IN THE HIGH COURT OF DELHI AT NEW DELHI

(***Reportable***)

O.M.P. 192 of 2010

Reserved on: 8th May, 2012
Decided on: 2nd July, 2012

UNION OF INDIA ..... Petitioner
Through: Mr. A.S. Chandhiok, ASG with Mr. R.G. Srivastava, Ms. Aakriti Jain and Ms. Monika Tyagi, Advocates

Versus

NIKO RESOURCES LTD & ANR ..... Respondents
Through: Mr. L. Nageshwar Rao and Mr. Sandeep Sethi, Sr. Advocates with Mr. Dhirendra Negi and Ms. Saba Grover, Advocates for R-1
Mr. Aaspi Kapadia, Advocate for R-2

O.M.P. 944 of 2011

NIKO RESOURCES LTD ..... Petitioner
Through: Mr. L. Nageshwar Rao and Mr. Sandeep Sethi, Sr. Advocates with Mr. Dhirendra Negi and Ms. Saba Grover, Advocates for R-1
Mr. Aaspi Kapadia, Advocate for R-2

Versus

UNION OF INDIA & ANR ..... Respondents
Through: Mr. A.S. Chandhiok, ASG with Mr. R.G. Srivastava, Ms. Aakriti Jain and Ms. Monika Tyagi, Advocates for UOI.
Mr. Aaspi Kapadia, Advocate for R-2

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
02.07.2012

Introduction

1. O.M.P. No.192 of 2012 under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has been filed by Union of India ('UOI') through the Ministry of Petroleum and Natural Gas ('MoPNG') challenging the majority Award dated 23rd December 2009 passed by the Arbitral Tribunal in the disputes between MoPNG, Respondent No.1 Niko Resources Ltd. ('Niko'), Canada and Respondent No.2 Gujarat State Petroleum Corporation Limited ('GSPC') arising out of a Production Sharing Contract ('PSC') dated 23rd September 1994 entered into between the President of India (referred to as 'Government' in the PSC) on the one hand and GSPC and Niko on the other hand for the exploration, development and marketing of petroleum resources from the Hazira Field in Gujarat, identified in the PSC as the Contract Area.

2. O.M.P. No.944 of 2011 has been filed by Niko under Section 9 of the Act praying for a direction to permit Niko to deposit in this Court MoPNG's share of unpaid profit petroleum or deposit it in an escrow account during the pendency of O.M.P. No.192 of 2010.

3. The dispute between the parties concerns the cost of construction of a 14 km long 36" diameter pipeline from the Hazira Field to Mora village in the sum of Rs. 93.27 crores which Niko claims is part of 'development cost' which it is entitled to recover from the UOI. Niko also seeks to recover Rs. 44.76 crores towards production cost incurred in operating the said pipeline as well as reimbursement of the excess 'profit petroleum' paid to UOI. The case of the UOI is that the said pipeline cannot be granted 'cost recovery' status as it is outside the scope of the PSC. In order to examine the dispute in some detail, reference may be first made to the provisions of the PSC.

The Production Sharing Contract

4. Pursuant to the bids invited by the MoPNG the aforementioned PSC was entered into between the parties. The Contract Area described in Appendix A to the PSC was to an extent of 50 sq.m specified by points A, B, C and D with the latitudinal and the longitudinal points indicated. Associated Natural Gas ('ANG') was defined as natural gas occurring in association with crude oil either as free gas or in solution, if such crude oil could by itself be commercially produced. Non-Associated Natural Gas ('NANG') was defined as natural gas which is produced either without association with crude oil or in association with crude oil which by itself cannot be commercially produced.

5. In terms of the PSC, GSPC and Niko (collectively referred to as the 'Contractor') were entitled to undertake 'Petroleum Operations' which was defined as requiring Development Operations or Production Operations including construction and operation of facilities, plugging and abandonment of wells or disposition of petroleum to the Delivery Point.

6. The Delivery Point under Article 1.20 was defined as Group Gathering Station ('GGS') of Oil & Natural Gas Corporation Ltd. ('ONGC') or as may otherwise be agreed between the Contractor and ONGC. 'Cost Petroleum' under Article 1.18 was defined as portion of the total volume of petroleum produced and saved from the Contract Area which the Contractor is entitled to take in a particular period for the recovery of contract costs i.e. the development costs and production costs.

7. The following terms, viz., 'development area', 'development costs', 'development operations' and 'development plan' were defined under

Articles 1.21 to 1.24 of the PSC as under:

> "1.21 'Development Area', means that part of the Contract Area corresponding to the area of an Oil Field or Gas Field delineated in simple geometric shape, together with a reasonable margin of, additional area surrounding the Field consistent with petroleum industry practice and approved by the Management Committee or the Government, as the case may be.
>
> 1.22 'Development Costs' means those costs and expenditures incurred in carrying out Development Operations, as classified and defined in Section 2 of the Accounting Procedure and allowed to be recovered in terms of Section 3 thereof.
>
> 1.23 'Development Operations' means operations conducted in accordance with the Development Plan, and shall include the purchase, shipment or storage of equipment and materials used in developing Petroleum accumulations, the drilling, completion and testing of Development Wells, the drilling, completion of Wells for gas or water injection, the laying of gathering lines, the installation of separators, tankage, pumps, artificial lift and other producing and injection facilities required to produce, process and transport Petroleum into main oil storage or gas processing facilities, either onshore including the laying of pipelines within or outside the Contract Area, storage and Delivery Point or Points, the installation of said storage or gas processing facilities, the installation of export and loading facilities and other facilities required for the development and production of the said Petroleum accumulations and for the delivery of Crude Oil and / or Gas at the Delivery Point and also including incidental operations not specifically referred to herein as required for the most efficient and economic development and production of the said Petroleum accumulations in accordance with good petroleum industry practices.
>
> 1.24 'Development Plan' means a plan submitted by the contractor containing proposals required under Article 9 and / or Article 20 for the development of a Discovery."

