

\$~

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

+ **W.P.(C) 11600/2015 & CM APPL. 30709/2015**

CAIRN INDIA LIMITED & ORS Petitioners

Through Mr. C.S. Sundaram, Senior Advocate
with Ms. Fereshte Sethna, Mr. Rajat
Juneja and Mr. Adhijraj Malhotra,
Advocates.

versus

**DIRECTORATE GENERAL OF FOREIGN
TRADE & ORS** Respondents

Through Mr. Tushar Mehta, ASG with
Mr. Anurag Ahluwalia, CGSC with
Mr. Naveen Bhardwaj, Advocate for
R-1 & 2/UOI.
Mr. V.N. Koura with Mr. P.K.
Benipal and Mr. Sumit Benipal,
Advocates for R-3.

%

Reserved on : 10th August, 2016
Date of Decision : 18th October, 2016

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN**

J U D G M E N T

MANMOHAN, J:

1. Petitioners have filed the present writ petition seeking a writ of mandamus or any other appropriate writ, order or direction to respondent no.1 to issue to the petitioners necessary permissions/approvals/authorisations for direct export or in the alternative, permission/facilitation

for canalised export through respondent no.3 of petitioners' share of crude oil extracted from the Rajasthan Block RJ-0N-90/1 (for short "Rajasthan Block"), to the extent not lifted by respondent no. 2 or its nominee Public Sector Undertakings (for short "PSUs").

2. Mr. C.S. Sundaram, learned senior counsel for the petitioners stated that exploration, development and production of crude oil is a highly capital extensive operation. He stated that petitioner nos. 1 and 3 have invested more than rupees thirty thousand crores in the Rajasthan Block and have brought world class technology to India.

3. He stated that today, at the current level of production, approximately sixty to seventy per cent of the price realized from the Rajasthan Block Crude Oil production flows back to the public exchequer in the form of profit petroleum, inter alia through share of Government's nominee, royalty (paid to the State Government) and cess. He pointed out that every additional US\$ 1 per barrel of Rajasthan Block Crude Oil realized would fetch the public exchequer an additional US\$ 41 million / Rs. 258 crores (Rs. 63/US\$) on account of the Government's share of profit petroleum, share of its nominee, royalty and cess.

4. Mr. Sundaram contended that the Foreign Trade Policy of Government of India permits canalized export of crude oil through respondent no. 3 or direct export with the approval of respondent no.1. He stated that as Sr. No. 113 of Chapter 27 of Schedule 2 of ITC (HS) Classification of Export and Import provides for procedure for export of crude oil, it is permissible to export the crude oil. Consequently, according to him, petitioners have a legal right to export and the present writ petition has been filed for enforcement of the said legal right.

5. Learned senior counsel for petitioners submitted that though Article 18.1 of the Production Sharing Contract (for short "PSC") provides that until India attains self-sufficiency, the Contractor is obliged to sell to the Government or its nominee the entire share of crude oil, yet Article 18.7 of the PSC entitles the Contractor to freely lift, sell and export any portion of its share of the Rajasthan Block Crude Oil which the Government or its nominee PSUs are unable to lift. He stated that as Government and its Nominee PSUs are unable to lift the entire Rajasthan Block Crude Oil, Article 18.7 of the PSC comes into play and the petitioners have the unfettered right to lift and export the Rajasthan Block Crude Oil to the said extent.

6. He further submitted that Article 18.7 of the PSC is independent of Article 18.1 and therefore, the fact that India has not attained self-sufficiency is irrelevant. He also stated that Article 18 of the PSC does not provide for partial waiver/dispensation of the condition of India attaining self-sufficiency.

7. In any event, he submitted that this embargo had been dispensed with in the meeting of the Empowered Committee of Secretaries held on 17th August, 2009.

8. Mr. Sundaram lastly contended that respondent-UOI's decision to deny permission to export was with intent to force the petitioners to sell their crude oil containing high viscosity and wax to Essar and Reliance at a price lower than the international rates. He pointed out that Essar and Reliance are the only refineries which have the technology to refine the particular grade of crude oil generated by the petitioners.

9. On the other hand, Mr. Tushar Mehta, learned Additional Solicitor General appearing for respondents stated that the relationship between the petitioners and respondent No.2 is contractual in nature, which is governed by the provisions of PSC executed between the parties. He pointed out that Union of India had entered into the said contract on 15th May, 1995 under Article 297 of the Constitution of India as it deals with natural resources of the country. He submitted that this Court should not interpret the contract in exercise of writ jurisdiction.

10. He also submitted that the grievance raised by the petitioners in the present case qualifies as a dispute under the PSC which is arbitrable and hence, the present writ petition is not maintainable.

