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

Reserved on: 18.12.2019

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Pronounced on: 12.05.2020

+ O.M.P. (COMM) 509/2016

GEOENPRO PETROLEUM LTD Petitioner

Through Mr. Rajshekhar Rao, Mr. Aashish
Gupta, Mr. Dushyant Manocha,
Mr. Sharad Kharra, Mr. Chaitanya
Puri & Ms. Sadhika Gulati,
Advocates

versus

GEOPHYSICAL INSTITUTE OF ISRAEL Respondent

Through Mr. Abhimanyu Mahajan,
Mr. Arjun Mahajan, Ms. Anubha
Goel, Mr. Suneha Jain & Mr. Pulkit
Thareja, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as an 'Act') seeking setting aside of majority Award dated 30.07.2012 passed by the Arbitral Tribunal whereby the Tribunal has partially allowed the Claim of the Respondent herein and rejected the Counter Claim of the Petitioner.

2. The brief background facts are that the Government of India desired that the petroleum resources at the Kharsang Oil Fields (hereinafter referred to as 'KS') be exploited with utmost expedition and

in accordance with international petroleum industry practices. Therefore, Government of India entered into a Production Sharing Contract (hereinafter referred to as 'PSC') on 16.06.1995 with Oil India Ltd., Geopetrol International Inc., Enpro India Ltd. and the Petitioner. Petitioner was appointed as the Operator under the Contract.

3. Petitioner herein as an Operator for and on behalf of KS required services for acquisition, processing and interpretation of Seismic 3D data in KS. Thus an Agreement dated 13.12.2007 was entered into between the Respondent herein and the Petitioner. Respondent Geophysical Institute of Israel is an Israeli Government Company. On 03.01.2008, a Sub-Contract Agreement was entered into between the Respondent and Asian Oilfields Services Ltd. with Respondent as the Contractor and Asian Oilfields as a sub-Contractor. This was with the approval of the Petitioner. Contract was to be performed by the Respondent in three stages (a) Data collection/acquisition (b) processing and (c) interpretation.

Case of the Petitioner (Respondent before the Arbitral Tribunal)

4. Under the terms of the Contract, in order to collect acceptable Seismic Data, Respondent had to drill shot holes of 20 m for loading the charge and exploding the same. It was mentioned in the Contract itself, that in case where drilling up to 20 m was not possible, two holes of 10 m could be drilled or four holes of 5 m, called pattern holes. It was mentioned that Respondent will not drill any holes less than 5 m and the area covered under the survey shall be 52.5 km² with 2760 shots of work.

5. Respondent had admittedly in the past, undertaken similar operations in the State of Assam and Tripura. Further, Respondent as per

the terms of the Contract, before commencing its operations had undertaken an experimental drilling at the site from 29.08.2007 to 02.09.2007 and had, therefore, acquainted itself with the geological and other working conditions of the site. Parties had expressly agreed that time shall be the essence of the Contract as the work had to be undertaken by the Respondent before the onset of monsoon on account of fair weather in Arunachal Pradesh coming to an end by mid-June for purposes of drilling. Therefore, the Contract specifically provided that mobilisation of equipment, which was the sole responsibility of the Respondent, had to be completed within 60 days from signing of the Contract. Contract was signed on 13.12.2007 and, therefore, Respondent ought to have mobilised its equipment latest by 11.02.2008. However, mobilisation was completed only around late April 2008 and it was only on 15.04.2008 that shooting commenced. Thus, there was a delay in mobilisation of equipment and personnel by the Respondent. Clearly, this delay was extremely detrimental to the overall project, since it significantly reduced fair weather window within which Respondent could have acquired the Data.

6. As a result of the delay in mobilisation of resources and equipment by the Respondent, it was unable to complete the entire work contracted and abandoned the site without completing the entire contractual work. Consequently, out of the agreed 52.5 km² with 2760 shots, which was unilaterally even otherwise downsized by the Respondent to working area of 43.2 km² with 2299 shots, Respondent was able to shoot only 1688 shots, out of which 1440 shots, corresponding to 27 km², were accepted in the field i.e. half the contracted area. Further, the Respondent drilled shot holes of depth much less than the prescribed limit under the

Contract. Since the Respondent could not achieve the depths mentioned in the Contract including the relaxed norms, Petitioner's representative gave further relaxation to the Respondent to drill seven holes of 3 m deep, provided the Data was acceptable. However, the Respondent even failed to achieve the relaxed norms, resulting in the objectives of the 3D program not being achieved.

7. Since the Respondent could not perform its obligations under the Contract, it started blaming the Petitioner for its failure to inform the Respondent about the law and order situation at the Oilfield. It was alleged by the Respondent that locals of the area interrupted the mobilisation of equipment and personnel and the execution of the work on site. Respondent also started raising frivolous claims for standby charges for idling of equipment for reasons other than those attributable to the Petitioner. Significantly, these allegations of law and order situation were raised by the Respondent after it had written to the Petitioner that things were under control and it would commence the work under the Contract.

8. As the acquisition of Data by the Respondent was of poor quality, the processing and interpretation of the same resulted in a Report which was of no use to the Petitioner. In the Report itself the Respondent had admitted that acquisition of the Data was of poor quality. The Directorate General of Hydrocarbons, Ministry of Petroleum and Natural Gas, Government of India, which is the sectoral regulator for oil and gas sector, contested the cost recovery of the project on the ground that the work executed by the Respondent could not be used. Further, two other independent agencies, namely, Oil India Ltd., a Government of India

Undertaking and M/s Mindset Seismic Pvt. Ltd., an expert in the field of seismic processing and interpretation also rejected the work done by the Respondent. The work executed was poor in quality and since the Petitioner could not put the same to any use, it entered into a separate Contract with a Third party for undertaking the same scope of work.

9. Respondent failed to carry out its obligations under the Contract in a professional and efficient manner, in accordance with standards and specifications of the Contract and as per generally accepted oilfield practice and thus the Petitioner withheld the payments under certain Invoices raised by the Respondent. Petitioner had earlier made payments against certain Invoices raised during seismic acquisition and only some Invoices remained unpaid. Also, the Petitioner was not under any contractual obligation to pay the standby charges to the Respondent and thus, the Petitioner refused to clear the Invoices raised by the Respondent towards the said charges. In addition to the above, as provided in the Contract the Petitioner withheld amount of USD 385,000 from the Invoices raised for mobilisation fee.

10. As a result of the above, Respondent invoked the Arbitration Clause under the Contract. Parties could not mutually agree to appoint an Arbitrator and finally, the Supreme Court vide order dated 02.12.2009 appointed the Arbitral Tribunal in a petition filed under Section 11 of the Act.

11. Respondent filed its Statement of Claim and sought the following reliefs: –

“CLAIM NO.1

That the Claimant claims USD 1,631,288/- (USD) (or 1 Million 631 Hundred Thousand 2 Hundred and 88 USD only) per month from the date since the aforesaid invoices became due and the interest @24% on the above said amount from the date of accrual to the date of payment.

CLAIM NO.2

Claimant Claims and amount of INR 480,000.00 towards Invoice No. AOSL/GN/18 dated 30.06.2008 for INR 480,000.00 for reimbursement of G.B. Commission.

CLAIM NO.3

The Claimant claims the refund of an amount of USD 385,000.00 paid by the Claimant to the Respondent as performance bond along with an interest of 24% from the date of completion of works till the date of refund.

CLAIM. NO.4

It is submitted that by the time the Claimant had paid the various parties demanding protection money, to save its personnel and equipment, it had already suffered substantial damage to its equipment caused on account on not being provided adequate security by cutting, fire and sabotage which are estimated at amount of USD 500,000.00.

CLAIM. NO.5

Expense of USD 5,000.00 incurred towards 2 trips made to India by Mr. shabtayYakkov, Deputy General Manager, Finance & Administration of the Claimant to persuade the respondent to make payment of outstanding amounts due to the Claimant along with interest @ 18 per annum from the date of incurring of the same to the date of payment.

CLAIM NO. 6

Claim of USD 255,787 towards theft of equipment worth the aforesaid amount.

CLAIM NO. 7

The Claimant had received various payments from the Respondent Company on which the Respondent Company deducted tax at source. However, the Respondent Company has failed to issue TDS certificate towards the said payments, which is its legal responsibility. Therefore, the Claimant claims the amount of USD 60,130.49 that had been deducted at source from the payments of the Respondent to the Claimant on account of the failure of the Respondent to furnish the TDS certificate for the aforesaid amount along with an interest of 24%, per month, from the date of accrual to the date of payment.

CLAIM NO.8

The Claimant claims USD 800,000.00 towards the cost of new equipment purchased on account of damage, sabotage and theft.

CLAIM NO. 9

The Claimant claims the cost of the litigation and the proceedings to be attended before the arbitrator.”

12. Petitioner filed its Statement of Defence refuting the claims of the Respondent and also filed a Counter Claim for an amount of Rs. 11,07,51,470/- along with interest at the rate 18% as the expenses made by the Petitioner on the project. Counter Claim is as under: –

“Claim for the difference in the amount to be incurred by the Counter Claimant on account of the work being contracted out to another contractor.”

Case of the Respondent (Claimant) before the Arbitral Tribunal:

13. Stand of the Claimant was that it struggled hard to mobilize the equipment and personnel in the oilfields as the local mafia was obstructing the movement of the trucks carrying the equipment and

personnel. Petitioner assured that it would render all possible help to remove the hindrances, but failed to do so. Despite difficulties, Respondent started execution of the work. It executed the work as per specifications and drilled shot holes under supervision of the Petitioner and the work was approved from time to time by representatives of the Petitioner. Scope of work was in three phases of Data acquisition, processing, and interpreting and Respondent while working under the supervision of a Consultant, a Geologist and a General Manager (Operations) deputed by the Petitioner prepared Daily Progress Reports (DPR) which were duly signed by representative of the Petitioner who while signing, rejected work which was not as per specifications.

14. Respondent claimed that there was lot of lawlessness prevailing in the area and it had to pay money to the locals so that they permitted the Respondent to carry out work at the site. This money was paid as GB Commission. Respondent also alleged that the local police did not provide any protection to the employees or for the equipment to the Respondent and even the Petitioner did not intervene. The locals would often sabotage the work and damage the tools and equipment to extort money. The terrain and topography of the area was such that it was difficult to shoot points drilled by the Respondent though cables had been laid and geo-phones connected. Due to these logistic difficulties and damage to the equipment, Respondent could not complete the contracted volume of work within the available time window and the 3D coverage had to be restricted to 35.02 km² against the planned 52.5 km². Later, the area was reduced to 45 km² from 52.5 km² on instructions of the Petitioner.