8. The terms 'Petroleum Operations', 'Production Costs', 'Production Operations' and 'Profit Petroleum', were defined under Articles 1.47, 1.48,

1.49 and 1.51 of the PSC as under:

> "1.47 'Petroleum Operations' means, as the context may require, Development Operations or Production Operations or any combination of such operations, including construction, operation and maintenance of all necessary facilities, plugging and abandonment of Wells, or disposition of Petroleum to the Delivery Point, Site Restoration and all other incidental operations or activities as may be necessary.
>
> 1.48 'Production Costs' means those costs and expenditures incurred in carrying out Production Operations as classified and defined in Section 2 of the Accounting Procedure and allowed to be recovered in terms of Section 3 thereof.
>
> 1.49 'Production Operations' means all operations conducted for the purpose of producing Petroleum from the Contract Area including the operation and maintenance of all necessary facilities therefor.
>
> 1.51 'Profit Petroleum' means all Petroleum produced and saved from the Contract Area in a particular period as reduced by Cost Petroleum and calculated as provided in Article 14."

9. The duration of the contract was for 25 years from the effective date, which has been defined to be the date on which the contract was executed i.e. 23rd September 1994. It was provided that the contract could be extended by the MoPNG for a further period not exceeding five years and in the event of commercial production of NANG, the contract could be extended for a period up to but not exceeding thirty five years from the effective date.

10. In terms of Article 26.1 of the PSC, UOI was the sole owner of petroleum underlying the contract area. In terms of Article 26.2 of the PSC, title to Crude Oil and/or gas to which the Contractor was entitled and the title to the Crude Oil and/or gas sold to Government or its nominee by the Contractor shall pass to the Government or its nominee at the delivery point.

It was made clear that the Government or its nominee shall be responsible for all costs and risks in respect of the amount purchased after the Delivery Point, while the Contractor shall be responsible for all costs and risks prior to the Delivery Point.

11. Under Article 5.6 of the PSC, a Management Committee ('MC') consisting of four members, two members nominated by the Government and two members nominated by and representing Niko and GSPC, and chaired by a nominee of the Government, was to inter alia approve the following matters:

> "(a) Annual Work Programme and budgets and any modifications or revisions thereto, as proposed by the Contractor, for Development Operations and Productions Operations;"
>
> (b) proposals for the approval of Development Plans as may be required under this Contract, or revisions or additions thereto;
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> (c) delineation of a Field and a Development Area;
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> (d) appointment of auditors;
>
> (e) collaboration with Lessees or contractors of other areas;
>
> (f) claims or settlement of claims for or on behalf of or against the Contractor in excess of limits fixed by the Management Committee from time to time.
>
> (g) any proposed mortgage, charge or encumbrance on petroleum assets, petroleum reserves or production of Petroleum;
>
> (h) any other matter required by the terms of this contract to be submitted for the approval of the Management Committee;
>
> (i) any other matter which the Contractor decides to submit to it."

12. Article 5.7 stated that the MC was not to take any decision without the prior approval of the Government where such approval was mandated under the PSC. Article 5.13 required the approval of the MC to be unanimous. The Contractor was to commence the petroleum operations within six months from the date of the contract subject to a mining lease being granted by the Government. The Contactor was to submit a working programme and budgets relating to Petroleum Operations to be carried out during the ensuing financial year to the MC. Under Article 7.1 (a), the Contractor had the right to carry out Petroleum Operations in the Contract Area and the right to recover the costs and expenses, and under Article 7.1 (c) to lay, build, construct and install pipelines roads etc. and other ancillary rights as may be reasonably necessary for the conduct of Petroleum Operations subject to such approvals as may be required and in terms of the law. Under Article 7.3 (a), the Contractor was to conduct Petroleum Operations at its sole cost, risk and expenditure. Under Article 7.3 (b), the Contractor was to conduct Petroleum Operations within the Contract Area in accordance with good petroleum industry practice pursuant to the approved work programme, which was defined to mean all formalities for the performance of the Petroleum Operations.

13. Under Article 9 of the PSC, within 90 days of the effective date, the Contractor was to submit to the MC a comprehensive plan for the development of the petroleum reservoir which had been discovered by the ONGC before the effective date. Article 13 provided for recovery of costs of oil and gas by the Contractor. Under Article 20.5.2, in case the Development Plan was not approved by the MC within 90 days of its submission, the Contractor had a right to submit the Plan directly to the Government for approval within 60 days of the expiry of the time provided to the MC to approve the Plan. In such event the Government shall respond to the Plan

within 90 days of the receipt thereof. Article 20.5.5 provided for the value to be ascribed to natural gas for the purpose of calculating 'cost gas' and 'profit gas'. The Accounting Procedure to be applied to the PSC was set out in Appendix C. As per Article 26.4 the Government had an option of requiring the vesting of the full ownership of the assets in it either upon recovery of the costs of the assets or upon the expiry of or earlier termination of the PSC.

Joint Operation Agreement

14. In order to regulate inter party relations under the PSC, a Joint Operation Agreement ('JOA') was entered into between the GSPC and Niko on 5th December 1995. The JOA defined their respective rights and obligations under the PSC. In terms of the JOA, Niko was defined as the Operator. Both the PSC as well as the JOA contained an arbitration clause.

15. Under Article 13.2 of the PSC, the development costs incurred by the Contractor in the Contract Area up to the date of commercial production were to be aggregated and the Contractor was entitled to recover out of the cost of petroleum, the aggregate of such development costs at the rate of 100% per annum beginning from the date of such commercial production from the Contract Area. The Contractor was also entitled to recover out of the cost petroleum, the development costs incurred after the date of commercial production at the rate of 100% per annum of such development costs beginning from the date such development costs were incurred.

