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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 9th May, 2023

\+ O.M.P. (COMM) 487/2018 and I.A. 16396/2018 & 2448/2022

UNION OF INDIA ..... Petitioner

Through: Mr. K.K. Venugopal, Attorney General for India with Mr. A.K. Ganguli, Senior Advocate with Ms. Mamta Tiwari, Ms. Swati Sinha, Mr. Vijay Kumar & Mr. Debesh Panda, Advocates.

versus

RELIANCE INDUSTRIES LIMITED & ORS. ..... Respondents

Through: Mr. Harish Salve, Senior Advocate with Mr. Sameer Parekh, Mrs. Sonali Basu Parekh, Mr. Ishan Nagar, Mr.Prateek Khandelwal, Mr. Manu Bajaj and Ms. Chetna Rai, Advocate for Rl.
Mr. Dayan Krishnan, Senior Advocate with Mr. Mahesh Agarwal, Ms. Niyati Kohli, Mr. Pranjit Bhattacharya Ms. Manavi Agarwal and Mr. Shravan Niranjan, Advocates for R2.
Mr. Sasiprabhu, Mr. Vishnu Sharma, Mr. Tushar Bhardwaj, Mr. Vinayak Maini and Mr. Prakhar Agarwal for R3

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

I. INTRODUCTION

By way of the present petition under section 34 of the Arbitration & Conciliation Act, 1996 ('A&C Act' for short), the petitioner Union of India (through the Ministry of Petroleum and Natural Gas) impugns Arbitral Award dated 24.07.2018 ('**impugned award**', for short) rendered by a 2:1 majority of the arbitral tribunal, which decided the disputes that had arisen between the Ministry of Petroleum & Natural Gas of the Government of India ('**Ministry**', for short) *and* M/s Reliance Industries Limited ('**Reliance**' for short), M/s. Niko (NECO) Limited ('**Niko**' for short) and M/s. British Petroleum Exploration (Alpha) Limited ('**British Petroleum**' for short) from a Production Sharing Contract dated 12.04.2000 ('**PSC**' for short). The PSC related to exploration and extraction of natural gas from Block KG-DWN-98/3 in the Krishna-Godavari Basin off the coast of Andhra Pradesh in India ('**Reliance Block**' for short). For abundant clarity, under the PSC, Reliance was one of the constituents of the 'Contractor', the other two being Niko and (subsequently) British Petroleum; and Reliance was the 'Operator'.

2. Reliance was the claimant in the arbitral proceedings; and the Ministry was the respondent. By way of the impugned award, two of the members of the arbitral tribunal have decided certain issues in favour of Reliance; whereas the third member has decided the matter in favour of the Ministry. In essence and substance the majority has held *inter-alia* that "*Reliance is fully entitled to produce all hyrdrocarbons resulting from Petroleum Operations conducted within its Contract Area which may include hydrocarbons that could have migrated from an adjacent block.*"

3. The Ministry has now approached this court challenging the decision of the arbitral tribunal as held by the majority.

II. GENESIS OF THE DISPUTE LEADING TO ARBITRATION

4. The PSC was signed between the Ministry on the one hand and 02 corporate entities *viz.* M/s. Reliance Industries Limited and Niko on the other. Subsequently, by way of a Supplementary Contract dated 21.02.2011, Reliance transferred a portion of its 'Participating Interest' under the PSC as defined therein, in favour of British Petroleum.

5. Disputes arose when, sometime in the year 2013, the Oil and Natural Gas Corporation Limited ('**ONGC**' for short), by its letter dated 22.07.2013 addressed to the Directorate General of Hydrocarbons ('**DGH**' for short), informed the latter that there was "*evidence of lateral continuity of gas pools*" as between the Reliance Block and the adjacent blocks allocated to ONGC bearing name 'IG Block' and 'Block KG-DWN-98/2' ('**ONGC Blocks**' for short). In simple terms, this meant that the gas pools of the Reliance Block and the ONGC Blocks appeared to be *connected* with possible *migration of gas* between the two blocks.

6. This led ONGC to file a writ petition bearing W.P.(C) No. 3054/2014 before the Delhi High Court, with the Ministry as respondent No. 1, the DGH as respondent No. 2 and Reliance Industries Ltd. as respondent No. 3, which petition was disposed-of by the court, by directing the Ministry to consider the report produced by the expert agency by the name of M/s. DeGolyer & MacNaughton ('**D&M**' for short), which was to undertake an independent third-party study to verify the claimed continuity and migration of gas from the ONGC Blocks to the Reliance Block. These proceedings accordingly brought to the fore the issue of *migration* of gas from the ONGC Blocks to the Reliance Block, which subsequently led to disputes between the Ministry and Reliance.

7. In its final report dated 19.11.2015, (D&M Report-2015) D&M concluded *inter-alia* that *"the integrated analyses indicated connectivity*

and continuity of the reservoirs across the blocks operated by ONGC and RIL."

8. By way of Memorandum dated 15.12.2015 issued by it, the Ministry also appointed a one-man committee of Justice A.P. Shah, formerly Chief Justice of the Delhi High Court, (hereinafter referred to as the 'Shah Committee') to *inter-alia* consider the D&M Report-2015 and to recommend a future course of action in light of the findings contained in the report. After a detailed consideration of the matter, and after hearing the Ministry, Reliance and ONGC, the Shah Committee rendered a report dated 29.08.2016. It may be noted that Reliance withdrew halfway through the proceedings before the Shah Committee; the report was based on written and oral submissions made by the parties; and no experts appeared or rendered any assistance to the Shah Committee.

9. Matters got precipitated when, based upon the Shah Committee Report, *vide* its letter dated 03.11.2016, the Ministry raised upon Reliance a demand for USD 1,552,071,067.00 as computed provisionally alongwith interest upto 31.03.2016; and of USD 174,905,120.00 towards revised additional cumulative Profit Petroleum claimed to be receivable upto 31.03.2016, towards *disgorgement of 'unjust enrichment'* claimed to have been made by Reliance.

10. In response to the Ministry's claim, Reliance sought to invoke Article 33 of the PSC, *viz.* the arbitration provision; and issued to the Ministry a notice of arbitration dated 11.11.2016 in that behalf. Thereafter, Reliance nominated Sir Bernard Eder as their nominee arbitrator and the Ministry nominated Justice G.S. Singhvi as their nominee arbitrator, who together appointed Professor Lawrence Boo as the presiding arbitrator.

III. SUMMARY OF CLAIMS & SUMMARY OF TRIBUNAL'S DECISIONS

11. At this point, it would be relevant to set-out the claims made by Reliance in its Statement of Claims, which were as follows :

> "***VIII. RELIEF***
> *191. For the reasons outlined above, Claimant respectfully requests an award:*
>
> *191.1 Declaring that Contractor has produced all hydrocarbons from its Contract Area by conducting Petroleum Operations reviewed and approved by GOI;*
>
> *191.2 Declaring that Contractor has the right to produce all hydrocarbons from wells drilled in its Contract Area by conducting Petroleum Operations reviewed and approved by GOI, which may include hydrocarbons that could have migrated to those wells from an adjacent block;*
>
> *191.3 Declaring that Contractor is entitled to retain all benefits from, and cost recover for, the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC;*
>
> *191.4 Declaring that Contractor has paid GOI both Profit Petroleum and royalty for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC;*
>
> *191.5 Declaring GOI reviewed and approved Contractor's Petroleum Operations for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC and is therefore estopped from pursuing a claim for unjust enrichment against Contractor;*

191.6 Declaring Contractor paid GOI both Profit Petroleum and royalty for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC and is therefore estopped from pursuing a claim for unjust enrichment against Contractor;

191.7 Declaring that GOI has no right to restitution or other relief, not having suffered any injury or other compensable harm resulting from Contractor's production of hydrocarbons that allegedly migrated to Contractor's wells in its Contract Area from the adjacent ONGC Blocks;

191.8 Ordering GOI to reimburse all of Contractor's costs incurred in connection with this arbitration, including fees and expenses of the arbitrators, legal counsel, witnesses, experts, and consultants;

191.9 Ordering GOI to pay Claimant simple interest of an amount as determined by the Tribunal on any amounts from the date of the award until the date of payment; and

191.10 Ordering that the award be immediately enforceable, notwithstanding commencement or pendency of any action to set it aside or of any other proceeding."

12. The decision of the arbitral tribunal, by way of the majority award, may be summarized as below :

Issues		**Tribunal's Findings**
1.	Whether the Claimant's rights and obligations under the PSC to conduct Petroleum Operations in the Contract Area prohibit the Claimant from producing and selling gas which migrated into the sub-sea reservoir lying within the Contract Area from a source outside the Contract Area.	NO. The PSC **does not prohibit but permits** the Claimant to produce and sell gas which migrated into the sub-sea reservoir lying within the Contract Area from a source outside the Contract Area.

2.	*[If the answer to (1) is "Yes"]* Whether the Claimant is obliged to seek and obtain express permission to produce and sell migrated gas and if so, whether the Claimant obtained such permission.	NO.
3.	Whether the Claimant produced and sold gas which migrated into the sub-sea reservoir lying within the Contract Area from a source outside the Contract Area. If so, to ascertain quantity.	YES. **The Claimant's production of gas would have included gas which had migrated into the reservoir lying within the Contract Area from a source outside the Contract Area**.
4.	Whether the Claimant produced and sold gas from the sub-area reservoir lying within the Contract Area which extends beyond the Contract Area. If so, to ascertain quantity.	
5.	*[If the answers to (3) or (4) is "YES"]* Whether the Claimant is entitled under the PSC to retain or recover: i. cost petroleum; and/or ii. profit petroleum, from the production and sale of such gas.	YES.
6.	*[If the answer to (5) is "NO"]* Whether the Claimant has been "unjustly enriched".	NO. **There is no question of "unjust enrichment" that requires further determination**.
7.	Whether the Claimant is obliged under Articles 10, 12 and 26 of PSC to:	
	a. Make disclosure of the 2003 D&M Report to the Respondent.	YES. Under Article 26, the **Claimant was obliged to make disclosure of the 2003 D&M Report to the Respondent** under Article 26 of the PSC.

	b. Provide information and data as well as all interpretative and derivative data, including reports, analysis, interpretations and evaluations prepared in respect of Petroleum Operations, including interpretation and analysis, relating to connectivity of the reservoirs and / or continuity of the channels across in the boundary of Block-DWN-98/3.	YES. Under Article 26, the Claimant was obliged to provide to the Respondent all data as stipulated in Article 26.1 of the PSC. This included: (i) all interpretative and derivative data, including reports, analysis, interpretations and evaluations prepared in respect of Petroleum Operations; and (ii) interpretation and analysis **relating to connectivity of the reservoirs and/or continuity of the channels across in the boundary** of Block KG-DWN-98/3.
8.	*[If the answer to Issue (7) is "YES"]* Whether the Claimant had complied with such obligation.	NO. In failing to provide the Respondent with the Niko Reserve Reports including the 2003 D&M Report, the **Claimant had failed to comply with its obligation under Article 26** of the PSC.
9.	*[If the answer to (8) is "NO"]* **Whether the non-compliance amounts to a material non-disclosure constituting a breach by the Claimant of the PSC and the PNG Rules**.	**NO**.