15. Respondent alleged that despite the execution of the work, the standby charges as well as charges for Data processing and interpretation, though being fixed under the Contract were not paid, under the Invoices raised, on the pretext that the Report indicated that the Data was of poor quality. Petitioner had never raised any objection during the execution of the work and had never required the Respondent to change or add anything to the Report during several meetings held between the parties. Petitioner was also bound to refund the money under the Performance Bond, which it failed to do even after execution of the work.

16. The Arbitral Tribunal, by a majority Award in the ratio of 2:1 allowed some of the Claims of the Respondent as under:

“(1) Respondent GeoEnpro Petroleum Ltd. shall pay to the Claimant, Geophysical Institute of Israel US\$1,387,379.00 and Rs.(INR) 4,80,000/-.

(2) Respondent, GeoEnpro Petroleum Ltd. shall pay to the Claimant, Geophysical Institute of Israel Rs.(INR)13,00,000/- (Rupees thirteen lakh) as cost of arbitration proceedings.

(3) Respondent, GeoEnpro Petroleum Ltd. shall pay to the Claimant, Geophysical Institute of Israel interest @ 6% per annum on the amount of US\$ 1,387,379.00 and Rs.(INR) 4,80,000/- from 2.3.2009 till the date of Award.

(4) Further interest at the rate of 6% on the amount of US\$ 1,387,379.00 and Rs. (INR) 4,80,000/- from the date of Award till the payment. However, no such future interest shall be payable in case Respondent, GeoEnpro Petroleum Ltd. pay to the Claimant, Geophysical Institute of Israel this amount of the Award within two months from today i.e. the date of Award.”

17. Assailing the Award, learned counsel for the Petitioner contends that the Tribunal has completely failed to appreciate that work performed by the Respondent was of extremely poor quality and of no use to the Petitioner. As per the terms of the Contract, Respondent was under an obligation to perform its work *“diligently, efficiently, in a safe and workman like manner, according to the standards and specifications contained in this Contract and generally accepted Oil field practice.”* Reliance is based on Clauses 4.4.1 and 4.4.4 of the Contract. Contrary to the above, Respondent delayed mobilizing its equipment and personnel to the site. Respondent failed to drill the holes of required specifications and could not cover the entire area of survey as agreed under the Contract. To support the argument, counsel relies on KS 3D Survey Report where Respondent itself admitted that the Data acquisition was of poor quality and thus the objectives could not be met. Reliance is placed on letter dated 22.01.2010 written by Directorate General, Hydrocarbons, which is the sectoral regulator for the oil and gas sector, wherein it was mentioned that the work executed was not usable. The Data sent in the Report was examined by two independent agencies, namely, Oil India Ltd. and Mindset Seismic Pvt. Ltd. Both the agencies had rejected the Data and detailed reports by them were placed before the Tribunal.

18. Learned counsel explained the methodology used for seismic survey. To conduct the survey, holes of required depths are drilled and explosives are placed in them and the holes are exploded. The energy produced by this explosion travels inside the earth and gets reflected by different soil layers. The energy so reflected is captured by geophones/detectors planted on the surface. The vibrations received by

geophones are converted to electrical pulses and recorded by instrument on magnetic tapes/cartridges. These pulses are the seismic Data which is ultimately processed and interpreted. Thus, it is imperative that the shot holes are of required depths, as deeper the hole, more energy would travel inside the earth for better results. It was submitted that the objective of seismic survey is to map the different Sub-Surface Formations deep inside the Earth and identify the composition of the Formations, to find suitable location for drilling a Well, where probability of occurrence of Hydrocarbons, is high. However, if Formations are not properly mapped, the objective cannot be met. The whole purpose of survey was to provide the Data to DGH and Oil India Ltd. in accordance with the PSC, which the Petitioner had entered into with the Government of India. Therefore, it is argued that there is complete perversity in the Award in as much as the Tribunal has held that rejection of the Report has no relevance to the issues involved in the case. It is also perverse for the Tribunal to have rejected the argument of the Petitioner of poor quality Data on the ground that nature of the Contract is such that nobody could predict the ultimate result.

19. Learned counsel next contends that the majority Award proceeds on an incorrect presumption that Petitioner did not object during the execution of the Contract, at any stage and all objections were raised at the final stage, once the results were not in favour of the Petitioner. On this basis, the Tribunal concluded that since the Respondent performed its obligations without any objections, it was entitled to the claims raised. The above conclusion is incorrect according to the learned counsel. It is argued that a comparison of Chief Driller's Report prepared by the

Respondent and the Observer's Log, which was shared by the Respondent with the Petitioner during the execution of the work, would reflect number of inconsistencies and discrepancies in the two Reports. In fact, the Counsel even alleged that Respondent played a fraud by not sharing the Chief Driller's Report during the execution of the work and the same was shared only during the Arbitration Proceedings. The Report brings out the deficiencies in the shot holes and had the same been made available to the Petitioner during execution of the work, Petitioner would not have approved many of the shots which have been otherwise approved on the basis of false representations by the Respondent in the Observer's Log and DPRs. The said issue was highlighted before the Tribunal but has been disregarded on the ground that it could not be believed that the Petitioner did not have the Chief Driller's Report with it at the appropriate time. Even assuming that Petitioner was privy to the Report at an earlier point of time, yet it was not open to the Tribunal to disregard the discrepancies and deficiencies pointed out in the said Report.

20. Learned counsel argues that minority Award expressly records that issue regarding shot hole depth had been raised time and again by the Petitioner, including its effect in deterioration of Data quality. On the said basis, minority Award concludes that Respondent failed to carry out Data acquisition in a professional manner. It is pointed out that correspondence on record and the DPRs clearly reflect that Petitioner regularly objected to the work executed by the Respondent.

21. Learned counsel next contends that as per the terms of the Contract it was agreed that to collect seismic Data, shot hole depth will be 20 m

but where drilling up to 20 m was not possible, 2 holes of 10 m or 4 holes of 5 m each could be drilled called pattern holes. Further, Respondent before entering into the Contract had undertaken experimental drilling for four days and assured that it could achieve depth of 20 m. However, after starting the work belatedly, Respondent lost the fair weather window and also drilled shot holes of unacceptable depths. Petitioner categorically informed the Respondent, vide its email dated 11.04.2008 that if depth of holes was less than 3 metres, it would not be loaded and the shot point would be deemed as skipped. Also, the Petitioner informed the Respondent to drill 4 m deep pattern holes to get better Data. When the Respondent could not achieve the Contractual depths, Petitioner's representative gave further relaxation to drill seven holes of 3 m depth, provided Data was acceptable. Respondent, however, failed to achieve even the further relaxed norms. The Tribunal has erred in holding that it was not material for the Tribunal to go into technicalities of drilling shot holes of 3 m or less. The whole issue before the Tribunal was about the quality of Data acquired and processed by the Respondent and which in turn depended on the depth of the shot holes. By not getting into the technicality of the depth of the holes, the Tribunal has completely decided contrary to the contractual terms. Too much emphasis has been laid on the signing of the DPRs by the representative of the Petitioner without appreciating that the DPRs did not specify the depth of the holes in most cases.

22. The next argument of learned counsel for Petitioner is that the Tribunal has erred in appreciating the issue of area to be covered under the survey by the Respondent. The Contract clearly envisaged an area of

52.5 km². Petitioner had initially suggested that the area be 45 – 48 km² vide its email dated 04.01.2008. However, Respondent vide its email dated 08.01.2008, rejected the suggestion and insisted on covering the contractual area stating that reducing the surface area will save money, but will risk the final result. Therefore, it was an admitted stance of the Respondent that area under the Contract for survey could not be compromised. Subsequently, however, the area was unilaterally downsized to 43.2 km² by the Respondent and Petitioner was informed accordingly. The same was objected to by the Petitioner which is evident from the email dated 09.05.2008. Respondent vide its email dated 14.05.2008 admitted that area under survey was reduced on account of monsoon. Respondent, admittedly, failed to achieve even the downsized area and was able to shoot only 1688 shots, after which 1440, corresponding to 27 km², were acceptable i.e. half of the contracted area. This is evident from the last day's DPR entry, made on 14.06.2008.

23. Counsel for the Petitioner assails the majority Award also on the ground that the Tribunal has accepted the stand of the Respondent that delay in mobilisation was on account of prevailing law and order situation in KS area on account of interference by locals and threats from mafia and wrongly concluded that Petitioner being the principal employer failed to help. It is contended that as per Clause 6.6.1 of the Contract Respondent was required to complete mobilisation within 60 days of signing of the Contract on 13.12.2007 and ought to have mobilised its equipment by 11.02.2008. This was critical as the acquisition of the Data was to be completed before the onset of monsoon. However, mobilisation was completed around mid April 2008 and only on 15.04.2008, shooting

commenced which is evident from the DPR. It is argued that under the Contract it was the sole responsibility of the Respondent to ensure safety of its personnel and equipment as clearly specified in Clause 5 and Clause 10.3 of the Contract. Respondent, in any case, had got the Contract on the basis of its representation that it had substantial work experience in North – East India and was thus familiar with the ground realities.

24. The next contention is that grant of standby charges was erroneous as the standby was not caused due to any factor attributable to the Petitioner. Contract provided for standby charges @ USD 70,000 per day and does not define the term standby. Contract is also silent on when the standby shall be payable. Perusal of the reasons for claiming standby shows that the claim was primarily on account of damage and sabotage by the locals and theft of the equipment. This admittedly was not attributable to the Petitioner. It was not the Petitioner's responsibility under the Contract to ensure safety of the equipment and thus no standby charges could be claimed from the Petitioner. The Tribunal, however, disregarding this fact has awarded the Claim in favour of the Respondent. This has led to rewriting of the Contract between the parties and makes the Petitioner responsible for security of the personnel and equipment, despite the Contract being to the contrary. This conclusion leads to an absurdity whereby the Respondent could have mobilised its machinery, kept it on a standby mode and claimed the charges without doing any work.

25. The argument is that the standby charges have been allowed without examining individual claims and reasoning under one claim, for standby has been applied to the others. Petitioner had initially informed

the Respondent to suspend work between 24.05.2008 – 26.05.2008 on account of elections. However, on 24.05.2008, Petitioner had immediately instructed to suspend work only for one day and was willing to pay standby charges for that day. However, Tribunal has allowed standby charges for all the three days.

26. It is argued that the Tribunal has erred in allowing the claim for GB commission since the same was not only illegal but beyond the terms of the Contract. Payments under the Contract were to be made only as per appendix III and no additional payments were to be made as clearly stipulated in Clause 6.1. It was alleged by the Respondent that such commissions were paid by it at the instance of the Petitioner, who had undertaken to refund the same to the Respondent. Tribunal allowed the Claim on the ground that Petitioner in the past had paid the Respondent for crop compensation. It is argued that such a finding is against public policy of India and contrary to terms of the Contract. No such commission is provided under the Contract. Crop compensation cannot be equated with GB commission as the former was provided for in the Contract. In any case, there cannot be a direction of specific performance of an illegal payment.