Events leading to the disputes

16. NANG was the only major petroleum product which resulted from petroleum operations in the contract area although when the contract was entered into it was not contemplated that only NANG would be found in the Contract Area. On 3rd January 1998, an Operating Committee Meeting

('OCM') took place between GSPC and Niko where the issue of laying a 36" outer diameter (OD) pipe line from Hazira Gas Field to Hazira Industrial Park for transporting NANG discovered at the field was discussed at length.

17. However, GSPC deferred the approval for to a later date to enable the Consortium to have a better understanding of the market and calculate the return on investment in the project based on a proportionately higher price of gas which would have to be charged from the perspective buyers as compared to the well head price of gas realized at that time. The minutes of the OCM dated 22nd April 1998 referred *inter alia* to justify the stand of the GSPC that given the fact that the construction of such pipeline would require several clearances from the State and Central Governments and other statutory bodies, it would be better if the GSPC undertook the job of acquiring the Rights of User ('ROU') etc. for around 13 to 14 Km. pipeline from Hazira Gas Plant to Hazira Industrial Area. At the OCM meeting held on 14th August 1998 it was noted that in relation to the proposed 36" pipeline a number of pertinent queries had been raised by the representatives of IRS and the Directorate General of Hydrocarbons ('DGH') regarding verification of gas reserves. It was suggested that an additional evaluation should be done to reconcile the different reserve estimates of the IRS and the NRL.

18. On 24th August 1998, GSPC wrote to the DGH on the proposal of laying a 15 km. pipeline for allocation of gas. It was stated that the present production of around 2.53 lakhs SCMD of gas was being sold to M/s Gujarat Gas Co. Ltd. ('GGCL'), which had laid a 30 km pipeline between Hazira and Surat and that in order to effectively market the gas the Consortium planned to sell gas to a number of buyers in and around Hazira/Surat area. It was explained that since Hazira was highly industrialized and since the corridor was highly congested, there would be no space available for the pipeline in

near future. It was accordingly proposed that there should be a Delivery Point to take care of the gas sold in future from the Hazira field. The cost of the entire laying of the 36" OD pipeline for 15 km. was estimated at Rs.35 to 40 crores. Approval was, therefore, sought from the DGH.

19. On 30th August 1998, GSPC wrote to Niko in which it *inter alia* stated that the pipeline project should not be treated as a joint venture action and no action should be taken by Niko. On 6th October 1998, GSPC informed Niko that the work of the proposed 15 Km pipeline was in progress and that a reference had been sent to the DGH seeking clarification for allowing of the pipeline by the Consortium and for recovery of the cost incurred but that the DGH had not responded till then. GSPC further informed Niko that "it is imperative we create our own pipeline system in order to enable expeditious marketing of our gas". GSPC sought to know if Niko would be willing to participate in the project irrespective of the status of the project vis-à-vis costs recovery under the PSC.

20. In its letter dated 19th December 1998, GSPC insisted that the project would be a GSPC/State Government project which would have the option of allowing joint venture gas to be transported. On 21st December 1998, GSPC wrote to DGH stating that although no reply was received from the DGH, Niko had insisted on implementing the project in terms of the PSC and the JOA. On 4th January 1999, GSPC decided to lay down the pipeline from Hazira Gas Plant to Mora village on its own "as a GSPC/State Government project".

21. By a letter dated 6th January 1999, the DGH informed GSPC that the costs for laying of 15 km. pipeline of 36" diameter as proposed by GSPC was not eligible for cost recovery under the existing PSC provisions and that

any action taken by the Contractor without requisite approval of the MC/Government shall be at the Contractor's own risk. At an OCM held on 8th January 1999, GSPC and Niko decided that in the absence of a firm directive from DGH, the Consortium would undertake the pipeline project as a Joint Venture Project. It was further agreed that the issue would be raised in the forthcoming meeting with the DGH with the hope that DGH would grant cost recovery status to the project. On 26th April 1999, GSPC wrote again to the DGH requesting for an early decision as the imported items for construction of the pipeline had started arriving at customs. It sought help in the Consortium clearing the goods without paying custom duty. On 19th May 1999, GSPC requested the DGH to take a decision on the fixation of the Delivery Point. The DHG on 20th May 1999 informed GSPC that the matter had been referred to MoPNG for a decision. GSPC was in the meanwhile asked to demonstrate the additional gas potential available from Hazira field over and above the gas already committed for sale.

22. On 6th August 1999 the DGH replied to GSPC declining grant of approval and cost recovery status in respect of the 36" pipeline. It was stated that the laying of the pipeline up to Mora village and creating a Delivery Point was a policy issue which required the approval of the Government. If subsequent drilling results justified the laying of an additional pipeline for sale from the Hazira field, the DGH would, after review of the updated Development Plan (based on new information), appropriately recommend to the Government for consideration of a separate Delivery Point for those additional gas sales.

23. It appears that in the meanwhile GSPC went ahead with the construction of the 36" pipeline. By its letter dated 9th August 1999 GSPC informed Niko that that in view of the DGH not granting approval, the project of the 36" 14

km. pipeline "would no longer remain a GSPC-Niko joint venture project". It reiterated this on 31st August 1999. Niko in a reply dated 8th September 1999 informed GSPC of its decision to go in for arbitration.

24. On 1st January 2000, GSPC informed Niko about the reversal of the debit note of Rs.25,65,92,809 dated 15th July 1999 that was raised by the GSPC on the joint venture for the 36" pipeline project. While requesting that the debit note to be treated as cancelled, GSPC informed Niko that it would return Niko's contribution. By its letter dated 4th January 2000, Niko expressed surprise that GSPC had arbitrarily transferred the joint venture 36" pipeline to its other subsidiary, Gujarat State Petronet Limited ('GSPL') as part of the Gujarat Gas Grid. On 7th January 2000, GSPC refunded to Niko by way of demand drafts ('DDs') a sum of Rs.8.55 crores. However, Niko returned the DDs to GSPC and objected to the reversal of the debit note.

