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

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Date of decision: 05.09.2017

+ O.M.P. (COMM) 332/2017

NITIN FIRE PROTECTION INDUSTRIES LIMITED..... Petitioner
Through Mr.Shikhil Suri, Mr.Shiv Kumar Suri
and Ms.Shilpa Saini, Advs.

versus

GAIL (INDIA) LIMITED Respondent
Through Mr.Ajit Pudussery and
Mr.A.S.Verma, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

IA No.10145/2017

Allowed subject to all just exceptions.

Application stands disposed of.

IA No.10143/2017 (delay in re-filing)

For the reasons stated in the application, the delay of 25 days in re-filing the present petition is condoned.

Application is allowed.

O.M.P. (COMM) 332/2017 & IA No.10144/2017 (Stay)

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "The Act") seeking to impugn the Award dated 12.4.2017 passed by the learned Sole Arbitrator.
2. Some of the brief facts are that the petitioner, the respondent and five other entities, namely, Gujarat State Petroleum Corporation Ltd. (GSPCL), Hindustan Petroleum Corporation Ltd. (HPCL), Bharat Petroleum

Corporation Limited (BPCL), Hallworthy Shipping Ltd. (HSL), SA and Silverwave Energy Pte. Ltd. (SEPL) entered into a joint venture with a view to pool their financial and technical capabilities to explore, develop, market etc petroleum products. This joint venture entered into a Production Sharing Contract (PSC) dated 2.3.2007 with the President of India for production and sharing the outcome of a contract area for oil and gas in the proportion as delineated in the '*Participating Interest*' of the PSC Agreement. Upon execution of the said PSC, the said entities were granted a license to carry out, amongst other things, exploratory activities at the site. It is further pointed out that the contractor under Article 1.27 of PSC i.e. the group of companies would perform its functions through an "Operator" who was defined under Article 7.1 of PSC. Under Article 5.6 of PSC in the event the Contractor failed to complete the Mandatory Work Programme or Minimum Work Programme or both, at the end of the relevant exploration phase or early termination the constituent companies were required to pay to the Government equivalent to the participating interest, to complete the Mandatory Work Programme or Minimum Work Programme or both.

3. Pursuant to the aforesaid PSC Agreement the aforesaid entities had also entered into a Joint Operating Agreement (hereinafter referred to as JOA) on 31.10.2007 with a view to pool their respective financial and technical capabilities for the purpose of exploring the site for oil and natural gas and in case of successful exploration, developing the area and producing, transporting etc. all the produce in terms of the allotted share in terms of the PSC Agreement. It was also pointed out that under Article 5 of the JOA an Operating Committee was set up which consisted of

representatives of each of the parties to the JOA. The Operating Committee was responsible for overall supervision of the joint operations. The petitioner was a member of this Operating Committee. As per Article 7.1 of the JOA, all costs and expenses incurred by the Operator on behalf of the parties in carrying out joint operations were to be borne and paid by the parties in proportion to their participating interest. For the said purpose from time to time Cash Calls were made by the Operator. In the eventuality of a default by any party to the JOA in paying its proportionate share of the Cash Calls, action was to be taken in terms of various provisions of the JOA. It was the case of the respondent that the petitioner had defaulted to pay cash calls. The petitioner claims that it entered into the Agreement purely as an investor.

4. Subsequently, Silver Wave Energy Pvt.Ltd. left the Joint Venture and its 10% participating interest was distributed among the other JV Partners. The petitioner's participating interest now became 11.11%. Disputes having arisen between the parties the respondent on 21.1.2014 invoked the arbitration clause. The respondent also filed Arbitration Petition 384/2014 before this court for appointment of an Arbitrator to adjudicate the disputes. With the consent of the parties on 5.2.2015 this court appointed Justice S.N.Dhingra (Retd.) as a Sole Arbitrator. In the meantime, on 31.10.2014 the Government is said to have terminated the PSC Agreement w.e.f. 6.5.2013.