27. Arguing on the rejection of its Counter Claim, counsel for the Petitioner submits that the Tribunal has failed to give any reasons while rejecting the Counter Claim. There is only a broad analysis of the Claim but no reasons for its rejection. It is submitted that Section 31(3) of the Act mandates that the Award must contain reasons. This part of the Award also deserves to be set aside and the Petitioner is entitled to its

Counter Claim as the payment sought was on account of the expenses actually incurred by the Petitioner on the project.

28. As to the analysis of the evidence given by the witnesses of the Petitioner, by the Tribunal, learned counsel argues that the Tribunal has rejected the evidence of Mr. Murty on the baseless ground that he made statements on facts he was unaware of, without appreciating that he was involved in all the three stages of execution of the work and was deployed at site from 13.04.2008 to 15.05.2008. No reason has been given for this conclusion. Mr. Puri's evidence has been perversely rejected by the Tribunal on the ground that he has not deposed much on the merit of the controversy between the parties. This cannot be a reason to disregard the evidence of a necessary witness. Again, no reason has been given for arriving at an adverse presumption on account of failure of Mr. Suresh Kumar Batra, Senior Vice President to appear before the Tribunal as a witness. He did not appear during the proceedings since he joined the Petitioner company only in May 2008 and had little knowledge, to depose on the controversy. In any case, if the Tribunal considered it important to examine him as a witness, it could have exercised the power available to it under Section 27 of the Act.

29. Per contra counsel for the Respondent argues that the present petition is not maintainable as none of the grounds mentioned under Section 34 of the Act to challenge an Award have been made out in the petition. Petitioner has been unable to make out a case as to how the majority Award is against the public policy of India. The Petitioner is seeking indulgence of this Court to re-appreciate the evidence and also go behind the plausible view taken by the Tribunal, which is beyond the

scope of judicial review by this Court, as has been held by the Supreme Court in several judgments including in the case of *Associate Builders v. DDA, (2015) 3 SCC 49*.

30. Learned counsel for Respondent contends that the Respondent duly performed its part of the obligations under the Contract. Prior to acquisition of Data Respondent completed mobilisation and this was certified by the Petitioner. RW-1 admitted in cross-examination that mobilisation of equipment and personnel was completed and he was present at the site during that period. There was no correspondence or any material on record which indicated that any objection was raised to delay in mobilisation. Respondent drilled shot holes in the area under survey as per required specifications and this was duly approved from time to time by the supervisor/consultant/representative of the Petitioner i.e. Mr. M.S.N. Murty. Work in all the three phases was under the control and supervision of the officials deputed by the Petitioner in terms of Clause 8 of the Contract and every evening Daily Report was prepared, summarising all activities and then duly signed by the representative, signifying progress and approvals.

31. On the whole, Respondent posted four groups in the KS area, one for topographic survey, second for clearing of undergrowth, third for drilling of shot holes and fourth for recording data. This fact was never denied by the Petitioner. RW-1 admitted that he was scrutinising and signing DPRs prepared by the Respondent. It is further contended that the Supervisor was always aware that the geological conditions of the area did not always permit the Respondent to recover the skipped or rejected shots and was also aware that on account of hostile terrain, it was

not possible to achieve deeper drilling and that is why no defects were ever pointed out, in this regard under Clause 4.3.1.6 of the Contract.

32. Counsel next contends that Respondent repeatedly approached the local police for protection but there was no respite from the locals and the crew of the Respondent was constantly threatened and equipment was regularly damaged. Respondent was disabled from completing the targeted volume of work within the available time window due to these factors and as a consequence 3D coverage had to be restricted to 35.024 km². This situation was duly communicated to the Petitioner and is admitted by RW1 in answer to Q. 73. Because the Petitioner was aware of ground realities, it did not decline the request for reduction of the survey area, as is evident from the documents on record.

33. The next contention of the Respondent is that Petitioner being aware of the expertise and reputation of the Respondent, as a well-known service provider specialising in seismic exploration for oil and gas, including seismic field surveys, data processing and interpretation, awarded the Contract to the Respondent. The competency or expertise has never been disputed by the Petitioner even during the Arbitration Proceedings. Respondent being a foreign company had not worked in Arunachal Pradesh, prior to the signing of the Contract and had no knowledge of either the hostile terrain or the law and order situation. Petitioner, in fact, concealed that local mafia was operating in the area making it difficult for any agency to work, uninterruptedly. Despite several requests, Petitioner never came forward to salvage the situation.

34. Counsel next argues that in case the Respondent had allegedly failed to perform its obligation under the Contract, Petitioner was at

liberty to suspend the work under Clauses 3.3.1 and 3.3.2 of the Contract or even terminate the Contract under Clause 3.4.3. However, Petitioner did not do so and after sizeable amount was due to the Respondent, after completion of work, allegations were made against the Respondent. RW1 has also admitted in answer to Q.76 that permission to demobilise was given by the Petitioner and only thereafter the Respondent carried out the demobilisation of equipment and personnel. Insofar as the depth of the shot holes is concerned, counsel argues that even in the experimental drilling Report dated 29.08.2007, it was mentioned that it was difficult to drill beyond 3 m. Knowing the difficulties of the area, Petitioner accepted shallow holes throughout the period of execution of the work. The expert who signed the DPR, had acknowledged in his email dated 01.04.2008 that keeping the charge below the layer of boulders is ideal, provided it is possible to drill. The Tribunal has given clear findings on the issue of depth of the shot holes and on the Driller's Report and this Court cannot and should not interfere in such findings of fact. It is further argued that data processing was carried out by experienced personnel of the Respondent in Israel and representatives of the Petitioner, Mr. M.S.N. Murty and Mr. B.P. Sharma were present throughout. They were satisfied with the data processing and had admitted during cross-examination that they never wrote any note of objection or dissent. Likewise, the processed 3D data was interpreted at Israel under the supervision of both the officers. Final report was duly prepared and the findings clearly revolutionized the way KS field is viewed. For the first time, it was suggested that the field was limited to the area between the Miao vertical fault and the Miao thrust. Further, no claim was put forward by the

Petitioner to change or add anything to the final Report during the technical meeting held from time to time. It is argued that RW1 who was actively involved in the interpretation of data, admitted in response to Q.38 in cross-examination that while acquiring data, it is not possible to ascertain the results.

35. It is further argued that in terms of Clause 4.4.4.2 of the Contract, Petitioner had the right to call upon the Respondent within two months after termination of the Contract and submission of final report, to remedy the defects, if any. Report was submitted in October 2008 and no such right was ever exercised by the Petitioner within two months. It was only after the Respondent served notice dated 02.03.2009 for payment of dues that the Petitioner, as an afterthought, came up with the excuse of getting the work redone on 19.03.2009. Respondent had completed all the three stages of the Contract and performed its obligations and the Arbitrators, in the majority Award have rightly held the Respondent is entitled to its dues.

36. Learned counsel has also briefly argued on the merits of the Report and submitted that only after Respondent took charge of 2D data certain events started to appear, which could be co-related to the wells. It was demonstrated in the Report that old 2D lines were only processed and could not be reference for any comparison. The result of the survey brought out a much better migration of Data, new stratigraphical and petrophysical interpretation providing better net/gross porosity and water saturations, that the aerial extent of the field is limited by the Miao fault to the South-West and the Miao thrust to the North-East and the estimation of reserves of oil based on interpreted parameters indicated

44% increase from the earlier estimates. The report thus revolutionized the way KS field was viewed. It was suggested, for the first time, that the present field was limited to the area between Miao vertical fault and the Miao thrust. No such view was put forward before based on wrong interpretation of old 2D data.

37. Learned counsel further contends that having performed the Contract in all its three stages and given the report, Respondent rightly became entitled to refund of the Performance Bond and it is incorrect for Petitioner to argue that the Award is perverse in having allowed the said Claim. Tribunal has rightly held that merely because the Result is not to the liking of the Petitioner, Respondent had no legitimate ground to deprive the Respondent of its lawful dues.

38. Insofar as the objection to the standby charges is concerned, it is argued that the said charges were payable to the Respondent at the rate of USD 70,000 per day under the Contract. Evidence on record clearly established that Respondent did not carry out seismic operations for three days i.e. 24th, 25th and 26 May, 2008 and this was pursuant to communication dated 24.05.2008 from the Petitioner directing the Respondent to stop the survey for three days on account of *Panchayat* elections in the state of Arunachal Pradesh. Although, the Petitioner did communicate that Respondent could carry out work at its risk, fact was that there was lawlessness and security issues prevailing in the area and were well-known to the Petitioner. The Tribunal has given clear reasoning for allowing the claim for standby charges.

39. Insofar as claim for GB commission is concerned, it is contended by the Respondent that payment on account of commission/crop

compensation was made by the Respondent or its sub-Contractor to placate unruly elements who were hindering the work at site. It is an admitted case that Petitioner had reimbursed the Respondent of the amount of compensation paid earlier and had thus varied the terms of the Contract and, therefore, could not have declined payment of Rs. 4,80,000/-.

40. Arguing on the issue of supply of Chief Driller's Report at a belated stage, as alleged by the Petitioner, counsel for Respondent submits that there was no occasion for the Petitioner to get the said Report as the Respondent was regularly submitting the DPRs and there is no mention of the said report either in the defence statement or the Counter Claim filed by the Petitioner during the arbitration proceedings. This issue was raised only as an afterthought to give a wrong impression that the Respondent was trying to play fraud on the Petitioner.

41. Responding to the argument on rejection of the Counter Claim, counsel submits that during the arbitration proceedings, Petitioner failed to substantiate its Counter Claim and even failed to explain how it was claiming an amount more than the amount paid to the Respondent. Petitioner claimed Rs. 11,07,51,470/- though total payment made to the Respondent was only Rs.8,70,49,844/-. A question in this regard was put to the witness of the Petitioner, Mr. Puri, who merely answered that the amount claimed is the amount incurred on the project, but no evidence was produced. While the Petitioner repeatedly stressed that it had to appoint new Contractor to redo the survey, but even the Austrian entity so appointed was not informed of the lawlessness and complex geopolitical conditions prevailing and finally, even the said Contract was terminated.

It is thus argued that there is no perversity or illegality in the Award and the same should be upheld and the petition be dismissed.