25. Reference may also be made at this stage to the correspondence between DGH and the ONGC. By a letter dated 7th May 1999 the DGH sought clarification from the ONGC whether delivering gas at the end of 15 km. long pipeline was a cheaper option as compared to delivering gas 22 km. away at the GGS of ONGC. By its letter dated 12th May 1999, ONGC stated that it had no role in the gas delivery point since GSPC had planned to supply gas directly by laying the 36" pipeline for sale to private consumers and the pipeline costs were to be recovered from such consumers. ONGC asked the DGH to take the final call.

Proceedings under Section 9

26. Aggrieved by the stand of the GSPC as expressed by its letters dated 7th June and 27th July 2000 that it would transfer the pipeline to a third party, Niko filed O.M.P. No.200 of 2000 in this Court under Section 9 of the Act.

Niko also filed O.M.P. No.201 of 2000 under Section 9 of the Act against GSPC and the UOI. The said petitions were rejected by a learned Single Judge of this Court by a detailed judgment dated 8th March 2000. While *prima facie* expressing the view that "laying of the pipeline beyond the downstream flange of the gas/oil separation facility was clearly outside the scope of the PSC", the Court observed that since in the meantime GSPC had entered into a Memorandum of Understanding ('MoU') with GSPL on 29th January 2000, "the Court cannot set the clock back so as to rescind those third party rights" and direct GSPC to hand over the pipeline to Niko. Also GSPL whose rights were likely to be affected by such order was not a party to the proceedings.

27. Niko filed two appeals being FAO (OS) No. 148 and 149 of 2001. By a common order dated 1st June 2001 a Division Bench of this Court modified the order dated 8th March 2000 of the learned Single Judge by directing that a regular account would be maintained by GSPC in respect of the capital expenses for the pipeline and no third party interest would be created in the pipeline to the extent of 1/3rd share of Niko.

Constitution of the Arbitral Tribunal

28. By a letter dated 30th August 2000, Niko requested for the appointment of an Arbitral Tribunal in terms of Clause 13.1 of the JOA and also informed GSPC that it had appointed Mr. Justice P.N. Bhagwati, former Chief Justice of India as its Arbitrator. GSPC in its reply dated 29th September 2000 contended that the 36" pipeline from Hazira Gas field to village Mora was never part of the PSC and since JOA existed under the limited context of the PSC, the said dispute was not arbitrable.

29. On 12th October 2000, on the basis of the arbitration clause in the JOA,

Niko filed Arbitration Petition No.1 of 2001 against GSPC before the Chief Justice of India (CJI) under Section 11 (9) of the Act. It filed a separate Arbitration Petition No.7 of 2001 on 2nd March 2001 against UOI and GSPC in terms of the arbitration clause under the PSC. Both Arbitration Petition Nos.1 of 2001 and 7 of 2001 were allowed by the Designate Judge of the CJI by order dated 18th July 2002 which read as under:

> "After having heard learned counsel for the parties and perused the record, I am of the view that there exists a dispute between the parties and there is an arbitration clause in the agreement. Further I find that the Respondent company has failed to appoint an Arbitrator in compliance of the notice sent by the applicant. It is not disputed that the applicant is a body corporate situated outside India. I, therefore, find that there is an arbitration agreement between the parties under the category of international commercial agreement.
>
> I, therefore, allow these two petitions and appoint Mr. Justice D.P. Wadhwa a former Judge of Supreme Court of India as an Arbitrator jointly on behalf of GSPC and Union of India in Arbitration Petition No.7 of 2001 and also in Arbitration Petition No.1 of 2001 on behalf of GSPC. The cost of arbitration shall be fixed as provided in Clause (8) of Section 31 of the Act.
>
> The arbitration would be governed by the provision of the Act, although the arbitration agreement was entered into prior to enforcement of the Act. It is made clear that it would be open to the Respondent to raise such objections which are permissible under law before the Arbitrators."

30. The Arbitral Tribunal thus comprised Mr. Justice P.N. Bhagwati who was nominated by Niko and Mr. Justice D.P. Wadhwa appointed by the Designate Judge of the CJI by the aforementioned order jointly on behalf of GSPC and Union of India. The said two Arbitrators appointed Mr. Justice M.H. Kania, former Chief Justice of India, as the third and Presiding Arbitrator. The Arbitral Tribunal held its first sitting on 2nd September 2002.

Proceedings before the Arbitral Tribunal

31. On 31st October 2002, Niko filed an application under Section 32(2) of the Act before the Arbitral Tribunal, seeking termination of the arbitration proceedings against GSPC stating that the *inter se* disputes between Niko and GSPC had been settled. In its reply GSPC confirmed that the *inter se* disputes between it and Niko had been settled by a memorandum of understanding (MoU) dated 3rd October 2002. GSPC, therefore, prayed that it should be treated as co-claimant along with Niko against the UOI. On 3rd May 2003, the Arbitral Tribunal recorded this change in stand and directed that in future the sitting fee would be equally shared by Niko and the UOI.

32. Niko's stand before the Arbitral Tribunal in the statement of claim was that the laying of the 36" diameter pipeline was part of the Development Operations under the PSC. The 36" diameter pipeline had been laid and made operational and, therefore, the dispute related only to cost recovery which Niko quantified as Rs.99.8 crores. It further prayed in Clauses (f) to (h) as under:

> "f. Granting cost recovery of production cost incurred in operating the said pipeline for the period upto the date of this claim in the amount being quantified.
>
> g. Declaring and directing that the Investment Multiple Ratio and the accounting of Profit Petroleum shall be revised with retrospective effect after taking into account the cost Recovery status granted to the said 36 inch pipeline and accordingly, the excess Profit Petroleum payments made to the Government of India, amounting to Rs.44.76 crores, be reimbursed.
>
> h. Declare and Award interest @ 18% on the amount awarded by this Arbitral Tribunal under prayers (e), (f) and (g) above."