11. Mr. Mehta submitted that under Article 18 of PSC, a right is conferred upon the petitioner to seek permission to export the oil produced from the subject block only when self-sufficiency is attained by the country; meaning thereby that the total consumption of oil within India is either at par or less than the total production of oil and gas within India. According to him, Article 18.4 provides for deemed election in case of failure by Government to exercise this option for a particular year and it makes it obligatory for the Government to take and pay for the Crude Oil and Condensate in respect of which it has or is deemed to have elected to exercise its option to purchase. He stated that in the present case even if the petitioners' version is believed, then also the petitioners can only claim compensation.

12. In any event, he stated that the very object and purpose of entering into the PSC was not to generate revenue either for the petitioner or for the government, but to extract natural resources in the larger interest of the country.

13. Learned Additional Solicitor General further submitted that whether to permit export of crude oil exploited from the fields located within the territory of India essentially falls within the realm of a policy decision, which is to be taken by the government keeping in mind the national interest and larger public purpose. He pointed out that the National Policy is that, export of crude oil is not permitted till India attains self-sufficiency. He contended that the said policy has been incorporated in PSC as it prohibits export till India attains self-sufficiency.

14. He contended that by permitting export of the oil produced from the subject fields, the citizens of the country would be denuded from enjoying the benefits of the oil so produced in the country. According to him, if export is allowed, it would be contrary to national interest, especially when there is huge mismatch between indigenously produced oil and the energy demands within the country. He stated that the domestic requirement of crude oil is presently met partly with domestic production including Rajasthan Block Crude Oil and mainly from import. The chart relied upon by Mr. Mehta is reproduced hereinbelow :-

Quantity in million tones			
	2012-13	2013-14	2014-15
Domestic Crude Oil Production	37.86	37.79	37.46
Consumption of crude oil in terms of Domestic refining Capacity	219.21	222.5	223.24
Quantity of crude oil imported	184.8	189.24	189.43
% of import dependence	84.3	85.1	84.9
% of Domestic production	17.3	17.0	16.8

15. Mr. Mehta pointed out that Empowered Committee of Secretaries in its meeting held on 27th January, 2016 in pursuance to this Court's order had opined that it would be against the energy security of the nation to permit the petitioners to export Rajasthan Block Crude Oil.

16. Learned Additional Solicitor General emphasised that the Empowered Committee of Secretaries had held that permitting export of crude oil, apart from being not contemplated under the PSC was also against the national policy of Zero per cent export till India attain self-sufficiency. He stated that the "energy security" would be adversely affected in light of the following facts:-

(i) The domestic oil exported overseas would have to be replaced by more-expensive imported lighter crude oil, which would be detrimental to consumer interest. Allowing crude oil exports would lower the domestic supply available to meet demand. It would also reduce India's energy security by increasing its dependence on foreign oil, which is still vulnerable to frequent supply disruptions which may occur for a variety of reasons, including conflicts, natural disasters as well as technical difficulties. Hence, only Government should be allowed to make exemptions to the crude oil export ban if it is in the national interest.

(ii) Declining trends have been reported in domestic oil and gas production which would further be accentuated if the export of very scarce petroleum mineral viz. crude oil is permitted and would be detrimental to Indian economy as an additional cost burden on account of two-side shipping tariff without any explicit monetary advantage to Indian economy in the immediate run.

(iii) Permitting export of domestic crude would certainly compel the

Indian refineries to operate by importing additional equivalent quantity of crude oil at higher cost, consequently leading to reduction in Gross refining margin of Indian refinery as well.

(iv) Permission to export would add further chaos to worsening situation in terms of country's dependence on imported crude which is rising day-by-day. In FY 2014-15, out of 221 MMTPA crude oil requirement, 189 MMTPA was met through import i.e. about 85%.

(v) Country has never exported crude oil. Surplus production of petroleum products after meeting domestic demand only was allowed to export.

17. Mr. Mehta reiterated that the decision not to permit export of the oil produced by the petitioner is a policy decision of the Government, which cannot be in any way termed to be an arbitrary, irrational or malafide decision warranting interference by this Court in writ jurisdiction.

18. He pointed out that whenever exploration of natural resources is undertaken, it is never an essence of the contract that the entire quantity available should be extracted. In all PSCs, there are provisions to either increase or reduce production based upon various factors including transport facilities.

19. Learned Additional Solicitor General stated that since in the present case PSU refineries were unable to lift the entire quantity of crude oil, the petitioners themselves requested the Government to permit sale of crude to Essar and Reliance.

20. He clarified that the decision dated 17th August, 2009 permitted the petitioners to sell crude oil to all refineries within India and is not restricted to two companies i.e. Reliance or Essar as alleged by the petitioners. He

pointed out that Articles 19.4 and 19.5 stipulate that the price of the Crude Oil shall be determined between the petitioners and the buyers of Crude Oil and therefore, the petitioners have complete freedom to fix the price of crude oil at arm's length.