10.	*[If the answer to Issue (9) is "NO"]* Whether this prevented the Respondent from directing a joint-development under Article 12 of the PSC or Rule 28 of the PNG Rules.	NO.
11.	Whether the 2003 D&M report establishes connectivity of the reservoirs and/or continuity of the channels in Block KG-DWN-98/3 and the IG Block.	NO. **The Tribunal could not make any finding that the 2003 D&M Report establishes, as a fact, that there was connectivity of reservoirs over the adjoining blocks**.
12.	Whether the 2015 D&M Report establishes connectivity of the reservoirs and/or continuity of the channels in Block KG-DWN-98/3 and ONGC's Blocks (the IG Block and Block KG-DWN-98/2).	**YES**. While the Claimant has shown that the gas migration estimates made in the 2015 D&M Report were highly unreliable, grossly inaccurate or exaggerated, **the evidence sufficiently demonstrates that there is some degree of connectivity of the reservoirs in Block KG-DWN-98/3 and ONGC's Blocks (the IG Block and Block KG-DWN-98/2)**

(italics in original, bold and underscoring supplied)

IV. SUMMARY OF THE PRODUCTION SHARING CONTRACT

13. A brief conspectus of the salient aspects of the contract from which the disputes arose, is as follows :

13.1 The PSC recites that the Ministry derives its right to grant a licence for the purpose contemplated in it from Article 297 of the Constitution of India, since 'petroleum' in its natural state found

within the territorial waters and the continental shelf, or in the exclusive economic zone of India, vests in the Union of India. Furthermore, the Oilfields (Regulation and Development) Act 1948, The Petroleum and Natural Gas Rules 1959 ('**PNG Rules**' for short) and The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, which contain provisions for the regulation of petroleum operations, empower the Government of India *inter-alia* to grant licence for the exploration, development and production of such natural resources;

13.2 By way of the PSC, a licence (as detailed in the contract), was granted by the Ministry to Reliance and Niko, to carry-out Exploration Operations and Petroleum Operations (as defined in the contract) in an off-shore area identified as Block KG-DWN-98/3 in respect of natural gas in that area (referred to as '**natural gas**' or '**gas**' in this judgement). The licence was granted for a period of 20 years, comprising three Exploration Phases;

13.3 Reliance and Niko were together referred to in the PSC as "**Contractor**"; which definition would subsume British Petroleum once it acquired a '**Participating Interest'** under the PSC. The Union of India, Ministry of Petroleum and Natural Gas was referred to as the **'Government'**. The off-shore deep water area in respect of which licence was granted under the PSC was referred to in the contract as **'Contract Area'** and was described in Appendix-A and was delineated on a map attached as Appendix-B to the PSC;

13.4 The PSC also defined '**Development Area**', to mean an area within the Contract Area, which was relevant for certain purposes

as set-out in the contract, which Development Area is however, not to be confused with Contract Area;

13.5 Subject to the other contractual terms and conditions, the Contractor and the Ministry were entitled to receive a share in what was defined as '**Profit Petroleum**', being the total value of crude oil, condensate and natural gas produced and saved from the Contract Area in a particular period *after deducting* what was defined as '**Cost Petroleum**' calculated in accordance with the terms of the contract.

V. LEGAL AND CONTRACTUAL ARCHITECTURE

14. The relevant provisions of the Constitution of India, the PNG Rules and the PSC, which the parties have referred to in the course of hearings are extracted hereinbelow:

Article 297 of the Constitution of India

> ***"297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.****—(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.*
>
> *(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.*
>
> *(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.*

Rule 5 of the PNG Rules

> ***"5. Grant of license or lease.*** *— (1) A license or lease in respect of —*
>
> *(i) any land or mineral underlying the ocean within the territorial waters or continental shelf or the exclusive economic zone of India and vested in the Union, shall be granted by the Central Government, and*

(ii) any land vested in a State Government, shall be granted by the State Government.

(2) Every license and lease shall contain such of the terms, covenants and conditions prescribed by these rules as are applicable and such additional terms, covenants and conditions as may be provided in the agreement between the Central Government and the licensee or the lessee.

PROVIDED THAT where the licence or lease has been or is to be granted by the State Government, the Central government shall consult the State Government before agreeing to such additional terms, covenants and conditions.

(3) The Central government, if it deems fit, may from time to time notify in the Official Gazette, particulars regarding the basis on which the Central Government may be prepared to consider proposals for prospecting or mining operations in any specified area or areas;"

Rule 7 of the PNG Rules

"7. Right of the licensee and the lessee.— *Subject to the Act or any rules made thereunder and subject also to terms of the agreement that may be arrived at between the Central Government and the licensee or the lessee after consultation with the State Government.*

(i) every licensee shall have the exclusive right to carry out, in addition to geological and geophysical surveys, information drilling and test drilling operations for petroleum in the area covered by the license and shall have the exclusive right to a lease over such part of the land covered by the license as he may desire.

(ii) every lessee shall have the exclusive right to conduct mining operations for petroleum and natural gas in and on the land demised by such lease together with the right to construct and maintain in and on such land such works, buildings, plant, waterways, roads, pipelines dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electric power lines and other structures and equipment as are necessary for the full enjoyment of the lease or for fulfilling his obligation under the lease."

Rule 19 (c) of the PNG Rules

"19. General Provision. *— The licensee or the lessee shall—*

* * * * *

(c) The licensee or the lessee shall, as soon as possible provide the Central Government or its designated agency, free of cost, all data earlier obtained or to be obtained as a result of petroleum operations under the license or lease including, but not limited to, geological, geophysical, geochemical, petrophysical, engineering, well logs, maps, magnetic tapes, cores, cuttings and production data as well as all interpretative and derivative data, including reports, analysis, interpretations and evaluation prepared in respect of petroleum operations and as such data shall be the property of the Central Government:

PROVIDED THAT the licensee or the lessee shall have the right to make use of such data, free of cost, for the purpose of petroleum operations under the license or lease."

Rule 27 of the PNG Rules

"27. Restriction of production.— *The Central Government may in the interests of conservation of mineral oils by general or special order, restrict the amount of petroleum or oil or gas or coal bed methane or gas from gas hydrate that may be produced by a lessee in a particular field."*

Rule 28 of the PNG Rules

"28. Regulations of operations.—*(1) The Central Government may by notification in the Official Gazette prescribe conditions to regulate the conduct of operations by a lessee or licensee in a field or area where it has reason to believe that the petroleum deposit extends beyond the boundary of the leased or licensed area into areas worked by other lessees or licensee or into areas not covered by any license or lease and may require the lessee or licensee to undertake any operation or prohibit any operation or permit it to be undertaken subject to such conditions as it may deem fit.*

(2) Any order under Rule 27 or notification issued by the Central Government under sub-rule (1) of this rule shall be deemed to be a condition of the lease."

Rule 30 of the PNG Rules

*"**30. Suspension etc., of operations.** —No licensee or lessee shall—*

(i) suspend normal drilling;
(ii) suspend normal producing operations;
(iii) abandon an oil well or gas well;
(iv) re-condition such a well;
(v) resume drilling operations after a previous completion, suspension or abandonment of such a well; or
(vi) resume producing operations after a previous suspension without priorily giving to the Central Government at least a fortnight's notice of any or all of the aforesaid actions, provided that, if normal drilling or normal producing operations have to be suspended immediately due to any unforeseen reason, notice thereof shall be given to the Central Government within twenty four hours of such suspension under intimation to the State Government."

Rule 31 of the PNG Rules

***"31. Shutting down of wells.—** (1) If the Central Government is satisfied after holding an enquiry that an oil well or gas well is being operated in such a way that any provision of these rules or any order of the Central Government pursuant to these rules has been or is being contravened, the Central Government may order that, on and after a date to be fixed by the order, no production is to be permitted from the well and that it is to be shut down and kept shut down until such time as the Central Government may specify.*

(2) If, in the opinion of the Central Government, waste, damage to property, or pollution can thereby be prevented, the Central Government may order the well to be shut down pending an enquiry under sub-rule (1), which enquiry shall be held within fifteen days of the making of such order."

Rule 32-A of the PNG Rules

***"32-A. Penalties. —** (1) If the holder of a Petroleum Exploration License or Mining Lease or his transferee or assignee fails, without sufficient cause, to furnish the information or returns or acts in any manner in contravention of sub-rule (2) of Rule 14, Rule 19, Rule 21 and Rule 24, or to allow any authorised person as provided in Rule 32 to enter into and inspect any oil well or gas well or any drilled hole or information well in the process of drilling, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.*

(2) Whoever, after having been convicted of any offence referred to in sub-rule (1), continues to commit such offence shall be punishable for each day after the date of the first conviction during which he continues so to offend, with fine which may extend to one hundred rupees."

Rule 33 of the PNG Rules

"33. Arbitration of disputes—*Every license or lease shall be subject to the following term, namely:-*

Any dispute (including a dispute regarding the market price referred to in Rule 18) between the Government and the licensee or the lessee regarding—

- *(a) any right claimed by the licensee or the lessee under the license or lease, or*
- *(b) any breach alleged to have been committed by the licensee or lessee of any of the terms, covenants or conditions of the license or lease, or any penalty proposed to be inflicted therefor, or*
- *(c) the fees, royalty or rents payable under the license or the lease, or*
- *(d) any other matter or thing connected with the license or the lease.*

shall be settled through arbitration and conciliation proceedings under the provisions of Arbitration and Conciliation Act, 1996 and the rules made thereunder as are applicable to such proceedings."