33. GSPC supported Niko's claim. The stand of the UOI was that the constitution of the Arbitral Tribunal was pre-mature as channels of dispute settlement mechanism provided under Article 31 of the PSC had not been exhausted. The dispute in the present case had not been raised jointly by GSPC and Niko. GSPC had opposed the appointment of Arbitrator requested by Niko throughout in the proceedings before the High Court and the Supreme Court. It was further contended that the construction of the 36" pipeline had no approval of the MC; the Arbitral Tribunal had no jurisdiction to examine the correctness of the non-approval of the pipeline by the DGH and that the creation of a further Delivery Point was not within the domain of Niko. The UOI submitted that if despite making it clear to Niko that the construction of pipeline was at its risk and cost, GSPC and Niko went ahead with its construction they could not seek to extract that cost from the UOI. Once the gas was delivered at the downstream flange at the Delivery Point, the transportation of the gas thereafter was not a matter within the scope of the PSC and the liability was of the buyer.

34. After pleadings were completed, arguments were heard on the objections raised by the UOI, on 23rd March 2003, the Arbitral Tribunal passed the following order:

> "1. Mr. B. Sen, learned Senior Advocate appearing on behalf of the Union of India has raised a number of preliminary objections. We have heard Mr. Sen on the preliminary objections raised by him and also heard Mr. P. Chidambaram, leaned Senior Advocate who appears for the Claimant. We are of the view that there is no merit in the preliminary objections. In our opinion, there are two objections which can be properly regarded as preliminary objections and the same are that the arbitration has not been validly invoked under Article 31 of the Production Sharing Contract and that the Arbitral Tribunal has not been properly constituted.

2. As far as the objections relating to the invocation of the arbitration is concerned, we do not find any merit in the same in view of the documents shown to us. This is particularly so as attempts to conciliation have already been made and failed.

3. As far as the objection regarding the constitution of the Arbitral Tribunal is concerned we are again of the view that the objection has no substance as Mr. Justice Wadhwa (retired) was appointed by an order of the Supreme Court of India at a time when Gujarat State Petroleum Corporation as well as the Union of India were both Respondents and we do not find any invalidity in that appointment.

4. As far as other preliminary objections are concerned, in our opinion, they are not proper preliminary objections at all but will have to be decided along with the merits of the case.

5. We propose to give detailed reasons for this in our award if necessary."

35. When the matter was heard next on 1st May 2003, the Tribunal passed the following order:

> "At the outset Mr. Sen, Senior Advocate appearing on behalf of the Union of India submitted that the Respondent's in participating in these proceedings may not be taken to as having given up its preliminary objections regarding to jurisdiction. He says there are other preliminary objections apart from the two preliminary objections decided earlier for which he reserves his right to urge the same at appropriate occasion."

36. On 16th August 2005 final arguments were heard and the Arbitral Tribunal reserved the Award. It appears that on 7th August 2006 Niko filed an application for directions on which arguments were heard by the Arbitral tribunal on 10th and 11th November 2006.

37. It is seen from the dissenting Award of Justice Wadhwa that he circulated his draft Award to the other two learned Arbitrators soon after the conclusion of the final arguments in the arbitral proceedings. He states that he never heard "any comments on the same from the other members of the Arbitral Tribunal." He further states that only on 11th August 2009 he received a draft Award from the Presiding Arbitrator, "without even a mention of the draft Award circulated by me. We exchanged letters in which I expressed my disappointment and anguish about the process and delay, which is against the interest of arbitral process. It appeared that the draft Award sent to me had the approval of the other Arbitrators as well. I do not know where and when both of them met to discuss the draft Award. If that being so, it appears to me rather unusual."

38. As far as the majority Award of Justice Kania and Justice Bhagwati is concerned, they mention in the last paragraph as under:

> "Before parting with this case, there is an explanation which we owe to the parties and to our co-arbitrator. It is true that the arguments of both parties were concluded on August 16th 2005 and we received their written submission within a reasonable time. Unfortunately, for several reasons we could not have a meeting with our esteemed colleague Justice D.P. Wadhwa for sometime although he was willing to have a meeting. We received his draft Award in good time but on reading it we found that there were basic differences in our approach and reasoning and it could hardly be expected that we all would be able to agree upon a common Award. Thereafter both of us decided to write a separate Award but unfortunately both of us suffered health problems and on account of such health problems and other reasons there has been delay in declaring our Award."

The Majority and Dissenting Awards

39. The majority Award held that the decision of the Government that there could be no pipeline outside the Contract Area was "arbitrary, unreasonable

and clearly contrary to the object and intendment of the PSC." It proceeded to hold that in the background of the correspondence between the parties and other circumstances, the decision of the Contractor to lay a 36" pipeline was bonafide and was consistent with good petroleum practice; that Mora was the most suitable Delivery Point for NANG and that construction of the 36" pipeline "should have been included in the PSC" and that the PSC should have been accordingly amended. As far as the changing stand of the GSPC the majority Award held that GSPC could not be prevented from doing so if that was the correct stand. It held that since the question of recovery of costs even after the date of reference of the dispute to arbitration also arose from the contract, it was arbitrable.

40. The majority Award proceeded to allow the claims of Niko and *inter alia* granted a series of reliefs including the declaratory reliefs as prayed for by Niko and GSPC. It awarded them the cost recovery of the Development Cost in the sum of Rs. 93.27 crores which was to be paid by the UOI. A sum of Rs.14.02 crores towards cost recovery of operating costs as on 31st March 2003 was to be paid by the UOI to Niko and GSPC. For cost recovery after 1st April 2003 UOI was to pay the amount as would be determined by a certificate of M/s C.C. Chokshey & Co., a reputed firm of Chartered Accountants from year to year; the UOI to reimburse and pay to the Claimants i.e. Niko and GSPC the excess profit petroleum in the sum of Rs.67.14 crores as on 31st March 2003 together with interest at 9% per annum from that date till payment; sharing of the transportation revenues in the sum of Rs.17.80 crores as on 31st March 2003 was declared as already adjusted. The UOI was asked to pay the Claimants Rs.5 lakhs as costs of the arbitral proceedings.