42. I have heard the learned counsels for the parties and examined their contentions.

43. The undisputed facts are that the Government of India desired that petroleum resources at the KS be exploited and entered into a PSC on 16.06.1995 with Oil India Ltd., Geopetrol International Inc., Enpro India Ltd. and the Petitioner, whereby the Petitioner was appointed as the Operator under the Contract. The Petitioner, in turn, entered into a Contract with the Respondent on 13.12.2007 for services relating to acquisition, processing and interpretation of 3D seismic data. It is also undisputed that to collect the acceptable seismic data, Respondent had to drill shot holes of 20 m for the loading and exploding the charge. However, certain disputes arose between the parties and the matter went into arbitration wherein the Respondent raised certain Claims as mentioned above and the Petitioner raised a Counter Claim.

44. Before proceeding further, some relevant provisions of the Contract need to be noticed. Under Clause 3.2, the duration of the Contract was nine months from the signing of the Contract or six months from the commencement date, whichever was earlier, until termination in accordance with the provisions of the Contract. Commencement date of operation was as jointly agreed by both the parties. Clauses 3.1 and 3.2 read as under:

“3.1 Commencement Date of Operations

The date of commencement of operations shall be the date as jointly agreed by both the parties which

shall be subsequent to Company's verifying completion of mobilisation.

3.2 Duration

The Contract shall be effective from the date of signing the Contract. The duration of the Contract is 9 months from the signing of the contract or six months from the Commencement Date as specified in 3.1 whichever is earlier until the termination in accordance with the provisions of the Contract.”

45. Clauses 3.3.1 and 3.3.2 provide for suspension of the Contract due to the failure of the Contractor to fulfil its obligations and Clause 3.3.3 provides that the Contractor will not be entitled to any payment due for the work or part thereof done in case the work is suspended by the Company. The three Clauses are as under:

“3.3.1 Suspension due to Contractor's failure to fulfill obligations

Company shall have the right at any time and at its discretion to order contractor to immediately suspend all or part of the Work which Company in its sole discretion considers necessary by giving Contractor a (seven) 7 days notice of Suspension.

3.3.2 Company shall have the right at any time and at its discretion to immediately suspend all or part of the Work for a period not to exceed thirty (30) consecutive days in a manner which Company considers necessary by giving Contractor a (seven) 7 days notice of Suspension.

3.3.3 Payments

i. No payments shall be due by Company to Contractor for work or part thereof which is suspended by Company in accordance with provisions of article 3.3.1.

ii. For Work or part of Work suspended under article 3.3.2; Company shall pay Contractor in accordance with the Schedule of Prices and Rates of the Contract.”

46. Termination of the Contract is provided in Clause 3.4 and reads as under:

“3.4 Termination

3.4.1 General

The Contract shall terminate at the end of contract period without any notice being required, subject to elsewhere provided In the Contract.

3.4.2 Termination by Company

Company shall have the right at any time and at its discretion to Terminate the Contract or part thereof by giving Contractor a 30 (Thirty) days notice of termination.

3.4.3 Termination due to fault of Contractor

In the event that, in Company's reasonable opinion and at Company's discretion, the Contractor becomes unable to satisfactorily perform the work, Company shall have the right to terminate the Contract by giving Contractor a 15 (fifteen) days notice of such Termination.”

47. Provisions relating to the payment to the Contractor on account of termination under the above Clauses is provided for in Clause 3.4.5, which is as under:

“3.4.5 Provisions in case of Termination

i. Subject to Articles 3.4.1 and 3.4.2, Company shall pay Contractor until the Date of termination, in

accordance with the Schedule of Prices and Rates of the Contract.

ii. No payments shall be due by Company to Contractor for Work or part thereof which is terminated by Company in accordance with provisions of Article 3.4.3. (fault of Contractor) and Article 3.4.4. (Force Majeure).”

48. Clause 6.6 under Article 6 provides for liquidated damages and penalty. Clause 6.6.1 which deals with liquidated damages is as under:

“6.6 Liquidated damages and Penalty

6.6.1 Liquidated damages

The mobilisation should be completed and work should commence within 60 days of date of signing the contract. The mobilisation shall be complete on positioning at site of all the equipment along with the spares, consumables and accessories etc. for seismic data Acquisition. Aforesaid positioning of equipment etc. at the site as per list of equipment should be free of defects / encumbrance and duly certified by Company's representative as fit to undertake / commence the work assigned under the Contract.

In the event the Contractor fails to mobilise within the stipulated period, liquidated damages at the rate of 0.5% of the Contract value for delay of each week or part thereof, subject to a maximum of 5.0% of the Contract value shall be payable by the Contractor.

In the event the Contractor is unable to mobilize within a period on 75 days, the Company at its sole discretion may terminate the contract and the Contractor shall be deemed to have failed to perform under the Contract.”

49. Clause 6.6.2 stipulates that time is the essence of the Contract and in the event of default in timely completion, the Contract provides that the Contractor would be liable to pay penalty at the percentage prescribed therein. Clause 6.6.3 provides that the liquidated damages/penalty would be the genuine pre-ascertained damage which the company will suffer in case of delay by the Contractor and the same could be recovered from any money due to the Contractor. Clauses 6.6.2 and 6.6.3 are as under:

“6.6.2 PENALTY

Time is the essence of the Contract. In the event of default in timely completion of the contract, the Contractor will be liable to pay penalty at the rate of ½ % of Contract value for each week subject to a maximum of 5.0%.

6.6.3 Such liquidated damages/penalty are agreed between the parties to be genuine pre-ascertained damages which Company will suffer in case of delays in completion of the contract by the Contractor.

The Company may, without prejudice to any other method of recovery, deduct the amount of such liquidated damages and penalty from any monies due or which become due to the Contractor. The payment or deduction of such damages shall not relieve Contractor from its obligations and liabilities under this contract, neither will it effect right of Company pursuant to other provisions of the Contract.”

50. Clause 6.7.6 relates to the withholding of the payment by the company on account of certain defaults by the Contractor which are specified therein and is as under:

“6.7.6 With-holding

6.7.6.1 The Company may with-hold or nullify the whole or any part of the amount due to Contractor on account of subsequently discovered evidence in order to protect the Company from loss on account of:

- a) For non-completion of contracted work to Company's satisfaction.*
- b) Contractor's indebtedness arising out of execution of the Contract.*
- c) Defective work not remedied by Contractor.*
- d) Claims by sub-contractor of Contractor or others filed or on the basis of reasonable evidence indicating probable filing of such claims against Contractor.*
- e) Failure of Contractor to pay or provide for the payment of salaries I wages, contributions, unemployment compensation, taxes or enforced savings with-held from wages etc.*
- f) Failure of Contractor to pay the cost of removal of unnecessary debris, materials, tools or machinery.*
- g) All claims against Contractor for damages and injuries and I or for non-payment of bills etc.*
- h) Any failure by Contractor to fully reimburse the Company under any of the Indemnification provisions of this contract. If, during the process of the work Contractor shall allow any indebtedness to accrue for which Company may be primarily or contingently liable or ultimately responsible and Contractor shall, within five days after demand is made by the Company, fail to pay and discharge such indebtedness, then Company may during the period for which Indebtedness shall remain unpaid, with-hold from the amounts due to Contractor, a sum equal to the amount of such unpaid indebtedness. When all the above grounds for with-*

holding payments shall be removed, payment shall thereafter be made for amounts so with-held from the amounts due to Contractor, a sum equal to the amount of such unpaid Indebtedness. When all the above grounds for withholding payments shall be removed, payment shall thereafter be made for amounts so with-held. With-holding will also be effected on account of the following:

i) Garnishee order issued by a Court of Law in India.

ii) Income-tax deductible at source according to law prevalent from time to time in the country, according to clause 6.7.3.

iii) Any obligation of Contractor which by any law prevalent from time to time to be discharged by the Company in the event of Contractor's failure to adhere to such laws.

iv) Any payment due from Contractor in respect of unauthorised imports.”

51. Article 12 is *force majeure* clause and is as under:

*“12. Force Majeure
General*

Neither the Company nor the Contractor shall be liable one to the other for any delay in completion of the work where and to the extent such delay is caused by the inability of either party to fulfill its obligation under this contract due to Force Majeure as defined herein.

12.1 Definition

Force Majeure shall mean any occurrence affecting the rights and obligations of either party under the Contract which is beyond the control of the party claiming Force Majeure and could not have been foreseen or prevented by that party when exercising reasonable diligence.

12.2 Inclusions

Force Majeure shall Include but not limited to Acts of God, wars (declared or not), fires, rebellion, Insurrection, acts of terrorist, acts of Governments, strikes, boycotts, blockades, lockouts, unusually severe weather or any similar matters beyond the control of the party affected by same.

12.3 Exclusions

Notwithstanding Article 12, a Force Majeure occurrence shall not include:

- i. a strike affecting the Work restricted solely to Contractor's or Subcontractor's Personnel.*
- ii. breakdown of any equipment used by Contractor or its Subcontractors unless caused by a Force Majeure event.*
- iii. inclement weather typical for the operating area.*

12.4 Outstanding payments

Force Majeure occurrence other than Government instructions not to pay, shall not be just cause for non-payment of monies due under the Contract for work satisfactorily performed.”

52. Insofar as the execution of the work and its methodology is concerned, the same was provided for under Article 4. Clauses 4.3.1.3 and 4.3.1.4 deal with shot hole and loading and blasting of the holes as under:

“4.3.1.3 Shot-hole

- Contractor shall provide shotholes as per specifications and instructions from Company representative. A single shothole of depth upto 20m would serve the purpose. However at places where desired shothole depth cannot be achieved a pattern*

of shotholes as indicated under operating rate and approved by Company representative will be permitted. It is desirable to deploy large number of Mechanical Rotary Rigs.

- The accepted depth of shothole will be the depth upto which explosives charges has been loaded.*
- In case of collapse of drilled shothole the Contractor will ensure another shothole drilled to specified depth.*
- Wherever a shot point is skipped due to logistics, the Contractor shall try to make recovery of the shot at the nearest possible shotpoint.*

4.3.1.4 Loading of shothole and blasting of loaded holes

- The Contractor shall deploy competent and qualified personnel for preparation of charge, its priming, loading and blasting of shothole, following all relevant safety and security rules. The Contractor shall take necessary precautions in case of misfired holes.*
- The Contractor shall transport explosives detonator, blasters and loading poles etc. under security, manually from base camp to worksite and back to camp.*
- Advance loading of shothole would not be permitted and loaded holes would not be allowed to be left behind.”*

53. Clauses 4.3.1.8, 4.3.1.9 and 4.3.10 deal with reports, data processing and data interpretation and are as under:

“4.3.1.8 Reports

The Contractor will submit the following to the Company:

- A detailed report on experimental work (Within 15 days of completion of work)• Daily/Weekly /Monthly*

report regarding performance and progress of work duly signed and certified by Company representative.