Articles of the PSC

***"1.24** "**Contract Area**" means, on the Effective Date, the area described in Appendix A and delineated on the map attached as Appendix B or any portion of the said area remaining after relinquishment or surrender from time to time pursuant to the terms of this Contract (including any additional area as provided under Article 11.2).*

* * * * *

***"1.25** "**Contract Costs"** means Exploration Costs, Development Costs and Production Costs as provided in Section 2 of the Accounting Procedure and allowed to be cost recoverable in terms of Section 3 of the Accounting Procedure.*

* * * * *

***"1.28** "**Cost Petroleum**" means the portion of the total value of Crude Oil Condensate and Natural Gas produced and saved from the Contract Area which the Contractor is entitled to take in a particular period, for the recovery of Contract Costs as provided in Article 15.*

* * * * *

*"1.32 **"Development Area"** means an area within the Contract Area consisting of a single Reservoir or multiple Reservoirs all grouped on or related to the same individual geological structure or stratigraphic conditions, designated with the approval of the Management Committee, subject to Article 11.2, to include the maximum area of potential productivity in the Contract Area in a simple geometric shape, in respect of which a Commercial Discovery has been declared and a Development Plan has been approved. Where circumstances justify the Development Area may contain more than one Discovery with the approval of Management Committee.*

* * * * *

*"1.77 "**Profit Petroleum**" means, the total value of Crude Oil, Condensate and Natural Gas produced and saved from the Contract Area in a particular period, as reduced by Cost Petroleum and calculated as provided in Article 16."*

* * * * *

"ARTICLE 12

UNIT DEVELOPMENT

***"12.1** If a Reservoir in a Discovery Area is situated partly within the Contract Area and partly in an area in India over which other parties have a contract to conduct petroleum operations and both parts of the Reservoir can be more efficiently developed together on a commercial basis, the Government may, for securing the more effective recovery of Petroleum from such Reservoir, by notice in writing to the contractor require that the Contractor:*

a) collaborate and agree with such other parties on the joint development of the Reservoir;

b) submit such agreement between the Contractor and such other parties to the Government for approval; and

c) prepare a plan for such joint development of the said Reservoir, within one hundred and eighty (180) days of the approval of the agreement referred to in (b) above.

***"12.2** If no plan is submitted within the period specified in Article 12.1 (c) or such longer period as the Government and the Contractor and the other parties referred to in Article 12.1 may agree, or, if such plan as submitted is not acceptable to the Government and the Parties cannot agree on amendments to the proposed joint development plan, the Government may cause to be prepared at*

the expense of the Contractor and such other parties a plan for such joint development consistent with generally accepted Good International Petroleum Industry Practices which shall take into consideration any plans and presentations made by the Contractor and the aforementioned other parties.

*" **12.3** If the parties are unable to agree on the proposed plan for joint development, the Government may call for a joint development plan from an independent agency, which agency, may make such a proposal after taking into account the position of the parties in this regard. Such a development plan, if approved by Government, shall be binding on the parties, notwithstanding their disagreement with the plan. However, the Contractor may in case of any disagreement on the issue of joint development or the proposed joint development plan, prepared in accordance with Article 12.2 or within thirty (30) days of the plan approved as aforesaid in the Article, notify the Government that it elects to surrender its rights in the Reservoir/Discovery in lieu of participation in a joint development.*

***"12.4** If a proposed joint development plan is agreed and adopted by the parties, or adopted following determination by the Government, the plan as finally adopted shall be the approved joint development plan and the Contractor shall comply with the terms of the said Development Plan as if the Commercial Discovery is established.*

***"12.5** The provisions of Articles 12.1, 12.2 and 12.3 shall apply mutatis mutandis to a Discovery of a Reservoir located partly within the Contract Area, which although not equivalent to a Commercial Discovery if developed alone, would be a Commercial Discovery if developed together with that part of the Reservoir which extends outside the Contract Area to the areas subject to contract for Petroleum Operations by other parties.*

* * * * *

"ARTICLE 26
INFORMATION, DATA, CONFIDENTIALITY, INSPECTION AND SECURITY

*"**26.1** The Contractor shall, promptly after they become available in India, provide the Government, free of cost, with all data obtained as a result of Petroleum Operations under the Contract including, but not limited to geological, geophysical, geochemical, petrophysical, engineering, Well logs, maps, magnetic tapes, cores, cuttings and*

production data as well as as all interpretative and derivative data, including reports, analyses, interpretations and evaluation prepared in respect of Petroleum Operations (hereinafter referred to as "Data"). Data shall be the property of the Government, provided, however, that the Contractor shall have the right to make use of such Data, free of cost, for the purpose of Petroleum Operations under this Contract as provided herein.

* * * * *

*"**26.3** Contractor shall keep the Government currently advised of all developments taking place during the course of Petroleum Operations and shall furnish the Government with full and accurate information and progress reports relating to Petroleum Operations (on a daily, monthly, yearly or other periodic basis) as Government may reasonably require, provided that this obligation shall not extend to proprietary technology. Contractor shall meet with the Government at a mutually convenient location in India to present the results of all geological and geophysical work carried out as well as the results of all engineering and drilling operations as soon as such Data becomes available to the Contractor."*

VI. MINISTRY'S GROUNDS OF CHALLENGE TO ARBITRAL AWARD

15. This court has heard Mr. K.K. Venugopal, learned Attorney General for India and Mr. A.K. Ganguli learned senior counsel appearing for the Ministry. The Ministry has challenged the award on 03 main grounds which are as follows:

Ground I: Award Suffers from Patent Illegality

15.1. The case of the Ministry as canvassed before the arbitral tribunal and before this court, is that Reliance has extracted and sold gas which was drawn from the adjoining ONGC Blocks *i.e.* beyond the Contract Area allocated to Reliance under the PSC. It is the Ministry's contention that in the year 2003, *i.e.* at least 06 years before commencement of commercial operations by Reliance in 2009, Reliance and Niko had requisitioned a survey report from D&M, and from the D&M Report dated 31.03.2003 ('**D&M Report-2003**' for short) it could be concluded that the blocks allocated to Reliance and ONGC constituted a single 'reservoir'.

The Ministry argues that Reliance failed to disclose to it the D&M Report-2003, despite Reliance being under obligation under Article 26.1 of the PSC to provide to the 'Government' all data, including derivative and interpretative data relating to petroleum operations. The Ministry points-out that D&M Report-2003 expressly stated as follows :

> "*The OGIP and associated reserves that are located off of the KG-DWN-98/3 block have been* ***included as possible reserves*** *attributable to development of the KG-DWN-98/3 block. The reserves associated with* ***that portion*** *of the OGIP would require a separate stand-alone development* ***by the owner*** *of the block (KG-OS-IG) which could prove cost prohibitive. Development of the KG-DWN-98/3 block* ***will be capable of depleting*** *the OGIP on the KG-OS-IG block."*
>
> (emphasis supplied)

15.2. It is the Ministry's case that subsequent D&M Reports dated 31.03.2004 and 31.03.2005 ('**D&M Report-2004**' and '**D&M Report-2005**' respectively) also contain the same findings which were disclosed for the first time in 2017, during the arbitral proceedings.

15.3. It is urged, that in deciding issue No. 7 (a) *i.e.*, whether Reliance was obliged under Articles 10, 12 and 26 of the PSC to disclose the D&M Report-2003 and all other data relating to petroleum operations, the arbitral tribunal has held that Reliance was under an obligation to disclose *inter-alia* the D&M Report-2003; and further in deciding issue No.8, *i.e.*, whether Reliance had complied with such obligation the arbitral tribunal has noted that Reliance was in breach of such obligation in terms of Article 26.1 of the PSC. However, while deciding issue No.9, *i.e.*, whether non-compliance of such obligation would amount to material non-disclosure, the arbitral tribunal has held that such non-disclosure was not material

and it did not prevent the Ministry from taking action under Article 12 of the PSC and Rule 28 of the PNG Rules, which is evidently a perverse finding.

15.4. It is further argued by the Ministry that Reliance was under obligation in terms of Articles 12 and 26 of the PSC and Rules 19 and 28 of the PNG Rules to disclose to the Ministry the D&M Reports-2003, 2004 and 2005, which it did not do. It is contended that the Initial Development Plan ('**IDP**' for short) proposed by Reliance, received approval from the Ministry in November 2004; and had Reliance contemporaneously disclosed the D&M Report-2003, which was available to it prior to the approval of the IDP**,** the Ministry could have exercised various options available to it under the PSC, including :

a. The option to decline to approve Reliance's IDP 2004 and the Addendum to the IDP in December 2006, as a consequence of which no commercial exploitation of gas could have been undertaken by Reliance;

b. The option to direct joint-development (unit-development) of the adjoining Reliance Block and ONGC Blocks under Article 12.1 of the PSC;

c. The option to appoint a third party to prepare a Development Plan and if Reliance and ONGC did not agree to a Joint Development Plan, such third-party plan would be binding on both parties;

d. The option to exercise its powers under Rule 28 of the PNG Rules to regulate the conduct of petroleum operations in whatever manner it considered fit, including requiring the lessee or licensee to "*undertake any operation or prohibit any*

operation or permit it to be undertaken subject to such conditions as it may deem fit"; or

e. The option to call upon Reliance to account for the financial benefit received by Reliance from extraction of the migrated gas, under Rule 28 of the PNG Rules.

15.5. It is submitted that the Ministry was unable to exercise any of the foregoing options since Reliance did not disclose to the Ministry any of the aforementioned D&M Reports; and instead Reliance went ahead and extracted gas, including gas that had migrated to a Reservoir within its Contract Area from a source outside the Contract Area. It is contended that the migrated gas alone was valued at about USD 1.5 billion as on 30.06.2016.

15.6. The Ministry further argues that it is inexplicable as to how, despite the clear observation in D&M Report-2003 regarding depletion of gas from the ONGC Blocks into the Reliance Block, the arbitral tribunal was unable to appreciate that the said report establishes connectivity between the Reservoirs in these adjoining blocks. Thus, the conclusion of the arbitral tribunal that the D&M Report-2003 does not establish connectivity as a 'fact', and therefore its non-disclosure is not material, is a perverse finding.