21. Mr. Mehta also stated that the notional price difference between the domestic market and international market as urged by the petitioners is misleading. He stated that while the crude oil being extracted by the petitioners is being sold in domestic market at benchmark price of "Bonny Light", a particular grade of crude oil, its quality matches with "Dated Brent" another lower grade of crude oil in international market. Thus, according to him, in view of the decision dated 17th August, 2009, the petitioners are getting equal or more price from domestic private refineries as compared to the international market. He stated that operator is getting international price for its crude oil from both PSU and PVT buyer which is agreed amongst them at arm's length.

22. Mr. Tushar Mehta stated that the foreign trade policy is a policy document containing broad policy outlines of the Central Government to give effect to the Foreign Trade (Development and Regulation) Act, 1992 [for short "Act, 1992"]. He submitted that Section 3(2) of the Act, 1992 empowers the Central Government to make provisions for either prohibiting, restricting or otherwise regulating particular export/import. According to him, in exercise of the powers conferred upon the Central Government, the export of "crude oil" is provided in category of State Trading Enterprises (for short "STE"), and thus, is not freely exportable.

23. According to him, Chapter 27 merely means that if the Union Government permits export of crude oil, it can only be through "STE".

24. He stated that in the present case the application of the petitioners to permit export of crude oil was considered by the DGFT after taking assistance and advice of EXIM Facilitation Committee under Para 2.51 which reads as under:-

"2.51 EXIM Facilitation Committee

(a) Restricted item Authorisation may be granted by DGFT or any other RA authorised by him in this behalf. DGFT/RA may take assistance and advice of a Facilitation Committee while granting authorisation. The Assistance of technical authorities may also be taken by seeking their comments in writing. Facilitation Committee will consist of representatives of Technical Authorities and Department / Ministries concerned."

25. Learned Additional Solicitor General further stated that the DGFT and the EXIM Facilitation Committee sought the No Objection Certificate from the Administrative Ministry, i.e., the Ministry for Petroleum and Natural Gas which sent its comments vide communication dated 3rd February, 2016 which reads as under:-

"Dated- 3rd February, 2016

Office Memorandum

Subject : Request of M/s. Cairn India Limited, Mumbai for grant for permission for export of 3 cargoes of 600,000 bbls each of RJ Crude Oil to South East Asian Refineries.

The undersigned is directed to refer to DGFT's OM No. 01/91/10/95/AM 16/EC/1029 dated 28.1.2016 on the above captioned subject and to say that this Ministry has decided that till the time India becomes self-sufficient, crude oil produced domestically cannot be allowed to be exported as it would be detrimental to the energy security of the country and would also be violative of the provisions contained in concerned PSC and therefore, the request of Cairn India Limited for export has been rejected. This Ministry is not in a position to give the NOC to the proposal."

(emphasis supplied)

26. He contended that keeping in view the aforesaid the DGFT in its meeting held on 16th February, 2016 rejected the petitioners' request in view of denial of NOC by Ministry of Petroleum and Natural Gas to the proposal.

27. Consequently, Mr. Mehta contended that allowing export of domestic production of crude oil is neither legally nor economically justified.

28. In rejoinder, Mr. Sundaram submitted that respondent's preliminary objection that the writ petition is not maintainable due to an arbitration Clause in the PSC is untenable. He stated that the petitioners through present writ petition seek directions to the respondent nos. 1 and 3 who are not parties to the PSC to allow export of the Rajasthan Block Crude Oil in accordance with the relevant rules, regulations and policies. He also submitted that respondent nos. 1 and 3 cannot shirk their statutory functions and are bound to permit the petitioners to export the Rajasthan Block Crude Oil not lifted by the Government or its nominee PSUs. He also stated that the purpose of looking into the PSC is only to satisfy that equities are not violated or do not come in the way of granting legal reliefs to the petitioners.

29. He reiterated that in terms of Articles 18.1 of the PSC, petitioner nos. 1 and 3 are required to sell to the Government or its nominees their total share of the Rajasthan Block Crude Oil. According to him, on the Government failing to directly or through its nominees lift its share of the Rajasthan Block Crude Oil, Article 18.7 provides that Petitioner Nos. 1 and 3 shall be entitled to freely lift, sell and export any Crude Oil and Condensate which the Government has elected not to purchase.

30. Learned senior counsel for the petitioners contended that export of crude oil is neither prohibited nor restricted. He stated that in terms of the

Foreign Trade Policy read with the ITC (HS), there is no other regulation on the export of crude oil except canalization through respondent no. 3. He submitted that the respondents had failed to show any policy of the Government of India prohibiting the export of crude oil. He contended that the Foreign Trade Policy permits export of crude oil either through the STE, i.e. Respondent No. 3, or directly after seeking the requisite permission from respondent no. 1. Thus, according to him, petitioner nos. 1 and 3 have a vested right to export the Rajasthan Block Crude Oil through respondent no. 3, which is being arbitrarily fettered in the present case by the respondents.

31. Mr. Sundaram further contended that the Office Memorandum dated 3rd February, 2016 is not a policy. He submitted that the said Office Memorandum is merely an arbitrary and unilateral decision taken by respondent no. 2 which does not and cannot tantamount to a policy or an amendment to the Foreign Trade Policy of India or Chapter 27 of the ITC (HS). He emphasised that the government can make a new policy or amend an existing policy only in accordance with the procedure prescribed by law.