5. Before the learned Arbitrator the respondent has sought to recover a sum of Rs.2,54,48,919/- on account of amount payable by the petitioner due to unpaid Cash Calls till February 2015 plus interest. During pendency of the arbitration proceedings the respondent moved an application to amend

the claim to add a sum of Rs.12,17,655/- for outstanding expenses falling to the share of the petitioner for expenditure incurred from July 2015 to December 2016. The application was allowed and the total amount claimed was increased to Rs.2,80,75,628/- plus interest. The petitioner denied the liability to pay relying upon Article 7.6 and 7.7 of the JOA. It also made a counter-claim for refund of Rs.2,24,48,986/-, Rs.24,46,51,891/- and for Rs.75 crores towards loss of profit.

6. Following issues were framed by the learned Arbitrator:-

- “1. Whether no dispute had arisen between the parties in terms of JOA for arbitration?
2. Whether the claimant was entitled to a sum of Rs.2,54,48,919/- from the Respondent as outstanding amount of cash calls made in terms of Joint Operating Agreement (JOA) where under the respondent was having 11.11% share?
3. Whether the claimant was entitled to interest amount of Rs.14,09,054/- as per the rate contained in the agreement between parties for a period of default up to date of claim?
4. Whether the claimant was entitled to interest from date of claim till the date of Award and for Post Award Period. If so, at what rate?
5. Whether the Claimant failed to follow the mechanism as provided in clause 7.6 of JOA?
6. Whether the non-defaulting parties were obliged to pay to the operators (claimant and GSPC) the amount of cash calls not paid by respondent?
7. Whether the payment made by claimant in compliance of obligation of Respondent under JOA in respect of call numbers 27, 28 and 29 discharged the Respondent of its liability to make the payment against above cash calls?
8. Whether the delay in filing claim by the Claimant before Delhi International Arbitration Centre should result in rejection of the claim?

9. Whether there was failure on the part of claimant in obtaining timely approvals from Ministry of Petroleum and Natural Gas and a failure in furnishing requisite information to the Respondent. If so, the consequences thereof?
10. Whether the Claimant (GAIL) committed breach of Joint Operating Agreement (JOA) dated 31.10.2007 and if so, of what provisions and to what extent?
11. Whether there was a wilful misconduct and gross negligence of GAIL, in performing its obligation under JOA resulting into infructuous payment/loss of INR 2,24,48,996/- (Rs.two crore twenty four lakh forty eight thousand and nine hundred ninety six only)?
- 12.If the above issue is proved in favour of the Respondent, whether GAIL, was liable to pay an amount of IN 2,24,48,996/- to the Respondent?
13. Whether the Respondent was entitled to claim INR 24,46,51,891/- being the amount already paid by Respondent because of breach of JOA by the claimant (GAIL)?
14. Whether the respondent was entitled to a sum of INR 75,00,00,000/- towards loss of profit?
15. Whether the Respondent was entitled to interest@ 18% on INR 2,24,48,986/and INR 24,46,51,891/-?
16. Whether the counter claim made by the Respondent was barred by limitation?
17. Whether the counter claims were liable to be rejected on account of waiver and estoppels on account of Respondent's conduct and behaviour?
18. Relief.”

7. On issues No.1,5,6,7 and 9 the learned Arbitrator noted the plea of the petitioner that under Article 7.6 of the JOA the petitioner is not liable for demanded_cash calls. The learned Arbitrator also noted the plea of the petitioner that under Article 7.7 on continuation of default in payment of the cash call by a particular party the interest of the defaulting party shall be forfeited in favour of the non- defaulting parties. The plea of the petitioner

that in view of the said clause the petitioner is absolved of its liability to pay the defaulted call money was rejected.