15.7. The Ministry argues that the arbitral tribunal's finding based *inter-alia* on the counter-affidavit dated 11.08.2014 filed by the DGH before the Delhi High Court in W.P. (C) No. 3054/2014, to conclude that the Ministry would in any case not have ordered joint development is a perverse finding. The Ministry draws attention to the following observations made by the arbitral tribunal:

> "**87.** *It is clear from DGH's affidavit that it had taken a firm and unequivocal view that even if reservoir connectivity (and therefore migration or gas movement due to differential pressures) is in fact established between the adjacent fields, GOI*

> *would not have ordered unitisation under Article 12 of the PSC because that would have impeded rather than expedited the exploitation of the natural gas found in the Claimant's Development Area. In other words, GOI accepted that it had no basis to order and would not have ordered any joint development under Article 12.*
>
> * * * * *
>
> ***"178.*** *In summary, it is the Tribunal's conclusion that the failure to provide the 2003 D&M Report (as well as the other Niko Reserve Reports) was not material and made no difference whatsoever. In particular, we reject the Respondent's contention that such failure prevented the Respondent from directing a joint development under Article 12 of the PSC or Section 28 of the PNG Rules. We reach this conclusion without hesitation (a) because there is simply no evidence to support the Respondent's contention that the scheme of development, exploration and production from the reservoir would have been "wholly different" if the 2003 D&M Report or the other Niko Reserve Reports had been provided; and (b) the evidence is to the contrary as appears from the earlier part of this Award in the context of the Tribunal's consideration of Issue 1. In particular, as stated in paragraph <87> above, it is clear from DGH's affidavit submitted to the Delhi High Court that it had taken the firm and unequivocal position that even if reservoir connectivity was in fact established, GOI would not have ordered unitisation under Article 12 of the PSC because that would have impeded.(sic) rather than expedited the exploitation of the natural gas found in the Claimant's Development Area. In other words, GOI in effect accepted that it had no basis to order and would not have ordered any joint development under Article 12 of the PSC or otherwise exercised its powers pursuant to Section 28 of the PNG Rules."*

15.8. It is the Ministry's submission that the arbitral tribunal's reference to the DGH affidavit dated 11.08.2014 is completely misplaced, since this affidavit reflected the fact situation that prevailed in or about 2014 *i.e.,* 11 years *after* Reliance first acquired knowledge of the continuity of gas reserves from the D&M Report-2003. It is argued that though in 2014 joint development would not have been possible, since by 2014, Reliance had already extracted the majority of natural gas from the Reservoir, but at the relevant time, *i.e.,* in or about 2003, the Ministry may have exercised one or the

other option available to it as delineated hereinabove. It is accordingly contended, that the majority decision is illegal and perverse, since the arbitral tribunal has overlooked the non-disclosure of the D&M Report-2003 at the relevant time *i.e.*, as on 2003 and has instead relied upon the situation prevailing in 2014 when no joint development would have been possible as Reliance and ONGC were at different stages of production. However, in 2003 when neither Reliance nor ONGC had begun production of gas, joint development could have been directed. It is submitted that no reasonable person could have come to the conclusion arrived at by the arbitral tribunal.

15.9. The Ministry also argues that the impugned award has taken a view, which no reasonable or rational person could ever take, when it holds that the PSC " ... *does not prohibit but permits ...*"[1] Reliance to produce and sell gas that had migrated into its Contract Area from outside the Contract Area, despite the fact that Reliance was unable to point-out any specific provision in the PSC which permitted it to produce and sell migrated gas. The submission is, that where due to geological and seismological reasons, migration of gas is possible/probable/proved, the very purpose of defining a Contract Area in the PSC carries within it the intention of allowing the Contractor to extract *only* the gas found within that Contract Area and *prohibits* the Contractor from extracting gas that may migrate into that area. This intention is evident from the fact that gas blocks are demarcated by geological co-ordinates; that different gas blocks are allocated to companies/entities/corporations; and there is no affirmative provision permitting extraction of migrated gas.

[1] cf. para 95 of the majority arbitral award.

15.10. To support its submissions, the Ministry has relied upon judicial precedents to state that an arbitral award vitiated by 'patent illegality' appearing on the face of the award, such as a finding based on no evidence or ignoring vital evidence, is liable to be set-aside. Furthermore it is argued, that an award can be set-aside if it 'shocks the conscience of the court'; or has taken a view that no reasonable person would take and the view of the arbitrator is not even a 'possible view'[2]. The Ministry accordingly urges that the arbitral award is liable to be set-aside.

Ground II: The Award is in Conflict with the Public Policy of India.

16. The Ministry has also argued the award is contrary to the public policy of India. It is argued that the impugned award holds that Reliance *cannot even be made accountable* for extracting and selling gas from outside its Contract Area, which finding is in the teeth of the overriding 'public trust doctrine', which doctrine is part of the 'fundamental policy of Indian law' and therefore is an integral part of the 'public policy of India'. It is further argued, that such a view renders nugatory the entire regulatory regime for priceless natural resources like natural gas, which are part of the national wealth. The Ministry argues that in essence, the arbitral tribunal has conferred upon Reliance the right to produce migrated gas as per the 'doctrine of capture' which is antithetical to the public trust doctrine.

16.1. It is argued that the arbitral award is also contrary to the public policy of India inasmuch as it ignores that a contractor's right to

[2] *Ssangyong Engg. & Construction Co. Ltd. vs. NHAI* (2019) 15 SCC 131; paras 40 & 41.
Delhi Airport Metro Express Pvt. Ltd. vs. DMRC (2022) 1 SCC 131; para 29.
Associate Builders vs. DDA, (2015) 3 SCC 49; para 36.
Patel Engg. Ltd. vs. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167; para 22.
Champsey Bhara vs. Jivraj Balloo, AIR 1923 PC 66.
Union of India vs. Bungoo Steel 1967 1 SCR 324.

extract natural resources is highly restricted. Since all natural resources vest in the Union of India, and the government deals with those resources in trust for the people of India, a contractor may not extract natural resources without the *explicit permission* of the Union, which permission may be granted pursuant to a rationally framed policy[3]. The arbitral award is also against the public policy of India since it holds that the PSC does not expressly prohibit, but in fact permits the production of migrated gas. It is further argued that by holding that Reliance's non-disclosure of the D&M Report-2003 did not constitute a material breach of Article 26 of the PSC, the arbitral tribunal has erred, inasmuch as it has failed to appreciate that as a result of such non-disclosure, Reliance obtained unlawful gains at the cost of the public exchequer.

16.2. It is further submitted that in finding that *"There is no question of "unjust enrichment" that requires further determination."* the arbitral tribunal has ignored the law laid down by the Supreme Court in *Common Cause vs. Union of India*,[4] wherein it was held that 100% disgorgement is mandatory when natural resources have been produced without any unlawful authority[5].

16.3. The arbitral tribunal ignores that fraud was played by Reliance upon the Ministry in suppressing the D&M Reports-2003, 2004 and 2005 and extracting migrated gas. It is submitted that the arbitral tribunal has failed to appreciate that fraud vitiates even the most solemn proceedings, and that concealment of that which is to be disclosed amounts to fraud[6]. It is argued that the arbitral tribunal not only ignores the fraud played upon the Ministry but legitimizes

[3] *RNRL vs. RIL* (2010) 7 SCC 1; paras 122, 249, 152, 250.
[4] (2017) 9 SCC 499; paras 153 & 154.
[5] see also-*Indian Council for Enviro-Legal Action vs. UOI & Ors*, (2011) 8 SCC 161; *Sahakari Khand Udyog Mandal Ltd. vs.Commissioner of Central Excise & Customs* (2005) 3 SCC 738.
[6] *Bhaurao Dagdu Paralkar vs. State of Maharashtra* (2005) 7 SCC 605

Reliance's conduct of suppression and non-disclosure, which is in conflict with the public policy of India.

16.4. The Ministry has further drawn the attention of this court to the following observation made by the arbitral tribunal in para 89 of the arbitral award:

> *"**89**. GOI's power to order a prohibition means that unless such an order is made, the Claimant is not prohibited and is permitted to continue its Petroleum Operations within its Contract Area in a situation where the reservoir extends beyond its Contract Area into another…."*

It is submitted that the above observation is in stark contradiction to the dictum of *RNRL vs. RIL* (*supra)* to submit that the arbitral tribunal ought to have interpreted the PSC in conformity with the public trust doctrine, which subjects the government to strict restrictions when dealing with natural resources. Attention is drawn to the following paras of the judgement of the Supreme Court:

> *"117. RIL's right of distribution is based on the PSC, which itself is derived from the power of the Government under the constitutional provisions. Thus, the very basis of RIL's mandate is the constitutional concepts that have been discussed by now, including Article 297, Articles 14 and 39(b) and the public trust doctrine. Therefore, it would be beyond the power of RIL to do something which even the Government is not allowed to do. The transactions between RIL and RNRL are subject to the overriding role of the Government.*
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> *"118. It is relevant to note that the Constitution envisages exploration, extraction and supply of gas to be within the domain of governmental functions. It is the duty of the Union to make sure that these resources are used for the benefit of the citizens of this country. Due to shortage of funds and technical know-how, the Government has privatised such activities through the mechanism provided under the PSC. It would have been ideal for the PSUs to handle such projects exclusively. It is commendable*

> *that private entrepreneurial efforts are available, but the nature of the profits gained from such activities can ideally belong to the State which is in a better position to distribute them for the best interests of the people. Nevertheless, even if private parties are employed for such purposes, they must be accountable to the constitutional set-up. The statutory scheme of control of natural resources is governed by a combined reading of the Oilfields (Regulation and Development) Act, 1948, the Petroleum and Natural Gas Rules, 1959 and the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act.*
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> * * * * *
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> *"249. In light of the public trust elements so intrinsic to resources under the seabed, and the special nature of Article 297, the implications of natural gas for India's energy security, and the imperatives of national development—including the concepts of egalitarianism and promotion of interregional parity, we hold that the Union of India cannot enter into a contract that permits extraction of resources in a manner that would abrogate its permanent sovereignty over such resources. It is not just a matter of mere textual provisions in a contract or a statute. It is a matter of constitutional necessity."*

Reference is also made to similar observations of the Supreme Court in ***Bharti Airtel vs. Union of India***.[7]

16.5. The Ministry further argues that the above finding of the arbitral tribunal is also in the teeth of the express prohibition as contained in Articles 10.7, 10.15, 11.2, 12 and 26 of the PSC and Rules 19(c) and 28 of the PNG Rules, read together.

16.6. The court's attention has also been drawn to a judgment of a Division Bench of this court *in* ***Union of India vs. Vedanta Ltd. & Ors***[8], to submit that *"... in contracts concerning natural resources, which are held by the State in Trust on behalf of the people, the contractual provisions are to be interpreted in the backdrop of public interest and Constitutional goals…"*.

[7] (2015) 12 SCC 1; paras 45, 46, 47, 48.
[8] 2021 SCC Online Del 1336; paras 48, 52, 66.

16.7. It is further argued that the arbitral award is contrary to the public policy of India insofar as the arbitral tribunal has granted declaratory relief *simpliciter* to Reliance. Counsel have taken this court through various judgments to argue that Reliance could not have sought a mere declaratory relief from the arbitral tribunal.[9] Attention has also been drawn to a decision of the Supreme Court to argue that provisions of the Specific Relief Act, 1963 also apply to arbitral proceedings.[10]

16.8. It is submitted on behalf of the Ministry that upon the arbitral tribunal's directions, the Ministry had supplied a document *viz.* Addendum II, to answer Reliance's allegation that the Ministry had knowledge of continuity and connectivity of reservoirs. The Ministry contends however, that the arbitral tribunal has entirely ignored Addendum II. To substantiate this contention, the Ministry has taken the court through the evidence sought to be placed before the arbitral tribunal to prove that the Ministry neither knew nor could it have known of connectivity/continuity of gas reservoirs.