32. Mr. Sundaram stated that the alleged policy prohibiting export of Crude Oil had no nexus with the energy security of the country. He pointed out that the private domestic refineries to whom the Rajasthan Block Crude Oil is currently being sold are permitted to export, without restriction, the refined products and further, the end consumer does not directly buy or use the Rajasthan Block Crude Oil, which is only an intermediary product for the refined goods.

33. He further submitted that contrary to the Rules of Business the policy contained in the Office Memorandum dated 3rd February, 2016 had no concurrence of the Finance Department. He relied upon *Delhi International*

Airport Ltd. Vs. International Lease Finance Corporation & Ors., (2015) 8 SCC 446 wherein the Supreme Court has held that given the financial bearing of the decision, the same ought to have mandatorily been sanctioned by the Minister-in-charge in terms of Rule 3.

34. Learned senior counsel for the petitioners reiterated that by the impugned action, the petitioners are being forced to sell the Rajasthan Block Crude Oil at less than the international rates, which benefits only some private players. He submitted that this ran foul of the ratio of the Supreme Court in the case of ***Natural Resources Allocation, In Re, Special Reference No. 1 OF 2012, (2012) 10 SCC 1.***

35. Mr. Sundaram contended that there is no other way to discover the international price of the Rajasthan Block Crude Oil other than to export it. He stated that the private refineries which are permitted to export the refined products should not be permitted to purchase the Rajasthan Block Crude Oil at 20-25% discount from Brent Crude price inasmuch as Government also loses revenue.

36. Having heard the parties at length and having perused the paper book this Court is of the view that the present writ petition is maintainable as a writ court is empowered to entertain a writ petition even in contractual matters when the contract has been executed in pursuance to a constitutional provision and the issues involved are alleged to have a public law character. Also relief has been sought against respondents no.2 and 3, who are not parties to the PSC.

37. This Court is of the view that it is essential to analyse paragraph 2.20 and Chapter 27 of the Foreign Trade Policy 2015-2020. The said paragraph and Chapter are reproduced hereinbelow:-

“Import/Export Through State Trading Enterprise:

2.20 State Trading Enterprises (STEs)

(a) State Trading Enterprise (STEs) are governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import. Any good, import or export of which is governed through exclusive or special privilege granted to State Trading Enterprise (STE), may be imported or exported by the concerned STE as per conditions specified in ITC (HS). The list of STEs notified by DGFT is in Appendix 2J.

(b) Such STE (s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

(c) DGFT may, however, grant an authorisation to any other person to import or export any of the goods notified for exclusive trading through STEs.

xxxx

xxxx

xxxx

xxxx

Chapter 27

Mineral Fuels; Mineral Oils and Products of their Distillation; Bituminous Substances; Mineral waxes.

<i>S.No.</i>	<i>Tariff Item HS Code</i>	<i>Unit</i>	<i>Item Description</i>	<i>Export Policy</i>	<i>Nature of Restriction</i>
87	2709 00 00	Kg	Crude Oil	STE	Export through Indian Oil Corporation Limited
88	2710 19 10	Kg	(a) Kerosene	Free	Export allowed subject to obtaining NOC

89	2711 19 00	Kg	(b) Liquefied Petroleum Gas (LPG)	Free	from Ministry of Petroleum and Natural Gas Export allowed subject to obtaining NOC from Ministry of Petroleum and Natural Gas.
----	---------------	----	---	------	--

38. In the opinion of this Court, merely because the product 'crude oil' is mentioned as *STE* and *Export through Indian Oil Corporation Limited*, it does not create a legal vested right in anyone to export crude oil. The said paragraph and Chapter provide that if *STE* itself wants to export/import, it can do so and if 'any other person' intends to import/export, it will have to apply to *IOC*, who will consider the same in its wisdom and after consulting anyone it deems appropriate. The ultimate decision to permit export/import is always a decision to be taken by the *STE* which is, of course, justiciable. Consequently, in the present case, it is for the *IOC* to allow or refuse permission for export on germane grounds.

39. In any event, the Foreign Trade Policy is a broad policy document providing for regime of import/export of items and cannot be read as a statute for seeking a mandamus solely based upon it, if otherwise the decision of the *STE* Union of India is not arbitrary.

40. The other option to a party wanting to export crude oil is to apply under para 2.20(c) for an authorisation from *DGFT* and if so authorised, then to export it directly.