On issues No.10 and 11 the learned Arbitrator rejected the plea of the petitioner that there was any negligence or misconduct on the part of the respondent. Accordingly, issue No.12 was also decided against the petitioner. Regarding issue No.13 where the petitioner sought refund of Rs.24,46,51,891/- paid to Government of India for Joint Operations as being part of the consortium on the ground that the respondent committed breach, the plea was rejected noting that there was no communication from the Government terminating the contract on account of any default or gross negligence on the part of the Operator. The termination took place on account of completion of Phase-I inasmuch as under the PSC Agreement if no commercial discovery was made in the contract area by the end of the exploration period, the contract was to be terminated. On issue No.14 regarding the claim of the petitioner for loss of profit the same was rejected. On issues No.2, 3 and 4 noting that the share of the petitioner is not in dispute being 11.11%, there was no dispute raised regarding the quantum of expenditure and the resultant share of the petitioner. Accordingly, an Award was passed in favour of the respondent for a sum of Rs.2,66,66,574/- plus interest of Rs.14,09,054/-. LIBOR rate plus 2% interest on the amount of Rs.2,80,75,628/- from January 2016 till passing of the Award was also passed. If the amount was not paid within 30 days the petitioner was also liable to pay interest from the date of the Award till realisation of the Award. Costs were also awarded to the respondent.

8. I have heard learned counsel for the parties. Learned counsel for the petitioner has vehemently argued as follows to support his plea that the award is liable to be set aside:-

(i) It is submitted that under the PSC, the respondent had no authority to file the present proceedings on behalf of the other participants. Hence, the entire proceedings having been initiated by the respondent claiming himself to be the operator and being authorised to initiate the proceedings is liable to be set aside.

(ii) Reliance is placed on Article 7.6 and 7.7 to contend that in view of these clauses, on default by the petitioner, he forfeited his proportionate interest in the PSC Agreement of the JOA. The other participants got his share in the contract and hence became liable to pay the defaulted dues of the petitioner and hence the petitioner was absolved of his liability. He submits that the learned Arbitrator has grossly erred in passing of Award on unpaid Cash Calls in favour of the respondent.

(iii) He further submits that the principal amount claimed is incorrect as there were certain payments for a sum of Rs.58,48,919/- which were paid by the petitioner which has not been reflected in the accounts of the respondent.

(iv) It has been urged that the learned Arbitrator has wrongly absolved the respondent of all obligations. The fact is that there has been untold delay in completion of the contract. It is urged that none of the participating companies had agreed to drilling of remaining two wells and had agreed to relinquish the same obviating the need to seek extension. Further extension was sought and the government imposed penalty/liquidated damages and the petitioner had to pay Rs.25,90,577/- and Rs.47,14,988/-.

9. I may now deal with the submissions of learned counsel for the petitioner.

10. The first plea that is raised by learned counsel for the petitioner is regarding the authority of the respondent to file a claim petition before the learned Arbitrator. It is the case of the petitioner that the respondent had no authority to file the present proceedings on behalf of other participants/members of the operating committee.

11. A perusal of the issues framed by the learned Arbitrator would show that no such issue has been framed by the learned Arbitrator.

12. Further, a perusal of the reply filed by the petitioner to the claim petition that was filed by the respondent would show that no such plea has also been raised by the petitioner before the learned Arbitrator. Petitioner has chosen to raise this plea for the first time before this Court which is clearly not permissible.

13. For a moment, I may ignore the above aspect. A perusal of the JOA shows that the articles of the said Agreement clearly vest the operator with the power to take all necessary steps for appropriate functioning of the JV. Recovery of dues from a defaulting participant would certainly be included in the powers of the operator. Clause 4.6.05 of JOA specifically authorises the operator to represent parties before the court. In any case, it may be noted that none of the other constituents of the JOA have raised any objection regarding the rights of the operator/respondent to initiate the present proceedings on their behalf. The plea raised by the petitioner is hence even otherwise absolutely without merits.

14. I will now deal with the next submission of the learned counsel for the petitioner, namely, that the petitioner was not liable to pay the defaulted call dues. Reference may be had to some of the clauses of the JOA.