41. Justice Wadhwa in his dissenting Award dismissed the claims of the

Contractor. He held that laying of the 36" 14 km pipeline did not fall within the scope of the PSC and was in complete violation thereof. He adverted to the shifting stand of GSPC. Before the High Court in an affidavit filed in the Section 9 proceedings, GSPC had categorically averred that the 36" pipeline had not been accorded cost recovery status and was outside the purview of the PSC. It changed this stand only after the commencement of the arbitration proceedings, when in October 2002 it entered into an MoU with Niko. Importantly Justice Wadhwa noted that apart from giving an initial amount of about Rs. 8.55 crores to GSPC, Niko had remained outside the pipeline project. GSPC had proposed to take up the project as a collaborative venture with Niko but later decided to go alone. It sold the pipeline to GSPL and it was the latter which then spent money to complete the pipeline. It was only after the MoU dated 3rd October 2002 that the Consortium regained control of the pipeline.

42. Justice Wadhwa discussed the evidence of the witnesses in detail. The evidence of Mr. Robert Ohlson on behalf of Niko showed that the Delivery Point for NANG was where GGCL had laid its 8" pipeline. The evidence of Ms. Pomila Jaspal for the DGH revealed that the expenditure shown as having been incurred by Niko on the pipeline did not tally with its own accounts. It had accounted only for a sum of Rs. 25.7 crores and not Rs. 93.27 crores as claimed. The construction of the pipeline was therefore not consistent with the procedure outlined in the PSC and was outside the budgetary control and supervision of the UOI. There was no approval of either the MC or the UOI to the pipeline; there was no amendment to the Development Plan and clearly the Contractor was seeking to include the pipeline in the PSC after its construction in violation of the express terms of the PSC. Merely because the pipeline facilitated transmission of NANG would not bring it within the purview of the PSC. The individual contracts

with the consumers of NANG showed that the Delivery Point was defined as the downstream flange of the pipeline at the outlet of the gas metering station of the seller at Hazira. The cost of transportation thereafter was the liability of the Contractor and not of the UOI. Therefore the dispute regarding cost recovery status of the pipeline was outside the scope of the PSC and not arbitrable. Justice Wadhwa was of the view that the Arbitral Tribunal could not re-write the terms of the contract.

Delay in pronouncement of the Award

43. One of the first objections raised by Mr. A.S. Chandhiok, learned ASG appearing for the UOI was that the undue delay in the majority in pronouncing its Award vitiated the Award. He placed reliance on the decision of this Court in ***Harji Engg. Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. 153 (2008) DLT 489***. He submitted that the explanation offered regarding the health problems of the two Arbitrators, could not satisfactorily account for the extraordinary delay of over four years in pronouncing the Award. Further, there was no satisfactory explanation for not dealing with the findings of the third Arbitrator who had dissented. He relied on the decision in ***M/s Subhash Chugh & Co. v. M/s Girnar Fibres Ltd. 2000 (3) RAJ 461 (P&H)*** to urge that it was incumbent for the two Arbitrators who delivered the majority Award to have discussed the draft Award of the third Arbitrator by holding a meeting after conclusion of the final arguments. He also referred to the observation of the Supreme Court in ***P.H. Pandian v. P. Veldurai JT 2001 (9) SC 10***.

44. In reply, it was submitted by Mr. Nageshwar Rao, learned Senior counsel appearing for Respondent No.1 Niko that delay by itself did not vitiate the Award. Reliance was placed on the decision of this Court in ***PEAK Chemical Corporation Inc. v. National Aluminium Co. Ltd. (2012) II AD***

(Delhi) 304.

45. In the present case, the delay of over four years in the majority pronouncing its Award is indeed extraordinary. Even if one were to take into account the fact that the Arbitral Tribunal heard arguments on Niko's application for directions sometime in November 2006, the majority award was pronounced only on 23rd December 2009, three years thereafter. On the other hand the draft Award of the dissenting member was available shortly after conclusion of arguments on 16th August 2005. Justice Wadhwa received the draft of the majority Award only on 11th August 2009. After the Presiding Arbitrator expressed his inability to travel to Delhi, the seat of arbitration, Justice Wadhwa signed the dissenting Award in Mumbai on 23rd December 2009.

46. While under the Arbitration Act 1940 a time limit was envisaged for the pronouncement of an Award, the Arbitration and Conciliation Act 1996 did not. This was noted by the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (2003) 5 SCC 705***, where it was observed as under (SCC, p.727):

> "30**.** It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time-limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time-limit for deciding the dispute by the arbitrators could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving

limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice."

47. It appears to the Court that one possible remedy available to a party aggrieved by the delay in pronouncing an Award is to first approach the Tribunal itself with a prayer for expediting the Award and thereafter if that does not prove successful to invoke Section 14 of the Act. The relevant provision reads thus:

"***Section 14 - Failure or impossibility to act***

(1) The mandate of an arbitrator shall terminate if—

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."

