

Kokilaben can intervene under family MoU, Anil can claim damages

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MUMBAI: The famous MoU between the Ambani brothers, which was never made public, gives Kokilaben the right to intervene and the Anil Ambani Group to claim damages under certain conditions. One of the clauses of the MoU which was mentioned in the Supreme Court judgement says the "Mukesh Ambani Group will act in utmost good faith and will make best endeavours to work for and obtain" government and statutory approvals.

According to the MoU, "If there is any action taken in bad faith for not obtaining/scuttling the obtaining of such approvals, Kokilaben (mother of Anil and Mukesh) reserves her ability to intervene again and the Anil Ambani Group would also have a claim for damages."

"With the Supreme Court judgement, it's clear that they will need the government's approval on key issues like pricing...the court has said the MoU is not binding on the company, but it has not said it's not binding at all. In all likelihood, it is binding on the parties who signed it," said Hitesh Jain of ALMT Legal.

Though Anil Ambani has ruled out filing a review petition, investment bankers and legal experts feel he may be within his rights to seek compensation from his elder brother for renegeing on the gas sale agreement (GSA) laid down in the original family MoU drafted in April 2005. But Mr Jain feels the invocation of this clause could be a tricky issue and it is not simple to prove that the other party has not acted in good faith. "After all, it's up to the government to approve the price," added Mr Jain.

According to legal circles, if the renegotiation for the gas pricing fails, there could be further litigation. "The verdict is out but the issue may be far from resolved. As the parties will have to now renegotiate the price and to strike a balance between the terms of the MoU (family settlement) and government's gas utilisation policy, which if not achieved can lead to further litigation in the matter for enforcing terms under the agreements and consequent compensation," said Vyapak Desai, head of international litigation and dispute resolution practice at the law firm, Nishith Desai Associates.

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The GSA envisaged RIL to supply 28 million cubic metres of gas a day at \$2.34 per million British thermal unit (MMSCMD) for 17 years. The price, tenure and quantity were based on the 2005 family pact, but RIL subsequently said it could only sell the gas for \$4.2 per unit, as this was the price, the company claimed, fixed by the government.

"Everything depends on the MoU between the two brothers but it's contents have not been made public. Only a part of the MoU was submitted before the court, which concerned the gas-supply agreement," said to Berjis Desai, partner, J Sagar Associates... "So it can't be said if there is an arbitration clause or whether Anil can seek damages from Mukesh for failing to implement the MoU. But if everything fails between the two brothers, the last option left with Anil is to implement the MoU against Mukesh in his personal capacity," he said.

The compensation is usually arrived at by calculating the percentage of difference between the contract price and the price at which the supply finally happened, said an investment banker. A lot could also depend on the language of the MoU and whether compensations, if at all, are to be paid by Mukesh Ambani or his group firms. "If Anil Ambani can demonstrate that he acted upon the representation made by Mukesh Ambani and was given to believe that Mukesh Ambani had the authority to have it performed, then he may be successful in suing and demanding a compensation," said Anand Desai, managing partner of DSK Legal.

In relation to applicable governmental and statutory approvals, the MoU states that RIL will, "if so required by the Anil Ambani

Group, give an irrevocable Power of Attorney to the Anil Ambani Group/REL to apply for obtaining all such governmental and regulatory approvals as are necessary on its behalf.”

The family agreement further spells out that Kokilaben recognises that a long term, stable source of gas from RIL, which has the largest find of gas, was absolutely essential for the growth plans of the Anil Ambani Group. “Kokilaben has, therefore, specially stressed and impressed upon Mukesh and Mukesh shall personally ensure that at the time of finalisation of the binding gas-supply agreement the terms provide the required conform and stability in these agreements, even if that means some departure from the NTPC standard,” states one of the clauses of the agreement.

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