15. Article 7.6 and 7.7 of the JOA Agreement reads as follows:-

“7.6 Default

7.6.1 If any Party (hereinafter called the "Defaulting Party") fails to pay in part or full its share of any Cash Call by the date of payment thereof as provided in the Accounting Procedure (the Due Date):

- a) The Operator shall notify all Parties of such default no later than the fifth (5th) Business Day from the Due Date.
- b) The Parties with a Participating Interest other than the Defaulting Party (hereinafter called the "Non-Defaulting Parties") shall contribute, as hereinafter provided, to the amount in default.
- c) If the Defaulting Party fails to remedy its default within ten (10) days of the Due Date, the Operator shall notify the Non-Defaulting Parties of the amount in default and shall make further Cash Call to each of the Non-Defaulting Parties with a copy to the Defaulting Party, based on the proportions that such Non-Defaulting Party's Participating Interest bears to the total of the Participating Interest of the Non-Defaulting Parties .
- d) Unless the Operator notifies the Non-Defaulting Parties that such default has been remedied, each of the Non Defaulting Parties shall pay the amount specified in the Cash Call issued pursuant to (c) above not later than twenty (20) days from date of receipt of such notice, and shall continue to pay, in addition to its share of the subsequent Cash Call, the same proportions of that part

of all subsequent Cash Calls attributable to the Defaulting party until such time as the Defaulting Party has remedied its default as hereinafter provided.

- e) The Operator shall promptly notify the Parties whenever a default has been remedied.

7.6.2 The Defaulting Party shall have the right to remedy its default up to the time of transfer of its Participating Interest under Article 7. 7 by payment of the amount due together with interest thereon calculated at the LIBOR rate on the Due Date plus two percent (2%) per annum from and including the Due Date for the Calendar month in which the Due Date falls and thereafter at the LIBOR rate ruling on the first day of each subsequent Calendar month plus two percent (2%), such interest being compounded on a Calendar Monthly basis throughout the period of the default. All interest received by the Operator shall be paid to the Non-Defaulting Parties as well as any funds advanced in respect of the amount in default refunded.

7.7 Continuation of Default

7. 7.1 After any default has continued for thirty (30) Business Days from the date of written notice of Default under Article 7.6 and for as long thereafter as the Defaulting Party remains in default on any payment due under this Agreement, the Defaulting Party shall not be entitled to vote on any matter coming before the Operating Committee during the period such default continues. Unless agreed otherwise by the Non Defaulting Parties, the Voting interest of the Defaulting party shall be divided amongst the Non-Defaulting Parties in the proportion, of the Participation Interest for the duration of the period of default. Any matter requiring unanimous vote of the Parties shall be deemed to exclude the Defaulting Party. Notwithstanding the foregoing, the Defaulting Party shall be deemed to have approved, and shall join with the Non

Defaulting Parties in taking any action to maintain and preserve the Contract.

7.7.2 In the event that the default continues for more than ninety (90) days (the "Default Period ") and the Defaulting Party does not pay the amount in default plus accrued interest by the end of such time, a proportion of the Participating Interest of such Defaulting Party shall at the sole election of the Non-Defaulting Parties be forfeited to the Non- Defaulting Parties, to reflect the ratio that the Participating Interest of the Defaulting Party bears to the cumulative contribution made by the Defaulting Party to the cumulative contribution made plus amount in default of the Defaulting Party:

Following such forfeiture the reduced Participating Interest of the Defaulting Party shall be in accordance of the following formula, except that in the case of a default on the first Cash Call made on a Party, ten percent (10%) of the Participating Interest of the Defaulting Party shall stand forfeited:-

A = $[B/(B+C)] \times D$ where:

A = the reduced Participating Interest of the Defaulting Party.

B = the total contributions to the Joint Operations costs of the Defaulting Party up to but not including the amount in default.

C = the amount in default

D = Participating Interest of the Defaulting Party.