48. Under Section 14(2) of the Act a party can seek the Court's interference to terminate the mandate of the Arbitrator if the 'controversy' concerning the Tribunal's *de jure* or *de facto* inability to perform its functions "remains". Therefore, if after being approached by either party with a prayer to expedite the pronouncement of the Award, the tribunal fails to do so, the Court can be approached in terms of Section 14 (2). In the present case, when asked why the UOI did not approach this Court under Section 14(2) of the Act, Mr. Chandhiok, referred to the decision of the Division Bench of this Court in

Progressive Career Academy Pvt. Ltd. v. FIIT JEE Ltd. 2011 (2) Arb.LR 323 (Delhi) where it was held that the Court should refrain from interdicting arbitral proceedings under Section 14 of the Act where an attempt by the party at getting the learned Arbitrator to recuse under Section 12 read with Section 13 failed. That decision does not deal with a situation where the pronouncement of an award is unreasonably delayed and therefore does not come in the way of a party approaching the Court under Section 14 (2) for relief. In the present the fact remains that neither party resorted to the said remedy.

49. Given the scheme of the Act, it might be appropriate to exhaust the above remedy before the stage of challenge to the Award. It hardly needs be stated that delay *per se* is not identified as one of the grounds under Section 34 of the Act. It would have to be shown that the Award suffered from patent illegality on account of such delay. What also should weigh with the Court when faced with a situation where an Award is sought to be challenged on the ground of delay is to consider the costs incurred and the time spent in the arbitral proceedings. If delay alone was to be the factor then, as is happening not infrequently these days, many an Award would be vulnerable to invalidation on this ground alone. It would be the facts and circumstances of a given case which would determine if the delay is so unconscionable as to vitiate the Award.

50. In ***PEAK Chemical Corporation Inc***., this Court noticed the judgment in ***Harji Engineering Works Pvt. Ltd.*** and pointed out that the said decision was distinguishable on facts**.** This Court observed in para 29 as under:

> "29. The question whether the delay in the pronouncement of an Award after final arguments have concluded vitiates the Award will depend on the facts and circumstances of each case. The decisions relied upon by Mr. Ganguli turned on their peculiar

> facts. No two cases are the same. Significantly, delay has not been specified as one of the grounds under Section 34 of the Act for setting aside an Award. It would be straining the language of that provision to hold that delay in the pronouncement of an Award would by itself place it in "conflict with the public policy of India" within the meaning of Section 34 (2) (b) (ii) of the Act. As will be discussed hereafter, the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, and the detailed reasons issue-wise. Another factor that requires to be accounted for is that the dispute between the parties has been pending since 1996. It would not be in the interests of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination. The learned Arbitrator who passed the impugned Award has since expired. A fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far. Therefore, it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award. This plea is accordingly rejected."

51. Therefore, one factor that weighed with this Court in ***PEAK*** was that notwithstanding the delay, the impugned Award had comprehensively dealt with all the submissions made by the parties and the issues that arose. However, in the present case on this aspect, for the reasons discussed hereafter, the majority Award does not inspire confidence. While it has dealt with the submissions of the parties in detail, it did not deem it appropriate to deal with the findings of Justice Wadhwa in his dissenting Award. The majority acknowledges that the draft Award of Justice Wadhwa was received by them in good time. They found that "there were basic differences in our approach and reasoning and it could hardly be expected that we all would be able to agree upon a common Award". Yet, the reasons given by the majority for not meeting with him "although he was willing to have a meeting" are not satisfactory. It was incumbent in such circumstances, for the majority to have discussed the points raised by Justice Wadhwa in the dissenting Award.

How the failure to do this has vitiated the majority Award is evident from the discussion that follows. Consequently, while in the present case the delay in pronouncement of the Award *per se* does not vitiate it, the delay appears to have led to the Award being vitiated by patent illegality for reasons discussed hereafter.

Examination of the impugned majority Award on merits

52. The principal question that arose in the arbitral proceedings was whether the 36" pipeline was part of the PSC. There was no dispute that NANG was not one of the petroleum products contemplated as existing when the PSC was entered into. The Delivery Point identified was relevant for crude oil and Condensate and not NANG. Yet, the evidence on record showed that GGCL was a monopoly buyer of gas and that it had laid an 8" pipeline for that purpose up to the downstream flange of the gas metering station at Hazira. If there was to be a Delivery point beyond the downstream flange, it would require the amendment to the Development Plan and its approval by the MC. Only then could it be made part of the PSC.

53. There is also no dispute that the DGH did not agree to the grant of cost recovery status to the 36" pipeline. This was a decision that had to be taken by the UOI as it was a matter of policy. Even if MC had approved, it would have to be further cleared by the UOI. The letter dated 5th February 2000 from GSPC to Niko correctly noted that change in Delivery Point being a policy matter of the Government could not be decided by the Contractor or even the MC. If this was the procedure envisaged by the PSC then it could not be deviated from. The majority appears to have overlooked this important aspect and committed the error of stepping into the shoes of the UOI to determine whether a 36" pipeline was consistent with "good petroleum practice."

54. The majority also conveniently overlooked the earlier stand of GSPC in the proceedings under Section 9 of the Act. The GSPC had correctly noted in its affidavit in those proceedings that the 36" pipeline was not part of the Development Plan. It had not been accorded cost recovery status by the MC. The existing Delivery Point was the downstream flange of the gas separator at Hazira. This was also evident from the individual supply contracts entered into by the Contractor with buyers including GGCL, Gujarat State Energy Generation Limited ('GSEGL'), Essar Steel etc. With the non-approval of the MC to the construction of the 36" pipeline by creating a Delivery Point beyond the Contract Area, the said pipeline was not within the scope of Petroleum Operations and therefore outside the scope of the PSC. In the Gas Sales Agreements with GGCL, GSEGL, Essar Steel, Essar Power, the Delivery Point was in fact the downstream flange of the gas metering station of the seller at Hazira. A separate agreement for transportation of the gas beyond that point was entered into by each buyer with the pipeline company i.e. GSPL. In terms of Section 3.2 (iii) of Appendix C to the PSC, the cost of marketing and transporting NANG beyond the downstream flange was to be borne by the Contractor. Consequently the 36" pipeline was outside the scope of the PSC and not entitled to cost recovery. The above stand of the GSPC was based on a correct interpretation of the provisions of the PSC. The Arbitral Tribunal ought to have drawn an adverse inference at the volte face of GSPC when it departed from the above stand and chose to support Niko and get impleaded as a co-claimant. It must be mentioned that before this Court GSPC appears to have reverted to its earlier stand. Be that as it may, the fact remains that the Contractor, i.e. Niko and GSPC took a conscious decision, and a calculated risk, in proceeding with the 36" pipeline despite the MC not according its approval and the DGH communicating the refusal of permission by the letter dated 6th August 1999. The

correspondence between GSPC and the DGH on the one hand and the GSPC and Niko and the other belies the change of stand by GSPC before the Arbitral Tribunal and ought not to have been countenanced by it.