41. In the present case, the DGFT when approached by the petitioners in view of Clause 18 of PSC, sought a 'No Objection' from the Government of India, who in turn took a considered decision in the meeting of Empowered Committee of Secretaries dated 27th January, 2016 to reject the petitioners' request for export of crude oil. The said Committee consisting of the Law Secretary, Secretary, Petroleum and National Gas and Joint Secretary, Ministry of Finance opined as under:-

"1. As per the directions of Delhi High Court dated 19th January, 2016, the request of Cairn India Limited for export of crude oil from block RJ-ON-90/1 along with the orders of the Court dated 14th December, 2015 and 19th January, 2016 was placed before the Empowered Committee of Secretaries. The meeting of ECS was held on 27th January, 2016 at 11.30 AM in the chamber of Secretary (P&NG). List of participants in the meeting is enclosed.

2. The Committee was of the view that the energy security of the country is paramount for economic development and well being of the citizens of the country. All efforts would need to be made in this direction by the stakeholders so that the overall interest of the country in this regard is not compromised.

3. Contractual provisions of the Production Sharing Contract, earlier decisions of ECS, present status of crude evacuation from the block etc. were brought to the notice of ECS. ECS considered the request of the operator both from the macro perspective of country's economic interest and also from the contractual provisions of the Production Sharing Contract.

4. The contractual provisions clearly bring out that Self-Sufficiency of the country in petroleum products is of paramount importance as explicitly mentioned in the Article 18.1 of Production Sharing Contract. Subsequent Articles of PSC 18. and 18.7 are to be read along with Article 18.1. Under Article 18.1, until such time India attains self sufficiency, the Contractor is obligated to sell the crude oil to the Government or its nominee to assist in satisfying the national demand. The operator of the block, CIL, has admitted vide its letter dated 14th August, 2013 that the export of crude oil is not in line with

the PSC and has further mentioned in the said letter that it is only leasible to swap RJ-ON-90/1 crude with other crudes in international market, and provide them to Indian PSU refineries.

5. *The Government nominates the PSU refineries to buy the crude oil produced under various PSCs. In the instant case the crude oil produced by the Operator from the Contract Area has very high viscosity, not permitting free flow of the crude oil during transportation and processing. The quality of the crude oil is very different form the general nature of crude oil produced from other fields and it requires special technology to transport and refine the oil.*

6. *In view of this, the Government nominated PSU refineries had technical constraints to lift the crude oil from the Contract Area. In order to overcome the technical constraint, the Operator approached the Government to approve as part of the Contract Cost, a special purpose heated pipeline for transporting the crude oil from the Contract Area to Salaya at Gujarat coast. The proposal of the Operator was approved by the Government. The Operator laid the pipeline and recovered the cost of the pipeline as part of the Contract Costs.*

7. *The Operator again approached the Government to permit it to sell the oil to private refineries in India, as the PSU refineries with their technical constraints could not lift the entire crude oil. Government has also allowed sale of crude oil to private refineries in India of the quantity not lifted by the sale of crude oil to private refineries in India of the quantity not lifted by the PSU refineries. Accordingly, the Operator has been selling the entire crude oil produced from the Contract Area to either the PSUs or the private refineries.*

8. *As per Article 18.7 of PSC, read with Article 18.1 the Contractor is to sell the crude oil produced from the Contract Area awarded to them under the PSC, within the country when the country is not self sufficient and may export the crude oil only when the country becomes self sufficient. Article permits the Operator to freely sell (within the country) or export as the case may be, when the Government has elected not to purchase the crude oil. In the instant case, the Government has elected to allow the PSU refineries and Indian private refineries to purchase the crude oil. The Operator is*

entitled to export the crude oil only when the oil cannot be consumed by domestic refineries.

9. *The country is currently importing about 80% of crude oil requirement due to shortage in the indigenous production. Hence export of crude oil would not be in the national interest. If the Operator is allowed to export the crude oil in violation of Article 18.1, similar concession is required to be extended uniformly to all other Contractors, who may like to export the crude oil on some pretext or other. Permitting the export of indigenous crude oil and import of foreign crude oil will also increase the cost of energy in India due to the unwarranted transportation cost on import and export.*

10. *The crude oil pipeline costing about US \$ 1200 million was agreed by the Government to be made part of the Contract Cost to facilitate refining of crude oil within the country.*

11. *In view of the above, the Empowered Committee of Secretaries concluded that the request of CIL for export is a contractual as well as a policy issue, and till the time India becomes self-sufficient, crude oil produced domestically cannot be allowed to be exported as it would be detrimental to the energy security of the country and would also be violative of the provisions of the Production Sharing Contract. Therefore, the request of Cairn India Limited, in this regard, is rejected.*

*Sd/-
(Sh.P.K. Malhotra)
Law Secretary*

*Sd/-
(Sh. K.D. Tripathi)
Secetary (Petroleum
& Natural Gas)*

*Sd/-
Sh. Arunish Chawla
Joint Secretary (MoF)
for Finance Secretary*

(Member)

(Chairman)

(Member)"

42. In the opinion of this Court, the reasons given by the Empowered Committee of Secretaries are legal, germane and valid grounds to decline the request for export of crude oil. In fact, the policy prohibiting export of crude oil has concurrence of all the departments of the Union of India and has nexus with the energy security of the country. It is pertinent to mention that

the respondent-UOI's argument with regard to mismatch between indigenously produced oil and the energy demand within the country is not denied by the petitioners.