Such forfeiture shall not restore the Defaulting Party's powers and rights forfeited under Article 7.7.1 until such

Defaulting Party has paid the first Cash Call following the date of such forfeiture. If the Defaulting Party forfeits fifty percent (50%) or more of its Participating Interest at the Due Date (fifty percent times Participating Interest) to the Non—Defaulting Parties under this Article, such Defaulting Party shall, at the election of the willing Parties, forfeit all of its Participating Interest to such Non-Defaulting parties who shall assume such forfeited Participating Interest, including the obligations related thereto, in proportion to their Participating Interests or in such other proportion as unanimously agreed by them. The Defaulting Party shall execute such documents as are necessary to transfer its Participating Interest at its sole cost.

7.7.3 Notwithstanding the provisions of Article 7.7.2, in the event that as a result of a forfeiture by the Defaulting Party of a part of its Participating Interest pursuant to the provisions of Article 7.7.2, the remaining Participating Interest of the Defaulting Party falls below ten percent (10%) or as permitted under the Contract, the Non-Defaulting Parties shall assume such Participating Interest of the Defaulting Party in proportion to their Participating Interest or in such other proportion as unanimously agreed by them, subject to the approval of Management Committee/Government.

7.7.4(i) The Defaulting Party shall be deemed to have surrendered its Participating Interest in the Contract and each of the Non-Defaulting Parties shall have the right to request the transfer to it and to acquire, with effect from the date of default, subject to any necessary consent of the Government, as beneficial owner and free of any liens, charges and encumbrances, the Participating Interest of the Defaulting Party.

(ii) The Defaulting Party shall promptly join in such actions as may be required to obtain any necessary consent of the

Government and shall do such acts and execute such documents as may be necessary to transfer its Participating Interest in the Contract to the other Parties in the proportions agreed and all rights, title and interest derived there from in and under this Agreement, and in any Petroleum produced and Joint Property. All costs and expenses relating to such transfer shall be for the sole account of the Defaulting Party.

(iii) Each Party hereby irrevocably appoints the Operator (and any successor Operator) to act, in the event of default by such Party in the circumstances described in that clause, as its lawful attorney to do such acts and execute such documents as may be necessary to transfer all of its interest in accordance with the provisions thereof.”

16. The effect of the aforesaid clauses of the JOA is that in case any party fails to pay its share of any cash call by the date of payment, and the default continues as stated therein, the defaulting party shall not be entitled to vote on any matter coming up before the operating committee. The voting interest of the defaulting party shall be divided amongst non-defaulting parties in proportion. In the eventuality the default continues for more than the stated 90 days, a proportion of the participating interest of such defaulting party shall at the sole election of the non-defaulting parties be forfeited to the non-defaulting parties.

17. It is the contention of the petitioner that under Clause 7.7.2 of the above Agreement in the event the default continues of the defaulting party beyond 90 days the proportion of the participating interest of such defaulting party shall be forfeited to the non-defaulting parties. Reliance is also placed on clause 7.7.4 which provides that a defaulting party shall be deemed to have surrendered its participating interest in the contract and

each of the non-defaulting parties shall have the right to request to transfer to it and to acquire the same.

18. Based on the above two clauses of the agreement it is argued that as a result of such forfeiture of the participating interest of the petitioner the petitioner ceased to be liable for the dues of the Cash Calls.

19. The learned Arbitrator has rejected the said interpretation of the agreement by the petitioner and noted as follows:-

“32. The JOA did provide a mechanism to ensure that the work of exploration does not suffer because of non-providing funds by one of the parties. But that mechanism cannot be used as a defence by the defaulting party for non payment of its share. If that is permitted, then in all such contracts on the basis of initial results, the parties would stop paying cash calls and the entire burden of continuing the operations would come on the operator and ultimately, these defaulting parties may take a stand in case of non-recovery of oil that they were not liable to pay and in case of recovery of oil, they may come forward and pay the amount with interest as provided and reap the benefits. The contract did not envisage this. Article 7.6.5 makes it abundantly clear that liability of defaulting party does not get discharged on payment of its cash call share by other parties.....”

