr. v. State of Punjab*, [1975] 1 S.C.R. 814 H.A.L. is a Government company. It was really an agency, an instrumentality of Government of India though given a corporate shape. Article 117 is one form of control the government has over these corporate bodies. In the circumstances, it would be reasonable to understand the expression "President" in Article 117 as referring to the Government of India. To say that this power should be exercised by the President himself is neither practicable nor consistent with the dignity of the President. Of course, while the directive must be expressed in the name of the President but that is ultimately a matter of form, and the form has been held to be not mandatory. In this view of the matter, it is unnecessary to consider whether it is open to the appellants to raise this contention. We are, therefore, unable to say that the directive issued is not valid in law or that it was not issued by the competent authority. It is not disputed that the directive is binding upon H.A.L. and all its authorities. If so, the corporate identity or corporate existence of H.A.L. is in no way violated by the directive given. It cannot also be stipulated that before giving the directive, the appellants should have been heard. Not only giving of directive was an internal matter between H.A.L. and the Government of India, there was no point in giving notice to SPIC and P.B.G. whose offers were already rejected by the Board once and again after re-evaluation directed by the Government.

Lastly, it is argued that in the case of Torrent, the Minister of State had asked the H.A.L. to evaluate its proposal on June 15, 1994 and that without any reference to the said order the MOU was entered into on June 20, 1994. It is, however, explained by the respondents that the said order of the Minister of State was revised by the Minister for Chemicals and Fertilizers even before the issuance of the directive. Moreover, Torrent having entered the picture very late cannot complain of lack of fuller consideration. It is equally evident that since it was already in the process of setting up its own plant and also because its technology too was that of Biotica of Slovakia, which was already rejected in the case of P.B.G. no useful purpose would be served even by asking a reconsideration of its proposals.



- A Before parting with this matter, we must say that MOU entered into with M.G.B. is subject to the final approval of the Government of India, as expressly provided in the directive dated 20th June, 1994. We are sure that the Government would examine all the terms of MOU carefully before according its approval. It is obvious that it is always open to the Government to seek such modification of the terms of MOU as it thinks appropriate and as are feasible. But if it approves the MOU in the present form or in the modified form, as the case may be, it is but in the interest of all concerned that the project is given a concrete shape without any further loss of time.
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- C For the above reasons, the appeals fail and are dismissed. No costs.
- V.M. Appeals dismissed.