43. Even if Mr. Sundaram's argument is accepted that Sub-clause (c) to Clause 2.20 is an exception to sub-clause (a) and grants respondent no. 1 the power to authorize any person other than the designated STE to import or export any of the goods notified for exclusive trading through such STE, then also the issue that arises is whether STE is bound to export crude oil at any third party's request dehors the embargo contained in the contract executed between the third party and the government.

44. Articles 1.63, 18 and 27.1 of the PSC which deal with domestic supply, sale disposal and export of crude oil and condensate are reproduced hereinbelow:-

"ARTICLE 1 - DEFINITION

xxxx xxxx xxxx xxxx

1.63 "Self-sufficiency" means, in relation to any Year, that the volume of Crude Oil and Crude Oil equivalent of Petroleum products exported from India during that Year either equals or exceeds the volume of Crude Oil and Crude Oil equivalent of Petroleum products imported into India during the same Year.

xxxx xxxx xxxx xxxx

ARTICLE 18- DOMESTIC SUPPLY, SALE DISPOSAL AND EXPORT OF CRUDE OIL AND CONDENSATE

18.1 Until such time as India attains self-sufficiency, the Contractor shall be required to sell to the government or its nominee all of the Contractor's entitlement to Crude Oil and condensate in order to assist in satisfying the national demand.

18.2 Pursuant to Article 18.1 and subject to Article 18.4, the Contractor shall sell to the Government [or its nominee] its total

Participating Interest share of Crude Oil and Condensate to which it is entitled under Article 14 and 15 at the price determined in accordance with Article 19 for sales to Government and the Government shall purchase the whole thereof at the said price.

18.3 If, during any Year, India attains Self-sufficiency, the Government shall promptly thereafter, but in no event later than the end of the first Quarter of the following Year, so advise the Contractor by the written notice. In such event, as from the end of the following Year, or such earlier date as the Parties may mutually agree, Government's obligation to purchase shall be suspended and the Contractor shall have the right to lift and export its Participating Interest Share of Crude Oil and Condensate, subject to the Government's option to purchase by giving notice to the Contractor as provided in Article 18.4.

18.4 Following the service of notice under Article 18.3 that India has attained self-sufficiency, the Government shall have the option but not the obligation to purchase all the production in a particular year of crude oil and condensate from a Development Area representing the Contractor's Participating Interest share of Cost Oil and profit Oil. The Government shall indicate whether or not it intends to exercise its said option to purchase, in writing, not later than ninety days [90] prior to the commencement of the year in respect of which the sale is to be made. Failure by the Government to give such notice within the period specified shall be conclusively deemed an election to continue the election made in respect of the current year or if no election has been made, to take all of the crude oil and condensate produced in the ensuing year. The Government shall be obliged to take and pay for the crude oil and condensate in respect of which it has or is deemed to have elected to exercise its option to purchase.

18.5 All payments in respect of sales to the Government pursuant to provisions of this Article 18 shall be made by the Government within thirty (30) days of the date of submissions of an invoice. Each Party constituting the Contractor shall submit invoices on or after the first and fifteenth days of each Calendar Month (or at such other intervals as may be agreed with the Government) for deliveries made to the Government of Crude Oil or Condensate. In the case of sales by a Foreign Company, payments shall be made in United

States Dollars or at the request of the Foreign Company in any other convertible currency acceptable to the Government and the Foreign Company, by wire transfer to the credit of the Foreign Company's designated account with a bank within or outside India designated by the Foreign Company. All amounts unpaid by the Government by the due date shall, from the due date, bear interest calculated on a day to day basis at LIBOR plus two (2) percentage points from the date due until paid.

18.6 If full payment is not received by a Party constituting the Contractor when due as provided in Article 18.5, such Party may at any time thereafter, notify the Government of the default and unless such default is remedied within fifteen (15) days from the date of the said notice, the Contractor shall have the right, upon giving written notice to the Government:

a) to suspend the Government's right to lift Crude Oil and Condensate;

b) to freely lift, sell and export all its Participating Interest share of Crude Oil and Condensate subject to the destination restrictions specified in Article 18.7, until the Government has paid the due amount, together with any costs of transport of such Crude Oil and Condensate from the normal Delivery Point for sales to Government to the customer or the export facility, plus interest as provided herein; and

c) if the payment plus interest is not received by each Party constituting the Contractor within one hundred and eight (180) days from the date the said payment was due, to receive and sell (including sale for export) the Government's share of Profit Oil until such time as either the value of the Government's share of Profit Oil so sold by the Contractor determined by applying the price calculated in accordance with Article 19.3 is equal to all amounts due in accordance with Article 18.5 plus the transport costs as referred to in Article 18.6 b) of any Crude Oil and Condensate (whether forming part of the Government's or the Contractor's share) together with interest in accordance with Article 18.6, or the Government has paid all such amounts, whichever first occurs; provided, however, that if the Government makes a payment after the Contractor has commenced the sale of Government's share of Profit Oil and such payment together with the value of Government's share of Profit Oil sold, determined as aforesaid, exceeds all such amounts including interest, the necessary adjustment shall be carried out to refund to the Government forthwith the excess amount

received by the Contractor.