20. It is quite clear that the interpretation which is sought to be made by the petitioner of the stated terms of the JOA is entirely baseless. If such an interpretation was accepted, it would tantamount to rewarding a party guilty of default. The interpretation urged by the petitioner would lead to absurd results. The moment it becomes apparent that no oil or gas is going to be discovered, the participants can default on the call money leaving only the

operator to fund for the entire operation. The Award rightly relies upon clause 7.6.5 to hold that a defaulting party remains liable and obligated for its participating interest especially for costs and obligations. The said clause 7.6.5 reads as follows:-

“7.6.5 The Defaulting Party shall remain liable and obligated for its Participating Interest share of all costs and obligations that any way relate to any abandonment of Petroleum Operations. Any sums paid in respect of such abandonment, by the Non Defaulting Parties on behalf of the Defaulting Party (together with interest thereon pursuant to Clause 7.6.2) shall remain a debt due and owing by the Defaulting party. ”

21. Hence, the learned Arbitrator has interpreted the clauses of the JOA to hold that the petitioner was liable to pay the defaulted cash calls and could not wriggle out of its liability in the manner sought.

22. The petitioner is essentially trying to challenge the interpretation of the JOA made by the learned Arbitrator. The interpretation of the learned Arbitrator of the said clauses of the JOA are a plausible interpretation and cannot said to be in any manner illegal or suffering from any illegality. It is settled legal position that interpretation of a contract is within the domain of an Arbitrator. The court shall not ordinarily substitute its interpretation of the terms of the contract with the interpretation of the arbitrator. Reference may be had to the judgment of the Supreme Court in the case of ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739***. The court held as follows:

“19. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act,

1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

23. Similarly, the Supreme Court in *National Highways Authority of India vs. ITD. Cementation India Limited*, (2015) 14 SCC 21/(MANU /SC/0490/2015), held as follows:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

24. Accordingly, there is clearly no merit in the said plea of the petitioner.

25. Regarding the third contention of the petitioner, namely, that a credit of Rs.58,48,919/- has not been made by the respondent in the Statement of Account, it is admitted that no such plea was raised before the learned Arbitrator. It is, at this stage, not possible to raise the said plea. In fact a perusal of the record would show that the learned Arbitrator has recorded that there was no dispute raised that the participating share of the petitioner

was 11.11%. The documents that have been filed by the parties also showed that there was no dispute regarding the amount spent on exploration of the oil field and that the amount payable by the petitioner was not in dispute and that there has been no challenge to the quantum of expenditure. Accordingly, there is no merit in the said plea of the petitioner.

26. The last plea raised by the petitioner pertained to the claim that there has been needless delay on the part of the operator in seeking extension of time from the Government for completion of Minimum Work Programme. Hence, it is pleaded that the respondent is liable for the same on account of which certain damages have been imposed by the government.

27. A perusal of the Award would show that the learned Arbitrator has noted that under Article 4.9.1 of the JOA any loss of damages suffered in connection with the conduct of the operations except in the case of gross negligence or wilful conduct will not render any liability on the operator. The Award notes that the only negligence alleged on behalf of the operator was seeking extension of time from the government for completion of Minimum Work Programme in respect of Phase-I of the Programme. It notes that the extension of time was obtained by the operator with the consent of the operating committee of which the respondent was a member. It is also noted that this issue has been raised for the first time in arbitration proceedings. At the earlier stages no objection was taken by the petitioner. Hence, the plea was rejected. This is a finding of fact recorded by the learned Arbitrator which is binding. The petitioner has not been able to show how this finding of fact is untenable or illegal. It is settled legal position that findings of fact recorded by the learned Arbitrator have finality.

28. There is no merit in the present petition. The same is dismissed. All pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

SEPTEMBER 05, 2017/n