55. The majority Award suffers from patent illegality inasmuch as it seeks to rewrite the PSC by deeming an amendment to the PSC to include the 36" pipeline as part of the Development Plan and deeming a changed Delivery Point when there was no approval to such change. Also, the entire construction of the pipeline and its operation was without the procedure under the PSC being followed. It was outside the budgetary control and supervision of the UOI that was mandated by the PSC. The 36" pipeline was therefore contrary to the PSC. The Arbitral Tribunal was mandated to examine if the action of the Contractor in constructing and operating the pipeline was in conformity with the PSC. Only then the question of granting it cost recovery status would arise. The Arbitral Tribunal could not have rewritten the PSC by reading into it clauses and provisions that were non-existent. The majority Award was therefore in clear violation of Section 28 (3) of the Act.

56. The majority Award totally overlooked the facts stated in an affidavit dated 30th July 2003 filed by GSPC before the Arbitral Tribunal. In the said affidavit GSPC stated that it had sold the pipeline to GSPL on 1st February 2000 for Rs.49.27 crores (including sales tax of Rs. 1.97 crores) and that GSPPL had thereafter completed the pipeline by expending a further Rs. 43.99 crores. GSPL was not a party to the arbitration agreement and the relief that Niko was seeking, viz.; grant of cost recovery status to the pipeline which would result in its ultimate transfer to the UOI was incapable of being granted. The MoU dated 3rd October 2002 between Niko and GSPC was an event subsequent to the commencement of arbitral proceedings. It showed

that till then the pipeline was in the control of and being operated by GSPL. In fact, apart from making an initial payment to GSPC of a sum of Rs. 8.55 crores, Niko neither spent any sum on the construction nor was in any way involved in its completion and operation. The Contractor admittedly regained control of the pipeline from GSPL only after the MoU. Niko failed to prove that it had spent Rs. 93.27 crores on the pipeline. Further, the evidence of Ms. Jaspal on behalf of the DGH showed that even the accounts submitted by the Contractor did not support such a claim. Till the Contractor regained control of the pipeline, the question of booking the costs of the pipeline to the Consortium did not arise. In the circumstances, the majority committed a patent illegality in awarding Niko a sum of Rs. 93.27 crores towards recovery of development cost of the pipeline.

57. Although under Article 26.4, the Government had the option of requiring the vesting in it of the assets purchased by the Contractor after the effective date for use in petroleum operations, it could not be compelled to take over a pipeline which it did not approve. The majority Award does not even discuss the evidence of the witnesses of the parties which reveals that there was no approval by the MC or the Government to the construction of the 36" pipeline and that the Contractor still went ahead with it at their own risk and costs.

58. The Award by the majority in favour of the Claimants of reimbursement of excess profit petroleum supposedly paid to UOI was also misconceived. It flowed from the erroneous determination regarding the grant of cost recovery status to the pipeline. In this regard the majority failed to deal with a pertinent observation in the dissenting Award of Justice Wadhwa that from a collective reading of Appendix D with Article 14 of the PSC it was evident that Government's share of profit petroleum was dependent on the quantum

of investment by the Contractor; if the cost of construction of the pipeline was shown as Contractor's investment it would reduce the Government's share of profit petroleum. Clearly therefore the majority erred in buying into the argument put forth by Niko that the Government had in any event benefited from the 36" pipeline.

59. The very approach of the majority to the issues for determination was flawed. In asking whether the Delivery Point needed to be changed, whether it was necessary to construct a 36" pipeline; whether the Contractor's decision in that regard was "bonafide" in the first place, the majority appears to have viewed its exercise as that of judicial review of an administrative decision and whether the refusal by the Government to grant approval was just and reasonable. This erroneous approach is evident from the observations of the majority in para 50 of their Award that the construction of the pipeline "should have been included in the PSC and we must proceed on the footing that it was so included in the PSC" and in para 53 that the PSC should have been amended by including therein the laying of the 36" pipeline. Apart from the fact that the majority was thereby rewriting the PSC, it erred in sitting in appeal over the decision of the DGH or the Government not to grant approval or cost recovery status to the 36" pipeline. The explanation offered in the letter dated 6th August 1999 of the DGH was a plausible one. Even in a writ jurisdiction the court has only to examine if the decision making process has been adhered to and not whether the decision itself is erroneous. If after following the procedure under the PSC there was no approval granted by the MC or the Government, then the Arbitral Tribunal could not have granted such approval and further ordered consequent reliefs on that basis. The majority Award was therefore in excess of jurisdiction and suffered from patent illegality.

Conclusion

60. For the aforementioned reasons, the Court is unable to sustain the impugned majority Award dated 23rd December 2009 of the Arbitral Tribunal. It is hereby set aside with costs of Rs.1 lakh which will be shared equally by Niko and GSPC and paid to the Petitioner UOI within a period of four weeks. O.M.P. No.192 of 2010 is allowed in the above terms.

61. Consequently the question of granting Niko the reliefs prayed for in O.M.P. No.944 of 2011 does not arise. O.M.P. No. 944 of 2011 is hereby dismissed.

S. MURALIDHAR, J.

July 2, 2012
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