- *An Operational Report within one month of the Completion of data acquisition work.*

4.3.1.9 DATA PROCESSING:

The Contractor shall employ state-of-the-art computer system and effective seismic application software and high resolution plotting system to obtain optimum results.

The processing sequence to be followed shall in general, be as given in the seismic 3-DAPI Programme. Certain special sub-routines may be added if so warranted.

Processing of data shall be completed within one month of the completion of data acquisition.

The Contractor shall submit a detailed report consisting of 5 hard copies including 5 digital copies on processing of data highlighting the sequence and Q.C. checks followed and measures taken to obtain best possible results, within one month of the completion of data processing work.

4.3.1.10 DATA INTERPRETATION:

- *The Contractor shall employ state-of-the-art Interactive Interpretation Work station, with suitable Interpretation packages for obtaining optimum results. The system as a whole should be such that it should be possible to integrate all geoscientific data and bring out geological models in terms of structural and stratigraphic traps.*

- *Data interpretation will be carried out following the details given in the seismic 2-D API programme. Certain special sub routines may be added if so warranted.*
- *Data interpretation work shall be completed within 5 months from commencement of data acquisition.*
- *The Contractor shall submit a detailed report consisting of 5 hard copies including 5 digital copies on interpretation of data as per oil industry standards within 6 months from the commencement of data acquisition. Such report shall accompany requisite maps and plates.”*

54. Clauses which deal with the performance of the Contractor and its obligations under the Contract and are very relevant for the present case are as under:

“4.4 Contractor Performance

4.4.1 Performance of Contractor

Contractor represents that the Work hereunder shall be carried out diligently, efficiently, in a safe and workman like manner according to the standards and specifications contained in this Contract and generally accepted Oil field practice. The contractor will provide a performance guarantee in one of the following two options:

Op. I Contractor shall provide to the Company within 15 days of Contract signing on irrevocable and unconditional Performance Bank Guarantee equivalent to 10 % of Contract value as per Appendix V, which shall be valid upto 60 days beyond the contract period. In the event of failure,

to honour any commitments entered into under this Contract, the Company shall have the unconditional option under the guarantee to invoke the said guarantee with the bank and claim the amount from the bank.

Op. II. The company will hold the sum of USD 385000 from the mobilization fee as a performance guarantee upto 60 days beyond the contract period.

4.4.2 Performance of the Contractor during the Contract period

Company reserves the right at any time during the duration of the Contract to suspend or terminate the Contract if Contractor fails to comply with any of its obligations and duties under the Contract.

4.4.3 Rejection of the Work

Company shall have the right to reject any part of the Work which is not performed in accordance with the Contract. Where Company desires to exercise this right Company shall so advise Contractor In writing. Upon receipt of such notification, Contractor shall correct the defects in its performance of the Work and shall be responsible for all its costs associated therewith.”

55. Clause 4.4.4 deals with warranty and remedy of defects and are also important to the present controversy and are as under:

“4.4.4 Warranty and Remedy of Defects :

4.4.4.1 Contractor warrants that it shall perform the work in a first class, workmanlike, professional manner and that all work shall be performed in accordance with the highest quality, efficiency and current

state-of-the-art oil industry practices and in conformity with all specifications and standards, and guidance which Company may, from time to time, furnish to Contractor.

4.4.4.2 Should Company discover at any time during the terms of the Contract or within 2 (two) months after termination of this Contract that the work does not conform to the foregoing warranty, Contractor shall, after receipt of notice from Company, promptly perform any and all corrective work required for make the Services conform to the Warranty. Such corrective work shall be performed by the Contractor at its own expenses. Company, at its opinion may have such remedial work performed by others and charge the cost thereof to Contractor. In case Contractor fails to perform remedial work, the performance security shall be forfeited.

4.4.4.3 The rights and remedies of Company provided by this Clause 4.4.4 are in addition on any other rights and remedies provided by law or in equity or otherwise.”

56. The Contract also clearly provided a price Schedule relating to the different stages of data acquisition/processing/interpretation and is as under:

“PRICE SCHEDULE

A. DATA ACQUISITION

A.1 MOBILISATION CHARGES: \$540,000

(see Para 6.2.2)

- i) Mobilisation charges are inclusive of all spares / consumables /accessories and main equipment for data acquisition.*

- ii) Mobilisation charges will be payable when all equipment and personnel are positioned at their appointed site free of defects/ any encumbrances and duly certified by the Company representative to undertake/ commence the work assigned under the Contract.
- iii) Mobilisation charges cover all local and foreign costs of the Contractor to mobilize the equipment to the appointed site and include all duties and other local and foreign taxes, port fees and inland transport to the appointed site.
- iv) Details in relation to all equipment / spares / consumable/ any other material to be brought by the Contractor is as per annexure II.

A.2	OPERATING RATE: (minimum program: 50 Sq km)	USD 60,000 per Square Kilometer
A.3	EXPERIMENTAL SHOOTING	\$ 75,000 per day, \$6,500 per hour
A.4	STANDBY CHARGES	\$ 70,000 per day
A.5	DATA PROCESSING CHARGES	\$ 600 per SQ km (in Israel)
A.6	DATA INTERPRETATION CHARGES	\$ 720 per SQ km (in Israel)

Appendix-III

SUMMARY OF SCHEDULE OF PRICE AND RATES

<i>Sl. No.</i>	<i>Item</i>	<i>Rate</i>	<i>USD</i>	<i>USD-In Words</i>
1.	<i>Mobilisation</i>	<i>Lump Sum</i>	540,000	<i>Five Hundred forty thousands only</i>
2.	<i>Experimental Shooting</i>	<i>Per day</i>	75,000	<i>Seventy Five thousands only</i>
3.	<i>Operating Rate</i>	<i>Sq. km</i>	60,000	<i>Sixty thousands only</i>
4.	<i>Standby</i>	<i>Per day</i>	70,000	<i>Seventy Thousand Only</i>
5.	<i>Data processing</i>	<i>Sq. Km.</i>	600	<i>Six Hundred only</i>
6.	<i>Data interpretation</i>	<i>Sq. Km.</i>	720	<i>Seven Hundred twenty only</i>
7.	<i>Demobilisation</i>	<i>Lump Sum</i>	NIL	NIL

1. *Service Tax, if any, as per Indian regulations would be borne by the Company.*
2. *Payments will be divided between Contractor and their Subcontractor i.e. ASIAN OILFIELD SERVICES LTD - India as per Contractor's approval.*
3. *Contractor would provide the Company a detail of Jobs to be carried by their subcontractor (s) and value of the same. However, it is clearly understood by the Contractor that the Contractor not subcontractor would be fully responsible for*

technical and commercial aspect and implementation of the Contract.

4. *Invoice raised by subcontractor for the Job done by the Subcontractor would also be verified by the Contractor.*
5. *The Company agrees to pay the invoice directly to the Subcontractor.”*

57. The Arbitral Tribunal after a detailed analysis of the documents and the evidence on record observed that the Respondent did perform the Contract in all the three stages and gave a final Report to the Petitioner. Till the final report was given, Petitioner did not object to the execution of the Contract by the Respondent at any of the three stages and raised objections after the Report was given, which was not up to its expectations. The Arbitral Tribunal concluded that nature of the Contract was such that the ultimate result could not be predicted. It also observed that there had been no objection by the Petitioner to the nature of equipment deployed by the Respondent or on the expertise of its personnel working at site. When the data collected was processed and interpreted at Israel, a representative of the Petitioner was associated and stayed there for almost a month and, in fact, the Petitioner has not even raised any objection about the processing and interpretation of the data. Tribunal did not agree with the Petitioner on the aspect that the Respondent had delayed mobilisation which resulted in the work not being completed during the said fair weather window or that the Respondent abandoned the work on the ground.

58. Though the permission to demobilise was conditional but there was nothing on record to show that the Petitioner ever asked the

Respondent to come back and fulfil any conditions that had remained to be fulfilled. The Tribunal has also arrived at finding that it was impossible for the Respondent to continue the work for factors such as lawlessness in the area including occasions of sabotage and theft of the equipment and police and the Administration did not give a helping hand. Petitioner being a principal employer also did not come to the aid and help of the Respondent. Tribunal was of the view that only because Oil India Ltd., with whom Petitioner had a Contract did not accept the Report, it had no relevance to the issue to deny the dues of the Respondent, once it had performed its obligations under the Contract at all the three stages. Relevant parts of the Award are as under:

“Geophysical did perform the contract in three stages as per the contract. Geophysical after completion of the contract gave final report to the Respondent GeoEnpro. Till final report was given, Respondent GeoEnpro did not object to the functioning of the contract by Geophysical at any of the three stages. Geophysical says that GeoEnpro raised all the objections after the final stage because the result was not in favour of GeoEnpro. Nature of contract is such as to what the result would be ultimately no one can predict. There has not been any objection from GeoEnpro to the nature of equipment deployed by the Claimant as well as expertise of its personal. After data collection, when it was processed and interpretation done at Israel, a representative of the GeoEnpro was associated and he stayed there for almost a month. About the processing and interpretation nothing has been said to debar Geophysical from claiming the amount under these two heads.

Objection of the GeoEnpro is that the majority of the work is data collection wherein Claimant failed. It is stated that there was delay in mobilization which resulted in work

could not be done during the fair weather window; data collection was not done over the agreed area. All these and other objections to debar admissible payments to the Claimant even though no payment could be made for rejected and skip shots. GeoEnpro says that Claimant wound-up its work without completing the work but then the fact remains that GeoEnpro had agreed to demobilization by Geophysical. Though GeoEnpro says demobilization was conditional but then nothing has been said if Geophysical was ever asked to fulfill any such conditions or that geophysical failed to do that. Evidence on record would show that it had become impossible for the Claimant to continue the work for whole of the area. Factors are not far to seek. There existed conditions of lawlessness in the area and police and administration were not helpful. There were occasions of sabotage and theft of the equipment. GeoEnpro was also not helping even though being the Principal employer. In fact first it had reimbursed Geophysical/AOSL payment for crop compensation but later declined to do so. Geophysical/AOSL could not continue making payments when GeoEnpro was in breach of the contract to reimburse Geophysical/AOSL of those payments.

That Oil India Ltd. (OIL) with whom GeoEnpro had entered into production sharing contract did not accept the report of Geophysical, has no relevance to the issues involved in the present case and that cannot be the ground to deprive Geophysical of its dues under the contract. Geophysical has claimed certain amounts towards damages caused by local by fire, cutting of lines and sabotage and has also claimed amounts for purchase of new equipment. It is difficult to see as to how Geophysical is entitled to all these amounts as this fall outside the terms of the contract.