16.9. The Ministry argues that in declining to afford an equal opportunity to the Ministry, the arbitral award is contrary to the mandate of section 18 of the A&C Act. Section 18 of the A&C Act being binding law in India, is an integral part of the public policy of India. Therefore, being in contravention of the said provision, the arbitral award is liable to be set-aside on the grounds specified in section 34 (2) (b) (ii) of the A&C Act. To support their argument, learned senior counsel have drawn the attention of this court to the decision of the Supreme Court in *Associate Builders* (supra)[11] and

[9] *Muni Lal vs Oriental Fire and General Insurance Co Ltd.* (1996) 1 SCC 90; para 4 and *Venkataraja & ors vs. Vidyane Doureredjaperumal (through LRs) & Ors* (2014) 14 SCC 502; paras 19.3 to 27.
[10] *Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and Ors.* (1999) 5 SCC 651; paras 34 & 36.
[11] cf. footnote No.2, paras 30-31

Ssangyong Engg & Construction Co. Ltd (supra) [12], to submit that section 18 of the A&C Act embodies the principle of *audi alterem partem* which has been recognised as a 'fundamental juristic principle of Indian law' .

Ground III: Non-Arbitrability of Disputes.

17. The Ministry had, at the threshold of the arbitral proceedings**,** challenged the jurisdiction of the arbitral tribunal to arbitrate the disputes raised by filing an application under section 16 of the A&C Act. The arbitral tribunal's jurisdiction was challenged *inter-alia* on the ground that (i) the claims made by Reliance fell outside the scope of the arbitration agreement; (ii) the subject matter of the disputes fell within the public law arena and were matters of public policy, being covered by the public trust doctrine, and hence not arbitrable; and (iii) invocation of arbitration was premature as an amicable resolution process was a pre-condition to invoking arbitration and no attempt was made for any amicable resolution.

18. The Ministry further argues that the initial demand for disgorgement made *vide* Notice dated 03.11.2016 fell within the 'public law arena' and was made in exercise of the Ministry's sovereign powers under Article 297 read with Article 73 of the Constitution of India, and hence the dispute fell outside of the jurisdiction of the arbitral tribunal and was non-arbitrable.[13]

19. It is submitted therefore, that the findings in the impugned award are wholly perverse; obtained illegally; in conflict with the most basic notions of morality and justice; and contravene the public policy of India.

[12] cf. footnote No.2, paras 34 & 41

[13] *Vidya Drolia & Ors. vs. Durga Trading Cooperation* (2021) 2 SCC 1; paras 50 and 76.3(3).

VII. SUBMISSIONS ON BEHALF OF RELIANCE

20. This court has heard Mr. Harish Salve, learned senior counsel appearing on behalf of M/s Reliance Industries Ltd, who has argued for upholding the award. His submissions are summarized in the paras below:

Submission I: Scope of Intervention under Section 34 of the A&C Act is Limited.

21. Learned senior counsel for Reliance argues, that the scope of interference by the court under section 34 of the A&C Act is very limited. Furthermore, the proceedings in the present case were an 'international commercial arbitration' within the meaning of section 2(1)(f) of the A&C Act by reason of which the ground of 'patent illegality' is in any case not available to the Ministry. The contours of challenge permissible under section 34 of the A&C Act have been presented as follows:

21.1. Patent illegality in section 34 (2A) of the A&C Act is to be read in the manner as enunciated by the Supreme Court in *Associate Builders* (supra)[14] *i.e.*, that the illegality in question must go to the very root of the matter, and cannot be trivial in nature. Moreover, construction of the terms of the contract is primarily for the arbitral tribunal to undertake, and while the tribunal must abide by the terms of the contract, if it construes the contract in a reasonable manner, then the award would not be amenable to be set-aside on the ground of patent illegality. It is submitted that in this case, the arbitral tribunal has interpreted the terms of the PSC and the rights and obligations of the parties in a reasonable manner**.**

21.2. It is submitted that the Supreme Court has subsequently elaborated in *PSA SICAL Terminals vs. Board of Trustees*[15], that the arbitral tribunal in interpreting the contract between the parties, cannot go

[14] cf. footnote No.2, 40, 42, 42.1, 42.2, 42.3.
[15] (2021) SCC Online SC 508

beyond the remit of its terms, and any interpretation that entails re-writing of the contract between the parties would be in breach of the fundamental principles of justice, and would be a situation that shocks the conscience of the court. In the present case, it is submitted that the arbitral tribunal has only interpreted the contract the way it was presented to it by the parties, and has not re-interpreted the PSC in any way.

21.3. It is further argued that in *Ssangyong Engg. & Construction Co. Ltd* (supra)[16] the Supreme Court has held that patent illegality entails an illegality which both appears on the face of the award and goes to the root of the matter, however not amounting to an erroneous application of law. Moreover, the ground of patent illegality is separate from that of 'fundamental policy of Indian law' and cannot be brought in by the 'backdoor' when considering the ground of patent illegality. [17] This position has been re-iterated by the court in *Delhi Airport Metro Express Pvt Ltd. vs. Delhi Metro Rail Corporation*[18] whereby it has been clarified that patent illegality as a ground can only be invoked when no fair minded or reasonable person would arrive at the view taken by the arbitrator. If it is a 'possible view' then it is outside the scope of interference by the court. Furthermore, as exposited in *Renusagar Power Co. Ltd vs. General Electric Co*.[19] only the violation of a statute enacted for the "*national economic interest*" and disregarding Indian law would be antithetical to the fundamental policy of India.

[16] cf. footnote No. 2
[17] see also *Patel Engg Ltd. vs. North Eastern Electric Power Corpn Ltd* (footnote No. 2); *Vijay Karia vs. Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.
[18] cf. footnote No. 2.
[19] 1994 Supp (1) SCC 644; para 66.

21.4. Furthermore, it is the submission that, as elaborated in *HRD Corporation vs. Gail (India) Ltd*[20], which re-states the position in *Renusagar Power Co. Ltd* (supra) the term 'public policy' now includes only 'fundamental policy of India' and 'justice or morality'. It is argued that the terms 'justice or morality' must mean such notions as would shock the conscience of the court as understood in *Associate Builders* (supra). Furthermore, the ground of patent illegality would not be available merely by reason of erroneous application of law and especially not upon re-appreciation of evidence. It is submitted that the arbitral tribunal has neither incorrectly applied Indian law nor has it incorrectly appraised the evidence before it.

22. That being said, to re-iterate, as a matter of preliminary consideration, Reliance argues that the arbitral proceedings in the present case amounted to an 'international commercial arbitration' within the meaning of section 2(1)(f) of the A&C Act; and therefore 'patent illegality' is not available at all as a ground of challenge in view of the exception carved out in section 34 (2A) of the A&C Act.

23. To make good its submission that the arbitral award arose from an international commercial arbitration, learned senior counsel submits as follows:

23.1. The PSC from which the disputes that were referred to arbitration arose, is a commercial contract entered into between both Indian and foreign entities;

23.2. The demand notice pursuant to which the arbitral proceedings commenced was issued by the Ministry to *all three entities, viz.* Reliance, Niko and British Petroleum collectively defined as 'Contractor' in the PSC;

[20] (2018) 12 SCC 471; paras 18 & 19.

23.3. The notice of arbitration was served upon the Ministry by Reliance in the latter's capacity as the 'Operator' under the PSC and was supported by separate letters from Niko and British Petroleum;

23.4. The findings of the arbitral tribunal have determined the rights and liabilities equally of all constituents of the 'Contractor' as defined in the PSC;

23.5. To support his submission, learned senior counsel has also drawn the attention of this court to decisions of the Supreme Court in which, when one or more parties to the arbitration agreement were not Indian, the arbitration was held to be an 'international commercial arbitration'[21]. Attention has also been drawn to a decision of a Co-ordinate Bench of this Court where, in a challenge under section 34 of the A&C Act, considering that one of the parties to the agreement was a foreign incorporated entity, the arbitration was found to be an international commercial arbitration, and therefore the award could not be assessed on the touchstone of patent illegality[22].

23.6. It is argued, if any doubt were to remain, in its decision in ***Reliance Industries Ltd & Ors. vs. Union of India***[23]**,** while dealing with a dispute which arose from the self-same PSC that is the subject matter of the present proceedings, the Supreme Court has held that even though Reliance acted as 'Operator' under the PSC for and on behalf of itself, Niko, and British Petroleum, which are all three defined as 'Contractor' in the PSC, Niko and British Petroleum were very much part of the legal relationship from which the

[21] *Sasan Power Ltd. vs. North American Coal Corporation. (India) (P). Ltd.* (2016) 10 SCC 813.
Perkins Eastman Architects DPC vs. HSCC (India) Ltd. (2020) 20 SCC 760.
Amway (India) Enterprises (P) Ltd. vs. Ravindranath Rao Sindhia & Anr (2021) 8 SCC 465.

[22] *Steel Authority of India Ltd. vs. Tata Projects Ltd. and Anr.* 2021 SCC OnLine Del 4170

[23] 2014 (11) SCC 576

disputes arose; and since the said companies are entities incorporated in a country other than India, the arbitration was an international commercial arbitration.

Submission II: On the View Taken by the Arbitral Tribunal:

24. Reliance argues that the arbitral tribunal has taken a possible view which calls for no interference by this court under section 34 of the A&C Act. Attention in this behalf is drawn to the following factual submissions that were considered and accepted by the arbitral tribunal:

24.1. On 16.10.2007, *i.e.,* well before Reliance began extracting gas, ONGC submitted to the Ministry an appraisal report dated 10.09.2007 prepared by M/s. Schlumberger Ltd., which indicated cross-boundary connectivity, suggesting the possibility of discovery of gas in the adjoining blocks. Furthermore, the stratal geological view of the area shows that the ONGC Blocks were higher than the Reliance Block, as shown in the maps depicting the contours of the ocean floor. It is submitted that the Ministry therefore had knowledge of the continuity of channels as well as presence of gas on both sides in the adjoining blocks. The issue of connectivity of reservoir channels was never raised by ONGC even in 2009, when gas production had already started in the Reliance Block, though ONGC had prior knowledge about such production.

24.2. ONGC as well as Reliance gave data to the Ministry separately; and only the Ministry was privy to both sets of data. It was therefore only the Ministry that could have directed either ONGC or Reliance to do a ‘pressure check’ to see whether there was migration of gas between the two Contract Areas, which the Ministry chose not to do.