18.7 The Contractor shall be entitled to freely lift, sell and export any crude oil and condensate which the Government has elected not to purchase pursuant to this Article 18, subject to Government's generally applicable destination restrictions in respect of countries with which the Government, for policy reasons, has severed or restricted trade.

18.8 No later than sixty (60) days prior to the commencement of production from a Development Area, and thereafter no less than sixty (60) days before the commencement of each Year the Contractor shall cause to be prepared and submitted to the Parties a production forecast setting out the total quantities and grades of Crude Oil and Condensate that it estimates will be produced from each Reservoir within that Development Area during the succeeding Year, based on a maximum efficient rate of recovery in accordance with good petroleum industry practice. No later than thirty (30) days prior to the commencement of each Quarter, the Contractor shall advise its revised estimate of production for the succeeding Quarter.

18.9 Each Party constituting the Contractor shall, throughout the term of this Contract, have the right to separately take in kind and dispose of all its share of Cost Oil and Profit Oil and shall have the obligation to lift the said Cost Oil and Profit Oil on a current basis and in such quantities so as not to cause a restriction of production or inconvenience to the other Parties, and shall compensate the other Parties for any loss of production or additional flaring or any other losses caused by failure to do so, subject to Article 31.

18.10 The Government shall, throughout the term of this Contract, take in kind its share of Profit Oil and of such portion of the company's share of crude oil and condensate as is required to be purchased by the Government pursuant to Article 18 [notwithstanding any notice served pursuant to Article 18.6] and shall have the obligation to lift all of the same on a current basis and in such quantities so as not to cause a restriction of production or inconvenience to the other parties and shall compensate the other parties for any permanent loss of production or additional expenses caused by failure to do so, subject to Article 31.

18.11 For the purpose of implementing the provisions of Articles 18.8 and 18.10, a Crude Oil lifting procedure shall be agreed upon by the Parties no later than six (6) months prior to the commencement of the Commercial Production in a Development Area. Such lifting procedure shall include, but not necessarily be limited to:

- a) a procedure for notification by the Operator to the Government, and to each Party constituting the Contractor, of projected production of Crude Oil and Condensate;*
- b) a procedure for notification by the Government, and by each Party constituting the Contractor, to the Operator, of its expected of take and consequences of inability or failure to offtake.*

xxxx

xxxx

xxxx

xxxx

ARTICLE 27- TITLE TO PETROLEUM, DATA AND ASSETS

27.1 The Government is the sole owner of Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract except as regards that part of Crude Oil or Gas the title whereof has passed to the Contractor or any other person in accordance with the provisions of this Contract."

45. Keeping in view the aforesaid Articles, this Court is of the view that petitioners get the right to lift and export their Participating Interest share of Crude Oil and condensate only when a notice regarding attainment of self-sufficiency by India is given by Government to the petitioners and that too, subject to Government exercising an option under Article 18.4 to purchase the entire production in a particular year. Article 18.7 itself makes it explicit that it is only when the Government has elected not to purchase, the petitioners shall be entitled to freely lift, sell and export any Crude Oil and Condensate. Consequently, attaining self-sufficiency is a precursor to trigger

the right of the petitioners to seek permission to export their participating interest/share of crude oil and condensate.

46. Moreover, Articles 18.10 and 18.11 provide that if the Union of India fails to lift or does not exercise its option to lift the petitioners entire Participating Interest share of Crude Oil and condensate, the petitioners have a right to seek compensation. In the present case, in absence of any notice of India attaining self-sufficiency, the petitioners can only claim compensation under Article 18.10 read with 18.11 from the respondent no.2, under the dispute resolution mechanism provided under Article 33 of the PSC.

47. It is pertinent to mention that the petitioners vide letter dated 14th August, 2013 had itself requested the Government to permit swapping of crude oil in International market as it agreed and admitted the true position of interpretation of PSC as understood by the parties in the following terms:-

"With the commissioning of offshore loading terminal, we will be able to load aframax class vessels [600,000 bbls capacity] and effectively gain significant access to international market. Since export of crude oil is not in-line with the PSC, it is only feasible to swap RJ-ON-90/1 crude with other crudes in the international market, and provide them to Indian PSU refineries. This will facilitate optimal value realization of RJ-ON-90/1 crude while ensuring provision of domestic production equivalent volumes to domestic market."

(emphasis supplied)

48. The said request was considered, but eventually it were the petitioners and IOC who both intimated the Central Government that swapping arrangement is not feasible.