Having thus performed the contract by covering all these three stages in submitting the final report, GeoEnpro

became entitled to refund of the performance bond. Merely because results are not to its liking, Geo Enprohas certainly no ground to deprive the Claimant, Geophysical, of its lawful dues under the contract.”

59. The Tribunal went into the evidence given by the three witnesses of the Respondent, in great details. It analysed the affidavit filed by Dr. Yuval Ben Gai, who was working as Head of the Geophysical Project of the Respondent and was the Operations Manager at the stage of acquisition phase and In-charge of data processing and interpretation phases. Dr. Yuval Ben Gai had stated that the Respondent had to struggle to mobilise equipment and personnel as the locals in the area were obstructing the movement and that the Petitioner had kept the Respondent in dark about the hostile conditions in the area. Despite bringing the situation to the notice of the Petitioner and the District Administration and local police, no help was given to the Respondent. He also deposed that execution of the work, despite all hostilities was done with due diligence and as per specifications and more importantly, under the guidance and supervision of the representatives of the Respondent who signed the Daily Progress Reports. Mr. M.S.N. Murty (Geophysical Consultant), General Manager Operations, Kharsang Oil Field and Mr. D.K. Gogoi, Geologist were also supervising the day to day activities. The DPRs mentioned the number of accepted shots and the corresponding square kilometres coverage. Rejected shots were also noted separately and the fact that all shots were not accepted by the Petitioner, is evidence of the fact that the accepted shots were as per the required specifications. Dr. Yuval Ben Gai also explained at length the entire procedure of

acquisition and processing of data, apart from deposing that both the processing and interpretation of the data was carried out by its experienced personnel in Israel and under the guidance and supervision of Mr. M.S.N. Murty and Mr. B.P. Sharma, who were in Israel for about a month. He further deposed that the Invoices were raised only for the work executed under the Contract and in accordance with the price schedule agreed and as referred to in the Contract.

60. Insofar as reduction in the area of survey was concerned, Dr. Yuval Ben Gai deposed that the targeted area could not be surveyed on account of the law and order situation at the site and the geological conditions. He, however, emphasized that despite all this, the Report was a clear revelation and it revealed several facts which threw light on how the old 2D data was poorly processed. He also supported the correctness of the Invoices and the amounts due. On being questioned on the dimensions of the holes as given in the Contract, Dr. Yuval Ben Gai deposed that the DPRs were generated each day which was a summary of operations of each day and collated a lot of information of execution of work on the same day and were being signed by both the parties. He agreed that the Report did not mention the depth of the holes, but stated that at certain places and for some time the daily reports did include the depths and the pattern information and data showed that the depth was shallower than 3m. However, this was on account of the fact that the ground conditions were adverse and sometimes on account of the river overflowing and the risk to life, required depth could not be achieved in the holes.

61. The Tribunal also examined the evidence of the second witness of the Respondent, namely, Mr. Shabtay Yakkov, who clearly brought out

that the seismic data provided by the Respondent in its Report was far superior as compared to the earlier 2D data available with the Department. He emphasized that the criticism of the data was only an afterthought once the Report was received, while the Petitioner was throughout aware of the surface formations and complex seismo – geopolitical conditions prevailing in the area, with serious challenges. He corroborated the stand of Dr. Yuval Ben Gai that no deficiencies in the execution of the work were pointed out till the Report was furnished which showed that the work was being executed to the satisfaction of the representatives of the Petitioner present on ground. He supported the case of the Respondent as regards the payment towards the performance bond as well as towards loss of equipment due to theft, damage and sabotage by the locals. This witness clearly deposed that the Petitioner had agreed and approved the demobilisation by the Respondent from the area and this was well documented. In any case, under the Law in India, Respondent would not demobilise the equipment, without the permission and approval of the Petitioner and also referred to the no objection certificate given by the Petitioner for demobilization.

62. The Arbitral Tribunal then analysed the evidence of the third witness of the Respondent Mr. Ashok Sarin, who was working as General Manager (Operations) of Asian Oilfield Services Ltd. (AOSL), the sub-Contractor. He also corroborated the stand of the other witnesses regarding the difficulties faced in mobilisation. He specifically deposed on the reduction in the survey area to finish the survey before the beginning of May 2008 as also with respect to the work being executed under the supervision of the expert representatives of the Petitioner and

the law and order situation. He threw light on the detailed procedure in rendering the DPRs. He stated that due to the topography of the oilfield, several shot points drilled by the Respondent could not be shot, even though the cables had been laid and geophones connected, as sometimes this could have endangered human settlements and at other times, the river flowing next to the oilfield would swell up and this could endanger the life of the personnel working on the oilfield. He stated that the Petitioner was kept informed of the ground realities and the reduction of the coverage area was with the knowledge and on instructions of the Petitioner.

63. The Arbitral Tribunal thereafter went on to examine the evidence led by the Petitioner. The Tribunal took serious note of the fact that while the pleadings had been signed by Mr. Suresh Kumar Batra, Senior Vice President of the Petitioner and most of the correspondence had been exchanged with the Respondent by Mr. Suresh Kumar Batra, however, he never came forward to give evidence. The Tribunal took note of the admission of Mr. D.K. Puri, one of the witnesses of the Petitioner that there was nothing in the Contract which indicated that the Respondent will be entitled to the payment only after the approval of expenses by the Directorate General, Hydrocarbons, as also that the Respondent had not been paid for processing and interpretation of data, against which there was no objection. Mr. Puri admitted that even for the Invoice dated 23.10.2008, Respondent had not been paid for 97 shots which were rejected, but had been used for processing the data. Tribunal also took note of the answer of Mr. Puri in cross-examination that it was nowhere stated in the Contract that standby charges would be payable only if

Respondent was unable to perform his work due to the fault of the Petitioner.

64. Second witness of the Petitioner was Mr. M.S.N. Murty, who was a Geophysicist and working with the ONGC. He had been deployed at the site by the Petitioner from 13.04.2008 till 15.05.2008. Mr. Murty took a stand that he was not supervising the work on a day-to-day basis and it was the Respondent who prepared the DPRs and put them to the representative of the Petitioner. He put the blame of delay in mobilisation on the Respondent which then led to the significant portion of fair weather window being lost. He stated that the Respondent did not drill shot holes of requisite depth which adversely affected the quality of the data acquired. Mr. Murty, however, in cross-examination admitted that Respondent did not do experimental drilling after completion of mobilisation as also that quality of the data largely depended upon geological conditions prevailing in the area. He admitted that the geological conditions in the oilfield were complex and could have partly affected the quality of data. Significantly, he also admitted that complex areas are essentially faulted zones and formations under high velocity and hard rocks and informed that KS area was one such area and that it was not possible to ascertain the results, while acquiring data with certainty. Insofar as the recording of the DPRs was concerned, the witness was able to point out only Reports of four dates, where objection had been raised to the hole depth. The witness admitted having received a mail dated 14.05.2008, from the Respondent regarding continuance of test and sabotage by the local people. There was an admission that the survey area was reduced to 35 km² by the Petitioner, in order to ensure completion of

work within the fair weather window and that the demobilisation of the equipment by the Respondent was certified by the Petitioner, though conditionally, but the conditions were never invoked. Mr. Murty further admitted that he was involved at the stage of processing of the data in Israel and pointed out that he was not satisfied with the work of data processing, but when questioned about any evidence to that effect, he could not point out any such objection having been raised on any document. To the same effect was his response with respect to data interpretation. Most significantly, Mr. Murty admitted that parameters regarding required depth of shot holes were changed, although this was at the request of the Respondent. He also admitted that the Respondent and its sub-Contractor had from time to time written to the Petitioner about the difficulties created by the local people and lack of security, thereby causing unwarranted delay in execution of the work.

65. Having analysed the evidence, the Tribunal also went through the various correspondences exchanged between the parties and the provisions of the Contract. On the issue of Invoices relating to Claim towards acquisition, processing and interpretation of data as well as towards Performance Bond, the Tribunal, while allowing the said Claims other than those for skipped holes also relied on the evidence of Dr. Ben, whose evidence was unrebutted.

66. Having analysed the Award and the documents and the arguments of the parties, I am of the view that the said Claims have been rightly allowed by the Tribunal. The basis of this part of the Award is that the Respondent performed its part of the Contract in all three stages and gave a final Report which did have significant findings and data was far

superior compared to the earlier 2D data. The entire work was executed under the guidance and supervision of the representatives of the Petitioner, namely, Mr. M.S.N. Murty (Geophysical Consultant), General Manager Operations, Kharsang Oil Field and Mr. D.K. Gogoi, Geologist, who were well-versed with the constraints of near-surface formations and complex seismo-geological conditions of the field area. Daily reports were signed by the representative of the Petitioner which mentioned the number of accepted and rejected shots, with the corresponding accepted square kilometres coverage. The Tribunal rightly found that till the submission of the final Report, no objection was taken at any stage by the Petitioner pointing out any defects in the execution of the work.

67. The witnesses of the Petitioner had clearly admitted that after the acquisition of the data the same was processed and interpreted in Israel under the supervision of the representatives of the Petitioner. At no stage any objection was taken to the acquired data, not being up to the mark. Respondent is right in its contention that if the data acquired was not of the required standard and the holes shot were not as per the specifications, then there was no reason for the Petitioner to have not only permitted processing and interpretation of the data, but having deputed its expert officers to oversee the process for over a month in Israel. In fact, it is pertinent to note here that there is no objection to the processing and interpretation of the data.

68. The Tribunal has also observed at various places that the nature of the Contract was such that it was not possible for anyone to predict the result during the process of acquisition of the data. The relevant portion of the Award is as under:

“Nobody howsoever expert he may be, can predict the result of the 3D seismic survey. It is only when the result did not go as per the expectation of the Respondent and was not even recognized by DGH and OIL the Consortium member, that it dawned upon the Respondent to withhold payment and advance counter-claim alleging breach of contract by the Claimant.”

69. As regards the allegation of abandonment of work by the Petitioner is concerned, on the basis of the admission made by the witnesses of the Petitioner, the Tribunal correctly came to a conclusion that the demobilisation was carried out by the Respondent only after necessary permission and no objection certificate to that effect was granted by the Petitioner. Tribunal is right in concluding that without the permission, Respondent could not have demobilised its equipment and personnel and though the permission was conditional, but the condition was never invoked by the Petitioner, by calling upon the Respondent to rectify any defects or complete any work.

70. Tribunal also relied upon and extracted the email dated 16.08.2008 written by Mr. Batra, Senior Vice President of the Petitioner wherein he raised three issues for the Respondent to respond and which were: (a) Crop compensation, (b) Submission of Invoices for standby charges and (c) Skipped shots. The Respondent sent its Invoices and requested for their clearance. This email is evidence of the fact that the Petitioner had no objection with regard to the execution of work not being as per the specifications, which is now being alleged by the Petitioner.