24.3. In fact, insofar as D&M Report-2003 is concerned the arbitral tribunal accepted that Reliance had no knowledge of that report; but held that since Niko was a constituent of the 'Contractor', Reliance was in breach of its obligation to disclose the said report. This finding of the arbitral tribunal however, does not impute to Reliance any *mala-fides* to suppress information as suggested by the Ministry; and there is no finding of the arbitral tribunal to that effect.

24.4. The Ministry had sought to argue that the D&M Report-2003 conclusively 'established' connectivity between the reservoirs, to allege that since Reliance had suppressed that report, it was guilty of having committed fraud. However, the Ministry had not pleaded this before the arbitral tribunal, nor had it adduced any evidence in respect of the alleged fraudulent acts. However, the arbitral tribunal has held that the D&M Report-2003 does not conclusively establish connectivity, but only suggests it. It is argued that the D&M Report-2003 was not a 'gas migration study' at all and therefore did not evaluate quantitatively the effect of several non-unique models and uncertainties in relation to the migration of gas. For this reason, the non-supply by Reliance of the D&M Report-2003 to the Ministry is of no consequence. It is submitted that non-disclosure of immaterial information cannot constitute fraud.

24.5. The PSC contemplates and addresses the possibility of gas migration and addresses such situation by giving to the Ministry the authority to impose a Unit Development Plan. It is argued that if, having knowledge of gas migration, the Ministry still does not act to direct joint-development, the contractor is entitled to extract migrated gas, since in this circumstance, the PSC *permits* extraction of migrated gas.

24.6. Furthermore, the arbitral tribunal recognized that the Ministry had sufficient information even prior to 2003 which would have indicated the likelihood of continuity of the channel and the possibility of the reservoirs being connected. As recognized by the tribunal, the Ministry had multiple opportunities to consider directing a joint-development enquiry based on available information.

24.7. In any case, the finding that non-disclosure of the D&M Report-2003 made no material difference is a finding of fact which cannot be interfered with under section 34 of the A&C Act.

24.8. The view taken by the arbitral tribunal is also based on what the Ministry's witness, Dr. Mohan Kelkar admitted in his cross-examination *viz.* that the possibility of there being a channel running across the boundary-line drawn by the Ministry demarcating the Reliance Block and the ONGC Blocks, would have been obvious to a person with his expertise meaning thereby that this possibility would have been evident to any person with expertise in the field. Another witness produced by the Ministry, Mr. Anurag Gupta, also deposed that where there is channel continuity, there is possibility of reservoir continuity.

24.9. Furthermore, it is submitted that the Ministry's witness, Dr. Mohan Kelkar, had suggested in his report dated 20.09.2017 that the OGIP Report dated 31.01.2003 which related to the year 2002 ('OGIP Report-2002' for short) contained the same information as the D&M Report-2003.

24.10. Attention is also drawn to what Dr. Mohan Kelkar answered when he was asked by the arbitral tribunal as to whether when looking at the boundaries of the gas blocks (on an aerial or the stratal view) "*the reserves straddled the boundary",* to which Dr. Kelkar

answered: "*Obviously, somebody who is not familiar with it, it would be difficult, but if you're aware of where the boundaries are, and if I look at the figure and if I superimpose--I mean like what I did basically"*, implying thereby that the fact that the reserves straddled the boundaries was obvious.

24.11. The statement dated 21.09.2017 made by the Ministry's witness Dr. Ramanan Srinivasan was also cited, which says that the seismic data available to D&M, which was used for the D&M Report-2003 was exactly the same as the data that was used for the OGIP Report-2002 which had been filed by Reliance with the DGH prior to filing the IDP.

24.12. Furthermore, Articles 1.24 and 1.28 of the PSC which define 'Contract Area' and 'Cost Petroleum' respectively, give to Reliance the right to extract gas from the Contract Area, *with no restriction that only the Original Gas in Place* ('OGIP' for short) *may be extracted*.

24.13. As per Article 27.2 of the PSC, the Ministry *owns the entirety of the gas extracted*; and title to the extracted gas never passed to Reliance, except at the delivery point; by reason of which, the public trust doctrine has no application. Reliance had an indefeasible right under the PSC to extract gas, the only impediment to which could have been a direction from the Ministry for joint-development; but that direction was never given to Reliance.

24.14. In any case, under Article 12.1 of the PSC 'Unit Development' was contemplated *"for securing the more effective recovery of Petroleum from such Reservoir"*, which provision was intended for the *benefit of the people of India* and not for the benefit of ONGC. Recital (6) in the PSC says that Petroleum Resources be

"…exploited with the utmost expedition in the overall interest of India and in accordance with Good International Petroleum Industry Practices;" As such, while answering issues Nos. 1 and 2, *i.e.*, whether Reliance was entitled to extract migrated gas and whether it was obliged to obtain express permission to produce and sell such gas, the arbitral tribunal has held that any prohibition on extraction of migrated gas should have been explicit, in the absence of which there is an implicit permission/obligation to extract such gas. The arbitral tribunal has further observed that *"…In the Tribunal's view, the underlying rationale of the PNG Rules, the NELP and the terms of the PSC all point to the all-important principle that Indian natural resources identified as exploitable must be maximised commercially for the benefit of the Union".* This finding, it is submitted, was not only a possible conclusion but the *only* conclusion that the tribunal could have arrived at.

24.15. It is further argued that the arbitral tribunal's finding that Reliance had to discover and develop petroleum resources as expeditiously as possible is correct, and finds support in Articles 8.3 (b) , 8.3 (c) and 10.7 of the PSC.

24.16. Reliance argues that the arbitral tribunal's reference to the DGH affidavit dated 11.08.2014, to conclude that the Ministry omitted to direct joint development, is the correct view, since in their affidavit, DGH says that *ONGC was not ready for joint-development in 2003*, since ONGC did not even have a development plan in place at that time.

24.17. It is submitted that the PSC does not limit the amount of gas that can be extracted from a given Contract Area; and in fact, the Contractor is obliged to efficiently extract all petroleum resources within their Contract Area. It is not disputed that Reliance has *only*

set-up production units within its Contract Area and that gas had migrated due to reservoir connectivity. Any restriction on the quantity of gas that could be extracted should have come by way of a general or special order from the Ministry.

24.18. It is further submitted that the Ministry did not challenge the existence or legality of the PSC in its entirety; and therefore, cannot challenge the extraction of migrated gas which was done in terms of the PSC.

24.19. Learned senior counsel has also taken the court through decisions of the Supreme Court made under the Arbitration Act 1940, interpreting the scope of the term 'error apparent on the face of the award' to impress upon this court the truly limited scope of its power to interfere with an award[24]

VIII. MINISTRY'S SUBMISSIONS IN REJOINDER

25. In rejoinder, the Ministry submits that the argument made by Reliance as upheld by the arbitral tribunal that the Ministry knew or ought to have known of continuity and connectivity of gas reservoirs is misconceived inasmuch as it overlooks Reliance's obligation to '*provide the Government'* all data in terms of Article 26.1 of the PSC. It is urged that Reliance's argument that the Ministry ought to have known of connectivity without Reliance furnishing data, would amount to rewriting the contract.

26. The Ministry argues that even if continuity of gas reserves was evident both from the aerial and stratal geological view of the area demarcating the gas blocks, the *factum of communication or migration of gas* across the channels and reservoirs could only have been known when gas was actually drawn and extracted from the Reliance Block. The

[24] *Champsey Bhara & Co.* (supra footnote No.2)

communication and migration of gas may yet have happened in 'geological time' but that is not relevant. What is relevant is whether it happened in 'production time'.

27. The Ministry disputes Reliance's submission that the arbitral proceedings were an international commercial arbitration. In this behalf, the Ministry has made a two-fold argument. Firstly, it is submitted that in interpreting section 2(1)(f) of the A&C Act, this court must be guided by the words of the statute, which read as under:

> *"2. Definitions.—(1) In this Part, unless the context otherwise requires,—*
> * * * * *
>
> *(f) "international commercial arbitration" means an* ***arbitration*** *relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—*
>
> *(i) an individual who is a national of, or habitually resident in, any country other than India; or*
>
> *(ii) a body corporate which is incorporated in any country other than India; or*
>
> *(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or*
>
> *(iv) the Government of a foreign country;"*
>
> (emphasis supplied)

27.1. It is submitted that it is not the 'agreement' between the parties that would make an arbitration an international commercial arbitration; instead the court must see whether the *arbitration* fits any of the criteria as listed under section 2(1) (f) of the A&C Act. In this behalf attention is drawn to the decision of the Supreme Court in ***Larsen and Toubro Limited Scomi Engineering BHD vs. Mumbai***

Metropolitan Region Development Authority[25] as below, the following portion of which is cited:

> ***"18***. *This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.*
>
> ***"19***. *This being the case, we dismiss the petition filed under Section 11 of the Act, as there is no "international commercial arbitration" as defined under Section 2(1)(f) of the Act for the petitioner to come to this Court. We also do not deem it necessary to go into whether the appropriate stage for invoking arbitration has yet been reached."*
>
> (emphasis supplied)

27.2. In the present case, it is thus submitted, that Reliance was the 'Operator' as defined in Article 1.68 read with Article 7.1 of the PSC; and even though British Petroleum and Niko were parties to the PSC, they however did not seek to join the arbitration as parties. This court's attention is drawn to the observation made by the arbitral tribunal in para 192 of the arbitral award, which reads as under:

> "192.…*The scheme of the PSC is such that the Claimant as operator is the only party in the PSC entitled to deal with the Respondent. Neither BP nor Niko had sought to join the arbitration as a party."*

[25] (2019) 2 SCC 271

Counsel states that since Reliance has not challenged this finding of the arbitral tribunal, this position cannot be challenged at this stage.

27.3. Secondly, it is submitted that Reliance cannot draw support from the decision of the Supreme Court in *RIL vs. UOI* (supra) on the question whether the arbitration was an international commercial arbitration. The argument is that the said decision was made in separate proceedings and cannot inform the determination of this question in the present proceedings. Attention in this behalf is drawn to the decision of the Supreme Court in ***State of West Bengal & Ors. vs. Associated Contractors***[26] wherein the Supreme Court has observed as follows:

> *"11.…It is obvious that Section 11(12)(b) was necessitated in order that it be clear that the Chief Justice of "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1)(e). This sub-section also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record."*
>
> (emphasis supplied)

IX. DISCUSSION & CONCLUSIONS

28. Despite repeatedly prefacing their submissions by saying that this court is not empowered to undertake a 'merits review' of the arbitral award, both Reliance as well as the Ministry have taken the court through a fair amount of the details of the transaction, the evidence recorded in the

[26] (2015) 1 SCC 32

arbitral proceedings, apart from the legal position obtaining and the considerations that weighed with the arbitral tribunal.