49. In fact, the scope of the PSCs (like the present one) entered by the UOI with private contractors (like Petitioners) has already been interpreted by the Supreme Court in the case of ***Reliance Natural Resources Limited vs.***

Reliance Industries Limited, (2010) 7 SCC 1 wherein the Supreme Court has unequivocally held that by application of the public trust doctrine and by applying the correct import of the word "Vest" appearing in Article 297 of the Constitution of India, the oil and gas produced by the contractors from any field existing within the territory of India, vests in the Government of India. The government exercises permanent sovereignty over such oil and gas, in fiduciary capacity for and on behalf of its citizens and cannot in any way, give away such permanent sovereignty. Consequently, it is incumbent on the Government to regulate the manner of sale of such oil and gas through allotment and allocation that would subserve the best interest of the country. This necessarily means that the said oil and gas has to be used for the benefit of the citizens of the country and has to be necessarily sold in the domestic market till India achieves self sufficiency.

50. This Court is also of the view that the Empowered Committee of Secretaries in its meeting dated 17th August, 2009, did not give the right to the petitioners to export crude oil. In fact, in the said meeting the petitioners, themselves, proposed to the respondents to approve the delivery point at the outlet flanges of the delivery facilities being established for sale to private refineries viz., Essar and Reliance. The relevant portion of Minutes of Meeting dated 17th August, 2009 of ECS is reproduced hereinbelow:-

"3.12 In addition to supply to PSU refineries, contractor has submitted a proposal to approve the delivery point at the outlet flange of the delivery facilities being established, for sale to private refineries, subject to approval of GoI for such sales. It has indicated that though Government is making efforts to offtake the maximum quantities by PSU refineries, the private sector refineries have agreed to offtake 60,000 bbls/day by each of the refineries viz. Essar and Reliance. The Salaya terminal

(AGI 33) on Mangala Development Pipeline is located at a distance of 4 km from refinery gate of Essar. A new Intermediate delivery station (AGI 32A) on Mangala Development Pipeline is proposed and is located about 10 Km from Reliance Tank farm. At Salaya, intermediate pigging station and heating facilities have been planned. It has been reported by the Operator that in case the Government approves sales to other than PSU Refineries, the cost estimates for creating delivery facilities would be in the range of US\$ 40 MM to 80 MM."

51. After a detailed discussion in which various options were discussed, the ECS only allowed the petitioners' request to sell the quantities over and above what had been allocated to Government nominees and PSU refineries, to any domestic private refinery. The relevant portion of the decision of the Empowered Committee dated 17th August, 2009 is reproduced hereinbelow:-

"6.5 After detailed deliberations, ECS recommended the following proposals for consideration and approval of Minister (P&NG):

(i) To ascertain from the private sector refineries on the additional quantity of crude that can be allocated to them based on technological upgradation undertaken by them and thereafter, to allow marketing freedom to the contractor under RJ-ON-90/1 PSC to sell the remaining quantities, over and above those allocated to the Government nominees; to other domestic private refineries by dispensing with the requirement of notifying the Contractor that India has attained self sufficiency, which is stipulated in Article 18.3 of PSC.

(ii) The freedom to sell to private refineries shall be subject to the condition that the net-back crude price realized by the contractor shall be as per the PSC and shall not be less than the international price for the benchmarked crude price determined under the PSC, which will be used for all calculations under the PSC such as cost petroleum, profit petroleum, royalty etc.,

(iii) Any consequential change, which may arise in the implementation of the ECS decision, will be made by the administrative Ministry.”

52. Consequently, in the aforesaid Minutes of Meeting no permission to grant export of crude oil was granted to the petitioners. Even if it is assumed that the requirement of India having attained self-sufficiency was dispensed with, it was on the condition that unutilised crude oil would be sold to domestic private refineries. No particular domestic refinery was named. A further condition that crude oil would be sold at International price was also imposed. If petitioners are being forced to sell at a price lower than the International price, it is free to invoke the dispute resolution mechanism in the contract.

53. In fact, the petitioners' argument of loss to the exchequer is presumptuous and a disputed question of fact as according to the respondent-UOI the crude generated by the petitioners is Dated Brent and not Bonny Light. This is all the more relevant as it is an admitted position that the crude oil generated by the petitioners is of very heavy quality, high viscosity and wax with high pour point and residues. Even the petitioners during arguments admitted that the only way to ascertain the international price is to allow export of the crude generated. Consequently, it cannot be said with certainty today that the petitioners and UOI are suffering a loss on account of non-export of crude oil.

54. The allegation that the respondents have denied permission to the petitioners to export crude oil only to benefit Reliance and Essar cannot be examined behind their back. Despite this fact being pointed out during the hearing, the petitioners did not implead Reliance and Essar to the present

writ petition.

55. Keeping in view the aforesaid conclusions, present writ petition and application being bereft of merits are dismissed with liberty to invoke the dispute resolution mechanism in the contract, but with no order as to costs.

MANMOHAN, J

OCTOBER 18, 2016

js/rn