71. Insofar as the stand of the Respondent that there was lawlessness and sabotage at the site, is concerned, the Tribunal on the basis of evidence on record including the email dated 09.05.2008 by Mr. Murty has rendered a finding that, in fact, the locals did create a situation which hampered the timely execution of the work and also that neither the Administration nor the police and the Petitioner rendered any help or assistance in redeeming the situation.

72. In my view, the Tribunal has correctly held that the terms of the Contract empowered the Petitioner to not only suspend the work but even terminate the Contract, in case the same was not being performed as per the specifications or to the satisfaction of the Petitioner, but the Petitioner chose not to exercise any such right as provided under Clauses 3.3 and 3.4 of Article 3 of the Contract. Tribunal also rightly noted that under Clause 4.4.2, the Petitioner, even after two months of completion of the Contract, could call upon the Respondent to re-do the work, but no such action was taken by the Petitioner. Having held so, the Tribunal only allowed the Claims made in the Invoices for the charges for acquisition of the data, the accepted shots and the amount claimed towards Performance Bond, which had been withheld by the Petitioner, from the mobilisation amount. The Tribunal did not allow the claim towards the skipped shots and rightly so.

73. Insofar as the reduction of the survey area was concerned, the Tribunal relied upon the evidence of Mr. Sarin, who clearly stated that the Respondent was disabled from completing the targeted volume of work within the available window due to on-site threats by the local population and as a consequence, the 3D coverage had to be restricted to 35.024 km²

as against the planned 52.5 km² (later on changed to 45 km² on instructions of the Respondent) but the situation was duly communicated to the Petitioner and was concurred to. This fact has also been admitted by the witnesses of the Petitioner. Accordingly, the Tribunal found no fault with the Respondent in having surveyed an area lesser than the one agreed upon under the Contract and, in my view, rightly so.

74. The major issue sought to be raised by the Petitioner is about the drilling of the shot holes which according to the Petitioner has affected the output of the data, adversely. Mr. Murty had clearly in his evidence brought out that steps were taken by the Respondent towards clearing of site, laying down cables etc. and drilling of shot holes. Mr. Murty admitted that Respondent had on several occasions pointed out the difficulties faced on account of the obstruction by the local population. Relevant part of the order of the Tribunal is as under:

“Murthy admitted as correct that area of acquisition of data initially was stipulated at 54 Sq.km. and was reduced to approx .. 35 Kms. In stages by the Respondent. He said the main reason for reduction in the area was caused by the considerations that acquisition of data could not have been completed within fair weather window. Murthy said that demobilization of the equipment by the Claimant was conditionally certified by the Respondent. He said, he however, did not remember the condition as demobilization was not part of his function. If that is so, how come mobilization was part of his function? He said he was not aware if the foreign party can re-export its equipment only after obtaining demobilization certificate from the Claimant for whom the said foreign party carried out the work. Murthy said that steps taken by the Claimant for acquisition of data included clearing of site, laying down of cable and geophones, drilling of shot holes,

laying down and blasting of shot holes. He was asked even for skipped shot holes, clearing of site laying down of cables, geophones and drilling of shot holes was undertaken by the Claimant. He replied in affirmative and added that geophones and cables were to be laid all along the area including the places where shotpoints were drilled. Any places where shot points are to be skipped for safety reasons should not have been drilled as permission to drill the holes at an offset of 50 to 100 meters was given. Murthy admitted that Claimant and its sub-contractor had time to time written to the Respondent about the difficulties created by the local people and lack of security whereby causing unwarranted delay in the acquisition work. He said he was not aware if Claimant and its sub-contractor had given money to the local people in the interest of the continuation of the work. He said he was also not aware if some payment was reimbursed by the respondent.”

75. With respect to the evidence given by Mr. Ben Gai, Tribunal observed that there was nothing on record to contradict his evidence, more particularly, the fact that all through the period of drilling the depth of the holes was brought to the notice of the representatives of the Petitioner who were supervising the work on ground. Relevant part of the Tribunal’s order is as under:

“.....During his cross-examination Dr. Ben Gai said that Claimant did try drilling up to 20 meters even in the foothills or higher elevations. He said record of drilling performed there was brought to the attention of Respondent's representative during the entire length of survey. He denied the suggestion that the depth to which the drilling carried out was never brought to the attention of the Respondent while the contract was being executed. Dr. Ben Gai said that in general terms all decisions regarding operations on the ground during survey on daily basis were subject to discussions between the Operations manager of the

Claimant and the representative of the GeoEnpro. He said for this reason a daily report was issued by the Claimant and signed by the parties. Dr. Ben Gai said that daily report was a summary of the operations for each individual day and there was a lot of other information collected and documented that was available at all times to all the parties at the site. He further said that in addition each party could perform its own operation on drilling site to verify the performance. Dr. Ben Gai said that signing of the daily report meant that the parties were satisfied with all the operations that took place during the day which are summarised in single page in the daily report. Daily report summarised the number of holes and their locations. Dr. Ben Gai explained as to the depth of drilled holes which have been noticed in the earlier part of the Award. There is nothing on record to contradict the statement of Dr. Ben Gai and there is nothing for us not to accept the same. When Murthy said that Chief Driller's report was not available in 2008 and that it was made available to him only during 2010, he is not making a truthful statement. It does not stand to reason that what was the occasion for Murthy to get the Chief Driller's report now in the year 2010 when the final report of the Claimant had already been submitted by GeoEnpro. That apart Driller's report is not one of the documents which the contractor has to submit to the employer as per Clause 4.3.1.8 of the contract. On the basis of Driller's report Respondent is trying to build up its defence for its own failure to abide by the terms of contract and in that it found Murthy a willing witness."

76. Respondent has rightly contended that the Petitioner was well aware of the complex ground condition and topography of the oilfield and which is why the Petitioner had itself sometimes allowed the Respondent to drill shot holes of 3 m or less than 3 m. In fact, attention was drawn to Para (1.b) of the petition, where the Petitioner has admitted this fact. On

the quality of the data acquired, the Tribunal has, in my view, rightly held that the nature of the Contract was such that during acquisition process it was not possible for anyone to predict the exact result. Moreover, it is clear from the documents on record that the entire work was executed under supervision of the expert representatives of the Petitioner, who were privy to the daily reports and even signatory thereto. No objection was raised of any kind during the execution of the first stage of the work and the Petitioner permitted the Respondent to proceed to the second and the third stage of the Contract.

77. In view of the above, it is not open for the Petitioner at this stage to contend that the depths of the shot holes were not as per the specifications or that the Contracted area was not surveyed. It is not open for the Petitioner to question the quality of the data. As rightly held by the Tribunal, once the Petitioner permitted the Respondent to carry out the work under its supervision, the result being an uncertainty, could not affect the claims of the Respondent towards the work done and nor can the subsequent rejection of the report by the independent agencies or the Department of Hydrocarbons can have relevance. The Tribunal has, after a detailed analysis, given findings of fact and it is not possible for this Court to interfere with this part of the Award as the view is not only possible but a plausible view, apart from being well reasoned and based on the evidence led before the Tribunal.

78. The scope of interference by this Court under Section 34 of the Act is extremely limited, as rightly argued by learned counsel for the Respondent. Supreme Court in the case of *Ssangyong Engineering &*

Construction Co. Ltd. v. National Highways Authority of India Ltd.,
(2019) SCC OnLine SC 677 held as under:

“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 paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), 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 paragraph 30 of Associate Builders (supra).

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 paragraphs 36 to 39 of Associate Builders (supra), 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 paragraphs 18 and 27 of *Associate Builders* (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of *Associate Builders* (supra). 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* (supra), as understood in *Associate Builders* (supra), and paragraphs 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, paragraph 42.1 of *Associate Builders* (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of *Associate Builders* (supra), however, would remain, for if an

arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is

clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice

has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

79. In ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors.*** (2019 SCCOnLine SC 1520), Supreme Court held as under:-

“55. Further, this Court has repeatedly held that an application under Section 34 of the Arbitration Act, 1996 is a summary proceeding not in the nature of a regular suit - see Canara Nidhi Ltd. v. M. Shashikala 2019 SCC O.M.P. (COMM) 131/2017 Page 26 of 26 OnLine SC 1244 at paragraph 20. As a result, a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for - see Associated Construction v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128 at paragraph 17.

56. Also, as has been held in the recent decision Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019 SCC OnLine SC 677, after the 2015 Amendment Act, this Court cannot interfere with an arbitral award on merits (see paragraph 28 and 76 therein). The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, (where an appeal is in the nature of a rehearing of the original proceeding, where the chance of succeeding is far greater than in a restricted review of arbitral awards under Section 34), is itself a circumstance which militates against the enactment of Section 87, placing

the amendments made in the 2015 Amendment Act, in particular Section 36, on a backburner. For this reason also, Section 87 must be struck down as manifestly arbitrary under Article 14.”

80. This part of the Award is accordingly upheld in favour of the Respondent.

81. With respect to the Claim of the Respondent regarding standby charges, the same has been allowed by the Tribunal as under:

“Standby charges are payable at the rate US\$ 70,000.00 per day. Standby as such has not been defined in the Agreement. However, it is award of common parlance. Concise Oxford Dictionary, 11th Edition, gives the meaning of standby as -- "1. Readiness for duty or immediate deployment – a person or things ready to be deployed in an emergency. 2. The state of waiting to secure an unreserved place for journey or performance." On 24.5.2008 GeoEnpro wrote to Geophysical to stop the seismic survey operations from 24th to 26th May 2008 and resume from 27th May 2008 morning. It was stated that this was on account of Panchayat Raj elections in the State of Arunachal Pradesh. In pursuance to this Geophysical stopped the operations for three days. On 24.5.2012 itself GeoEnpro wrote another letter to Geophysical stating that it had written the letter considering the detailed security scenario in the Kharsang Oil-field and especially of Geophysical personnel security point of view. The second letter further stated that however, if Geophysical felt it can carry out the seismic operations under the present situation it was free to do so on its own risk and further that GeoEnpro will only consider the payment of seismic operation and not for any standby charges due to present security/scene situation. However, fact remains that Geophysical did not did seismic operations for three days i.e. on 24th, 25th and 26th May 2008 and had claimed standby charges for three days. Considering the security

situation prevailing in the area and the first letter dated 24.5.2008 from GeoEnpro we are of the view that claim for three days standby by Geophysical is correct. GeoEnpro cannot wash off its responsibility by sending second letter of the same date. Claimant has claimed stand by charges as well for other days on the basis of 10 hrs. for a day reflected in the invoices. It is not disputed that Claimant could not conduct seismic survey on these days for which standby charges have been claimed. As to why seismic survey could not be conducted was on account of sabotage and threat by the locals to the equipment as well as personnel of the Claimant. These facts are again not disputed.