29. Much has been argued on both sides. The arbitral award has been traversed. So have the terms of the PSC and PNG Rules. Judicial precedents have been cited at length.

30. In the opinion of this court, as per the settled position of law on the scope and ambit of section 34 of the A&C Act, it is not permissible for a court to undertake a *merits review* of the decision taken by an arbitral tribunal. However, in order to decide the objections filed under section 34 it is certainly within the remit of the court to undertake an *appraisal* of the arbitral award, to see if it falls within any of the limited grounds of challenge available under section 34.

31. To be absolutely sure, the factual controversies between the parties have been detailed herein *only* to give a bird's-eye view of the disputes that were before the arbitral tribunal; *and it is neither the intention nor the remit of the present proceedings to deal with the merits of the factual controversies all over again*.

32. The portion of section 34 of the A&C Act that is relevant in the context of the grounds raised in the present matter, may be extracted for ease of reference:

> ***"34. Application for setting aside arbitral award***.—*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> *(a)* * * * * *
>
> *(b) the Court finds that—*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
>
> *(ii) the arbitral award is in conflict with the public policy of India.*

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) * * * * *

(4) * * * * *

(5) * * * * *

(6) * * * * *"

33. Within the limited scope of section 34 of the A&C Act, and in light of the grounds of challenge raised by the parties, this court must assess the arbitral award *restricted* only to the following aspects :

33.1. Was the arbitration an 'international commercial arbitration' within the meaning of section 2 (1)(f) of the A&C Act, and consequently whether 'patent illegality appearing on the face of the award' is available as a ground for challenge under section 34 of the A&C Act;

33.2. Did the arbitration involve a question of 'public law' making the dispute non-arbitrable;

33.3. Is the award in conflict with the 'public policy of India', say, for being in contravention with the fundamental policy of Indian law; or in conflict with the most basic notions of morality or justice;

33.4. Was the transaction between the contesting parties governed by the 'public trust doctrine' with its over-arching considerations, that would warrant interference with the arbitral award on the ground that it was in conflict with the public policy of India;

33.5. Has the arbitral tribunal taken a 'possible view' and a view which is not 'perverse'. In addressing this last proposition, it would be necessary for the court to look at the factual controversies; the evidence adduced by the contesting parties in support of their respective positions; and also the conclusions arrived at by the arbitral tribunal, *without however* substituting the court's own view for the view taken by the arbitral tribunal on points of fact.

Was the Arbitration an 'International Commercial Arbitration'

34. In the opinion of this court, Reliance's argument that the arbitral proceedings were an 'international commercial arbitration' within the meaning of section 2(1)(f) of the A&C Act, and as a consequence, the ground of 'patent illegality' under section 34(2A) is not available, has merit. As pointed-out, both Reliance as well as Niko were signatories to the PSC; the demand raised by the Ministry *vide* its letter dated 03.11.2016 which led to invocation of arbitration, was issued to each of the three constituents of the 'contractor' under the PSC; the notice invoking arbitration was issued by Reliance on behalf of itself, British Petroleum as well as Niko, which entities held participating interests of 60, 30 and 10 per cent respectively in the Reliance Block; and the impugned arbitral award determines the interests not just of Reliance but also of British Petroleum and Niko.

35. Furthermore, as correctly pointed-out on behalf of Reliance, the decision of the Supreme Court in *Reliance Industries Ltd. and Ors. vs. Union of India* (supra) arising from the very same PSC dated 12.04.2000, closes the issue. In that case, the exact same parties *viz.* Reliance Industries Ltd., Niko (NECO) Ltd. and British Petroleum Exploration (Alpha) Ltd. on the one hand, and the Ministry of Petroleum & Natural Gas and Union of India on the other, were parties to the disputes arising from the same PSC. In that backdrop, the Supreme Court held as under :

> ***"56.*** *In my opinion, the submission is misconceived and proceeds on a misunderstanding of PSC. RIL, Niko and BP are all parties to PSC. They are all contractors under PSC. PSC recognises that the operator would act on behalf of the contractor. All investments are funded by not just Petitioner 1 but also by the other parties, and they are equally entitled to the costs recovered and the profits earned. For the sake of operational efficiency, the operator acts for and on behalf of the other parties. Therefore, I find substance in the submission of Mr Salve that the disputes have been raised in the correspondence addressed by Petitioner 1 not just on its own behalf but on behalf of all the parties. During the course of his submissions, Mr Anil Divan had, in fact, submitted that Niko and BP will be affected by the arbitral award and it would be binding upon them too. Therefore, if Petitioner 1 was to succeed in the arbitration, the award would enure not only to the benefit of Petitioner 1 but to all the parties to PSC. Conversely, if the Government of India were to succeed before the Tribunal, again the award would have to be enforced against all the parties. In other words, each of the contractors would have to perform the obligations cast upon them. In that view of the matter, it is not possible to accept the submission of Mr Divan that the arbitration in the present case is not an international arbitration.*
>
> ***"57.*** *It is equally not possible to accept the contention of Mr Divan that Niko and BP have not raised any arbitrable dispute with the Union of India. A perusal of some of the provisions of PSC would make it clear that all three entities are parties to PSC. All three entities have rights and obligations under PSC [see Article 28.1(a)], including with respect to the cost petroleum, profit petroleum and contract costs (see Article 2.2), all of which are fundamental issues in the underlying dispute. Where RIL acts under PSC, including by commencing arbitration, it*

> *does so not only on behalf of itself, but also "on behalf of all constituents of the contractors" including Niko and BP.* ***I am inclined to accept the submission of Mr Salve that there is a significant and broad-ranging dispute between RIL, Niko and BP on the one hand and the UoI on the other hand, that goes to the heart of the main contractual rights and obligations under PSC****. Furthermore, it is a matter of record that in the correspondence leading to the filing of the earlier petition being AP No. 8 of 2012, no such objection about Niko and BP not being a party to the dispute had been taken. In fact, the petition was disposed of on a joint request made by the parties that two arbitrators having been nominated, no further orders were required. Therefore, there seems to be substance in the submission of Mr Salve that all these objections about Niko and BP not being the parties are an afterthought. Such objections, at this stage, cannot be countenanced as the commencement of arbitration has already been much delayed."*
>
> (emphasis supplied)

36. Contradicting Reliance's submission, the Ministry relies upon the decision of the Supreme Court in *Associated Contractors* (supra) to argue that the decision of the Supreme Court in *RIL vs. Union of India* (supra) holding the arbitration in that case to be an international commercial arbitration, was merely an administrative order and is therefore not a binding precedent. This contention however is misplaced, since in *RIL vs. Union of India* (supra) in relation to disputes between the exact same parties, arising from the self-same PSC, where the arbitral proceedings were carried-on by Reliance in its capacity as 'operator' on behalf of the other two constituents of the 'contractor', the Supreme Court has taken the view that the arbitral proceedings amounted to an international commercial arbitration. In the opinion of this court, the disputes that were subject-matter of arbitration in the present case, also relate back to the main contractual rights of *all the parties* under the PSC. It matters not whether this view was taken in an 'administrative order' or in a 'judicial decision'. This court is in respectful agreement with the view so taken.

37. As a result, this court holds that the arbitral proceedings in the present case amounted to an 'international commercial arbitration'; and therefore the scope of interference by this court under section 34 A&C Act is even narrower; and the ground of challenge canvassed by the Ministry that the arbitral award proceeds on ignoring evidence on record, or draws inferences with no evidence, is not tenable in challenge to the arbitral award, since those would fall within the ambit of 'patent illegality'.

Did the Arbitration Involve a Question of 'Public Law' Making the Dispute Non-Arbitrable

38. The Ministry contends that the dispute was in relation (only) to migrated gas, which was not subject matter of disposition under the PSC. It says, that being a 'natural resource', migrated gas vests in the Union and is covered by the 'public trust doctrine'. The Ministry further says, that any matter governed by the public trust doctrine is a matter of public law, and the dispute arising from such a matter cannot be decided by a private arbitral tribunal. The Ministry therefore contends, that the arbitral tribunal could not have proceeded to decide a matter of public law, by reason of which the arbitral award is in conflict with the public policy of India.

39. However, it is observed that notice dated 03.11.2016 issued by the Ministry demanding disgorgement of about USD 1.5 billion alongwith interest of USD 174 million towards revised additional cumulative profit petroleum, which notice marks the commencement of the dispute, itself *referred to Reliance having violated the terms of the PSC*. By that notice, the Ministry claimed that by producing migrated gas and retaining the ensuing profits the contractor has made unjust enrichment, since in the absence of an order on joint development under Article 12, the PSC did not permit a contractor to produce and sell migrated gas. The notice was replete with reference to articles of the PSC; and, to be sure, the very

computation of the amount claimed for disgorgement was based upon the quantum of migrated gas stated to have been drawn by Reliance under the PSC. Clearly, the claim in the notice for disgorgement was not a claim made under public law but was founded on the alleged breach by Reliance of the terms of the PSC. Since the PSC, as also the PNG Rules, contemplated arbitration as a remedy for disputes arising therefrom, the claim for disgorgement was certainly amenable to arbitration. Just because the commodity that was subject matter of the disputes, *viz.* natural gas, is a natural resource which vests in the Union, would not make it any the less so.

40. To support its contention that migrated gas was governed by the public trust doctrine, the Ministry has relied heavily upon the decision of the Supreme Court in *RNRL vs. RIL* (supra). For one, it must be noted that the said case arose in the context of RIL giving priority pricing of gas in favour of RNRL without reference to government policy on the issue. It was in this context that the Supreme Court held that *a contract could not abrogate the permanent sovereignty of the Union over a natural resource*. In the opinion of this court the reference to abrogation of sovereignty over a natural resource, refers to disposition of the 'title' or 'ownership' of natural gas by the Union to a third party. In the present case, since the limited role of Reliance was to *explore and extract* natural gas as a licensee, admittedly the *title* to the natural gas never passed to Reliance. The natural resource *viz.* natural gas was neither 'bought' nor 'sold' as between Reliance and the Ministry. For this additional reason, the public trust doctrine was not contravened.