Respondent has referred to the minutes of the meeting dated 15.7.2008 to contend that parties had agreed to payment of one day standby charges with reference to the letter dated 24.5.2008 of the Respondent. It is not so. The Claimant has recorded the following note of on the minutes in its own handwriting:

"We do not agree regarding your comments on compensation issue. The minutes of the meeting are signed subjected to your releasing the payments of the compensation to Asian Oilfield Services immediately as per our letter dated 20th December 2007 and the mail of Mr. Ashok Sarin, GM, AOSL dated 30th July 2008 addressed.

We do hope that we will receive a favourable response from you and you will release the payments of compensation & standby to AOSL immediately."

This note throws doubt on the credence of the minutes in this respect. We do not accept the stand of the Respondent that standby of only one day was payable."

82. Standby charges were payable admittedly under the contract at the rate USD 70,000 per day. The word “standby” has not been defined in the Agreement as noticed by the Tribunal and thus it went by the dictionary meaning of the word to mean “readiness for duty or initiate deployment”. Tribunal noted that on 24.05.2008, Petitioner wrote to the Respondent to stop the seismic survey operations from 24th to 26 May, 2008 and resume from 27th May, 2008 morning. This was on account of Panchayat elections in the State of Arunachal Pradesh. In pursuance thereto, Respondent stopped operations for three days. Stand of the Petitioner is that on 24.05.2008, itself Petitioner had written another letter to the Respondent that the above letter had been written considering the security scenario in the oilfield, but in the second letter it was stated that if the Respondent felt that it could carry out the operations in the present situation, it was free to do so at his own risk and that standby charges would not be payable. The Tribunal was of the view that the security situation prevailing in the area as also admitted by the Petitioner did not inspire the Respondent to carry out the operations for these three days and hence, the Claim for standby charges was correct. Court does not find any infirmity with this view of the Tribunal. While it was very well for the Petitioner to permit the Respondent to carry out the operations at its risk, while admitting that there were security issues, the Respondent cannot be faulted for not having taken the risk and stopping the operations, during the said period.

83. The Petitioner has mainly contended that the Tribunal has not applied its mind and has painted the other two claims of standby charges, which were for different reasons, with the same analogy. From the

reading of the Award, I find that this contention is not justified. Tribunal has separately dealt with the standby charges for the remaining days and has come to a conclusion that the Respondent could not conduct the seismic survey on these days on account of sabotage and threat by the locals, to the equipment as well as personnel of the Respondent. The conclusion on the hindrances by the locals has been separately drawn by the Tribunal based on the detailed evidence which has been referred to in the earlier part of this judgment. The Tribunal has also referred to and extracted the minutes of the meeting dated 15.7.2008 and concluded that it was never agreed between the parties that standby charges for only one day was payable as was alleged by the Petitioner.

84. Learned counsel for the Petitioner sought to argue that by awarding the standby charges, the Tribunal has gone beyond the contractual provisions and has virtually rewritten the contract between the parties. The argument is that Clause 4.4.5 and Clause 5 clearly stipulated that it was for the Contractor to exercise due diligence and take necessary measures and precautions to ensure that equipment and property is not destroyed and would ensure that all the machinery and equipment is maintained in running order. Learned counsel submits that under Clause 10.3.1 of the Contract, Respondent had undertaken that its responsibility and indemnity under Article 10.3 would include events, amongst other things, civil commotion, hostilities, sabotage, riot, blockade, etc. and even in case of an event of *force majeure* under Clause 12, the Company and the Contractor shall not hold each other liable for any delay in completion of the work. Term *force majeure* has been defined in Clause 12.1 to include under Clause 12.2 strikes, boycotts, blockades, lockouts, etc. He

thus, argues that the safekeeping of his personnel and equipment was the responsibility of the contractor and once access to the site was given by the Petitioner, only because the Respondent was allegedly prevented from working on account of threats from the locals, cannot be the basis to claim standby charges.

85. Learned counsel further contended that a perusal of the reasons seeking standby charges under each individual Invoice and the award of the Claims by the Tribunal itself shows that the Award is perverse. For Claim under Invoice No. 89029, there are no reasons given and is, thus, contrary to Section 31 (3) of the Act and the finding is in the teeth of the vital evidence on record. Perusal of the Invoice shows that the same does not even mention the day for which standby was claimed and the Tribunal has not even examined this aspect. The DPR for 04.05.2008 clearly evidenced that due to local worker strike, there was no activity in the area and no production except drilling. This vital piece of evidence has not even been referred to by the Tribunal. There is also a difference in the reason given in the Invoice and the DPR. The Award is thus against the ratio of the judgment of the Supreme Court in *Ssangyong Engineering (supra)*, more particularly, para 42.

86. With respect to Invoice No. 89034, it is argued that vital evidence has been ignored and the only basis to allow the Claim was a Report dated 15.05.2008 which was attached with the Invoice and that the Petitioner did not contradict the Report. It is argued that in the Statement of Defence, Petitioner had expressly stated that no report was received by the Petitioner with the Invoice and, moreover, the Invoice mentioned the standby time of 40 hours on 15.05.2008 which could not be possible. The

Tribunal has also disregarded the DPR for the said date, which records that some work was carried out. With respect to Invoice No. 89040, the argument is that the Award is unreasoned and not based on any evidence. Claim has been allowed for standby of 33.5 hours across four days disregarding the DPR for 18.05.2008 that the standby was due to intensive and continuing sabotage along the seismic lines and not due to the Petitioner's instructions. Again, with respect to Invoice No. 89043 the argument is that the Award is perverse and ignoring the vital evidence in as much as DPRs for 07.06.2008 and 08.06.2008 clearly recorded that the work was suspended due to damage caused by river flooding and not on account of any sabotage by the locals.

87. Having perused the documents and the evidence, I find the Tribunal has wrongly allowed the claim under Invoice No.89034. Tribunal has found merit in the case of the Respondent based on a report which was attached with the Invoice. A categorical stand was taken by the Petitioner that no such report was received by the Petitioner and the DPR, which is on record for the said date, shows that some work was carried out. The finding of the Tribunal is thus contrary to the evidence on record and can be interfered with as held by the Court in the case of ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC OnLine SC 1656*** and is, therefore, liable to be set aside.

88. Insofar as Invoice No. 89043 is concerned, there is merit in the argument of the Petitioner. Learned counsel for the Petitioner rightly argues that the DPRs clearly revealed that the work was suspended on both days on account of river flooding and for the Tribunal to have allowed the claim on the basis of damage and sabotage by local farmers

would be in the teeth of the evidence on record. It is well settled that the Tribunal cannot pass an Award ignoring vital piece of evidence and if it does, the Award suffers from perversity. This part of the Award also deserves to be set aside. In so far as the Award with respect to Invoice No. 89040 is concerned, this Court finds no infirmity to interfere in the same.

89. The next contention of the Petitioner is with regard to the Claim of the Respondent for GB commission and the argument is that this amounts to granting specific performance of an illegal contract, as held by the Supreme Court in the case of *Associate Builders (supra)*. It is argued that the Tribunal has overlooked that the nature of payment constituting the commission is *ex-facie* illegal and even assuming that any such payment was made by the Respondent to the locals, it was an illegal gratification and cannot be awarded by any Court or Tribunal. It is also argued that the Tribunal has wandered beyond the contractual provisions, which it cannot do, as held in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors., (2006) 11 SCC 181*. There is no provision in the Contract envisaging such a payment.

90. I find merit in this argument of the Petitioner. There cannot be any doubt on the proposition of law that the Arbitrator is a creation of the contract and is bound by its terms and conditions. It is equally well-settled that the Arbitrator cannot rewrite or script the terms of the Contract between the parties.

91. Clause 6.1 of the Contract clearly provides that all payments shall be made only as per the terms of the Contract and no payments additional to those specified in Appendix 3 shall be due from the Petitioner to the

Respondent. The Contract does not stipulate any payment towards GB commission, as claimed by the Respondent. Reliance of the Tribunal on the earlier payment by the Petitioner in the form of crop compensation is completely misplaced. Compensation to the landowners was provided in terms of the Contract as given in Appendix 2 and the Petitioner had taken the responsibility to make payment towards crop compensation to landowners, which was in keeping with the industry practice as well. In fact, the witness of the Respondent Dr. Ben Gai had accepted in his evidence that Petitioner had never assured that any money would be reimbursed to the Respondent on account GB commission. This part of the Award is against the terms of the Contract and deserves to be set aside.

92. As far as the rejection of the Counter Claim of the Petitioner is concerned, learned counsel for the Respondent is right in its contention that during the Arbitration Proceedings, Petitioner failed to substantiate its Counter Claim. There was no explanation or basis on which the Petitioner claimed an amount of Rs. 11,07,51,470/- though the actual payment made to the Respondent under the contract was only Rs. 8,70,49,844/-. A specific question was also put in this regard to the witness of the Petitioner Mr. D.K. Puri but other than merely stating that the amount claimed was incurred on the project, he could not explain the basis for claiming the difference. Respondent had categorically asserted that even the new contractor engaged by the Petitioner for carrying out the balance work had not been informed of the hostile conditions in the Oil fields and finally even that contract was terminated. Moreover, once the Tribunal has held that the Respondent was entitled to its Claims on

account of data acquisition, processing and interpretation and which has been upheld by this Court in the earlier part of this judgment, Counter Claim for the difference in the amount does not survive. This part of the Award rejecting the Counter Claim is thus upheld.

93. Thus, the Award to the extent it has allowed the Claims towards Invoice no. 89067 dated 23.10.2008 for USD 49,235.00 for data processing and interpretation, is upheld as well as for Invoice No. 89068 dated 23.10.2008 for USD 58,200.00 for the accepted shots. Likewise, Award with respect to claims under Invoice No. AOSL/GN/01 dated 21.10.2008 for USD 65,394.00 for data acquisition charges, is upheld along with the Award for the Performance Bond.

94. Insofar as standby charges are concerned, the Award is upheld only with respect to Invoice No. 89040 dated 02.06.2008 for USD 234,500 for standby charges for 24th, 25th and 26 May, 2008. The Award with respect to the remaining Invoices on account of standby charges is hereby set aside. Award with respect to Invoice No. AOSL/GN/18, dated 30.06.2008, for Rs.4,80,000/- on account of payment to the locals is also set aside.

95. Petition is partially allowed in the aforesaid terms with no orders as to costs.

JYOTI SINGH, J

MAY 12th, 2020

rd/srb