<u>Is the Award in Conflict with the 'Public Policy of India'</u>

41. At this point, it would be appropriate to extract the extant position of law as regards the interpretation of 'public policy' under section 34 of the

A&C Act. The relevant paragraphs of the judgement of the Supreme Court in *Ssangyong Engineering & Construction Co Ltd* (supra) that address this issue are as follows:

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [(2015) 3 SCC 49] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263] expansion has been done away with. In short,* ***Western Geco] , as explained in paras 28 and 29 of Associate Builders, would no longer obtain****, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.*
>
> *"35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the* ***"most basic notions of morality or justice"****. This again would be in line with paras 36 to 39 of Associate Builders ,* ***as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.***
>
> *"36. Thus, it is clear that* ***public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders*** *, or secondly,* ***that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders*** *. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco , as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.*
>
> * * * * *

> *"65. This would imply that the* ***defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly.*** *In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India.* ***Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required."***
>
> (emphasis supplied)

42. The Supreme Court's decision in ***Associate Builders*** (supra) also requires to be noticed, in which the Supreme Court has held as under:

> "*18. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644], the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*
>
> > *"7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—*
> >
> > * * *
> >
> > *(b) if the Court dealing with the case is satisfied that—*
> >
> > * * *
>
> *(ii) the enforcement of the award will be contrary to the public policy."*
> *In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to*
>
> > *(i) The fundamental policy of Indian law,*
> > *(ii) The interest of India,*
> > *(iii) Justice or morality,*
>
> *would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally,* ***disregarding orders passed by the superior courts in India could***

also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law *(see SCC pp. 689 & 693, paras 85 & 95).*

* * * * *

"27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar judgment that ***violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.***

* * * * *

"*36.* *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".*

"*37.* *The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":*
"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.
(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860.

* * * * *

"*39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the*

> *prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."*
>
> (emphasis supplied)

43. It is therefore clear, that when an award is challenged under section 34 (2)(b)(ii) of the A&C Act the court may interfere only if the award is induced or affected by fraud or corruption or is in violation of sections 75 or 81 of the A&C Act; or is in "contravention of the fundamental policy of Indian law"; or if it is "in conflict with the most basic notions of morality and justice".

44. Coming next to the ground of the "contravention of the fundamental policy of Indian law". This ground as per *Associate Builders* (supra) entails, say, a case where a binding precedent of an Indian court is disregarded, or a statute enacted for "national economic interest" is contravened. As discussed, in the opinion of this court, the arbitral tribunal has neither ignored the decisions of any superior court of India, nor has it ignored the legal architecture governing the PSC.

45. As to the second ground of challenge under section 34 (2)(b)(ii)of the A&C Act *viz.* the award being in conflict with the "most basic notions of morality or justice", the Supreme Court has interpreted this to mean that the award must "shock the conscience of the court"[27]. Furthermore, as expounded in *Ssangyong Engineering & Construction Co Ltd* (supra) the section is to be interpreted narrowly, and entails a situation where "*…corruption, bribery or fraud and similar serious cases"*[28] obtain. In the present case, while the Ministry has alleged that Reliance has committed fraud in suppressing the D&M Report-2003, the arbitral tribunal has correctly held that though Reliance had an obligation to disclose the D&M Report-2003, and had failed to comply with that

[27] *Ssangyong Engineering & Construction Co Ltd* (supra), para 35.
[28] cf. para 71.

obligation, the contravention was not material as the Ministry had had multiple opportunities to direct joint-development even in the absence of the D&M Report-2003[29]. Furthermore, it is seen that Reliance has complied with all other aspects of the PSC, most importantly, that it has divided *all* profits derived from the production of *all* natural gas (including migrated gas) in the manner provided in the PSC.

Was the Transaction Between the Contesting Parties Governed by the 'Public Trust Doctrine'

46. The Ministry contends that the arbitral tribunal has ignored the dictum of the Supreme Court in *RNRL vs. RIL* (supra), when it holds that the public trust doctrine does not obtain where extraction of migrated gas is disputed. In this respect, in the opinion of this court, the Ministry's reading of the arbitral award is flawed, inasmuch as the arbitral tribunal has only held that the public trust doctrine entails extraction of gas in the most efficient and commercially sensible manner; and that therefore, the Ministry's interpretation and application of the public trust doctrine to the dispute does not support its contention that the PSC prohibits, or does not permit, extraction of migrated gas by Reliance from within the Contract Area.

47. In analysing that the PSC in fact permits extraction of migrated gas, the arbitral tribunal has closely examined the terms of the PSC as well as the PNG Rules, including Articles 10.5, 11.2 and 12 of the PSC[30] ; and has opined that in terms of Article 12.1 of the PSC, the Ministry *could* have ordered joint development if it took the view that *" ...the Reservoir can be more efficiently developed together on a commercial basis...for securing the more effective recovery of Petroleum from such*

[29] cf. para 180 of the majority arbitral award.
[30] cf. paras 83 to 86 of the majority arbitral award.

Reservoir".[31] The arbitral tribunal then relies upon the counter affidavit filed by Mr. Siddhartha Sengupta on behalf of the DGH in WP (Civil) No. 3054/2014, to conclude that in fact, the Ministry would in any case not have ordered joint-development, as that would impede rather than expedite the exploitation of natural gas.[32]

48. The arbitral tribunal further makes reference to Rules 28 and 30 of the PNG Rules, to arrive at the conclusion that Reliance's extraction of migrated gas was in fact in consonance with the public trust doctrine.

49. In the opinion of this court, the arbitral tribunal has in no sense of the word 'disregarded' the judgement of *RNRL vs. RIL* (supra), but has instead interpreted the law in its application to the fact situation in a manner it thought fit, which is well within the jurisdiction of the arbitral tribunal to do.

50. Therefore, the arbitral tribunal does not negate the existence of the public trust doctrine as enshrined in Article 297 of the Constitution and interpreted by courts of India; rather it states that Reliance has acted in furtherance of such doctrine by extracting petroleum in the most "*…efficient and commercially sensible manner*". Furthermore, the arbitral tribunal has interpreted the articles of the PSC while keeping in mind the statute that governs it, to hold that the PSC "*does not prohibit but permits*" the extraction of migrated gas.[33]

51. In view of the above, this court does not find any infirmity in what the arbitral tribunal has concluded.

Has the Arbitral Tribunal Taken a 'Possible View'.

52. Although technically the 'possible view test' is to be applied to an arbitral award only within the rubric of 'patent illegality' as a ground of

[31] cf. para 85 of the majority arbitral award
[32] cf. para 87 of the majority arbitral award
[33] cf. para 93 of the majority arbitral award

challenge, considering that the dispute in the present case is not a run-of-the-mill matter since it relates to a natural resource, this court has also *assessed* the view taken by the arbitral tribunal to further satisfy its conscience.

53. The decision of the arbitral tribunal proceeds on the following essential basis:

53.1. Under the PSC, Reliance was granted *license* to *extract* natural gas, in the capacity only of a 'contractor', by conducting 'petroleum operations' within the 'contract area'. There is no dispute that Reliance conducted petroleum operations *within* the contract area.

53.2. The Ministry's grievance is that Reliance extracted extra gas that had migrated into the Reliance Block from the adjoining ONGC Blocks. The Ministry says that Reliance was not permitted to extract the migrated gas; and that by doing so, Reliance has made unjust enrichment. The Ministry seeks disgorgement of the value of the excess gas extracted along with ancillary monetary benefits.

53.3. However, nowhere does the PSC say that Reliance was *only permitted to extract* the 'original gas in place' as per OGIP Report-2002. The PSC also does not say that Reliance was *not permitted* to extract migrated gas.

53.4. The Ministry says that Reliance did not provide to it D&M Report-2003. The arbitral tribunal finds that this was indeed so and holds Reliance guilty of breach of a condition of the PSC to that extent. The Ministry says that if Reliance had provided to it the D&M Report-2003, the Ministry *may have ordered* joint-development or unit-development of the Reliance Block and the adjoining ONGC Blocks, *for better extraction of gas.*

53.5. The Ministry's own witnesses in the arbitral proceedings, Mr. Anurag Gupta and Dr. Mohan Kelkar have deposed contrary to the

above contention, to say that the fact that there was *continuity* in the gas reserves between the two blocks was obvious to a person with expertise in the field, looking at the aerial and stratal view of the maps of the area. Evidence on record by way of geological survey maps, OGIP Report-2002, and the IDP filed by Reliance, all show the continuity of gas reservoirs. Whether or not there was *communication* between the contiguous gas blocks *i.e.*, whether or not gas migrated from one block to the other would depend on the geological structures between the blocks within the depths of the earth; and could only have been known for sure once extraction of gas began from one of the blocks.

53.6. In the writ proceedings in the Delhi High Court, the DGH said on affidavit, that unit-development *would not have been applicable* in the present case since the two adjoining blocks were not at a similar stage of development or production. Actual migration of gas *could have been* tested by the Ministry by appropriate pressure testing techniques. This could have been done even before Reliance began extraction of gas from its block sometime in 2009, but the Ministry chose not to do so.

53.7. The arbitral tribunal also notes that despite numerous opportunities, DGH had omitted to order joint-development. The arbitral tribunal has set-out no less than 10 such opportunities that arose in the course of dealings.[34]

53.8. Ergo, it transpires that since the adjoining ONGC Blocks were way behind the stage of development of the Reliance Block, it would have been *technically infeasible* to extract gas either under a joint-development plan or a unit-development plan.

[34] cf. para 180 of the majority arbitral award.

53.9. Reliance extracted whatever gas became available in the course of petroleum operations *within* their contract area. Reliance deducted the 'cost petroleum'; calculated the 'profit petroleum' and shared the requisite portion of the profit petroleum with the Ministry. The Ministry has not alleged that Reliance did not pay to them their share of profit petroleum *for the entire quantity of gas extracted* by Reliance, including migrated gas.

53.10. In the above backdrop, the arbitral tribunal holds that non-disclosure of *one solitary* D&M Report-2003, though a technical breach of terms of the PSC, was *not a material breach* of the contract. The arbitral tribunal also holds that the Ministry would not have ordered unit-development. The arbitral tribunal holds that the Ministry was not deprived of the benefits of Reliance producing gas from the contract area.

54. In the opinion of this court, *firstly*, the aforesaid inferences are factual conclusions arrived at by the arbitral tribunal, which cannot be second-guessed by this court in exercise of its powers under section 34 of the A&C Act. *Secondly*, in the opinion of this court, the factual conclusions are perfectly rational, coherent and logical, especially considering what was comprised in the PSC was a *purely commercial transaction* entered into by two contracting parties.

55. This court is accordingly not persuaded to hold that the conclusions drawn by the arbitral tribunal are such that no reasonable person would reach. Suffice it to say that the view taken by the arbitral tribunal is most certainly a 'possible view', which calls for no interference.

56. As a *sequitur* to the above discussion, this court finds no ground to interfere with the majority arbitral award; which is accordingly upheld.

57. The petition is dismissed and disposed-of accordingly.

58. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MAY 09, 2023/ds/*uj*/Ne