

\$~23

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

+ **O.M.P. (COMM) 457/2017**

Date of decision: 20th December, 2017

UNION OF INDIA

..... Petitioner
Through Mr.Vivek Kohli, Ms.Pruna
Kohli, Ms.Neha Rajpal and
Ms.Pankhuri, Advs.

versus

HINDUSTAN OIL EXPLORATION COMPANY LIMITED

..... Respondent
Through Mr.Tejas Karia, Ms,Ila Kapoor,
Ms.Ananya Aggarwal and
Ms.Ritika Sinha, Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

CAV.1101/2017

As learned counsel for the respondent has appeared on advance notice, the caveat stands discharged.

IA No.15327/2017 (Exemption)

Allowed, subject to all just exceptions

O.M.P. (COMM) 457/2017

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 21.08.2017 to the limited extent whereby it is held that the demand by Ministry of Petroleum and Natural Gases (hereinafter referred to as the 'petitioner') for liquidated damages of USD 893,791 vide its letter dated 10.09.2012 was not in accordance with the Clause A.1.(b) of New Extension Policy-2006 and directing the petitioner to refund Rs.4,48,67,345.27 i.e USD842,619 to the respondent along with interest @ 12% p.a. from 15.02.2013 till the date of the Award and future interest @ 12% from the date of the Award till the date of payment.

2. The dispute between the parties arises out of the grant of Product Sharing Contract (hereinafter referred to as "PSC") to the respondent on 08.01.2001. The licence was valid for a period of seven years from 16.03.2001, the "Effective Date". The Exploration Period consisted of three Exploration Phases, each phase not exceeding three years for a period not exceeding seven consecutive contract years, unless extended pursuant to the terms of the contract. The first exploration phase was not to exceed three consecutive contract years and the second and third phase could not exceed two consecutive contract years from the end of the earlier Exploration Phase. The Minimum Work Programme (MWP) was required to be completed during each Exploration Phase, as specified in the Production Sharing Contract (PSC).

3. The respondent completed the MWP for the first Exploration Phase by 15.03.2004. The second Exploration Phase commenced on 16.03.2004 and its term was to expire on 15.03.2006. The respondent sought extension of time for completion of the said Exploration Phase under Article 3.6 of the PSC. The petitioner, in terms of the PSC, approved the said proposal for grant of six months period in Phase II commencing from 16.03.2006 to 15.09.2006 to complete the MWP.

4. On 18.04.2006, the petitioner issued a policy known as “New Extension Policy” (NEP) for grant of extension in Exploration Phase. This extension policy made a provision for grant of additional extension above and beyond the one and only 6 months' extension that could be granted under the PSC subject to the contractor furnishing additional bank guarantee and also depositing certain amount as cash payment towards “pre-estimated liquidated damages” for unfinished MWP. The relevant Clauses of the policy are quoted herein below:-

a) First 6 months extension may be granted by MC or the Government in terms of the provisions of respective PSCs) maintaining the same terms and conditions of the PSCs

b) An additional up to 6 months extension (that is between 6 - up to 12 months) may be granted on the following terms and conditions:

- The Contractor will provide 100% bank guarantee and 10% cash payment as agreed pre-estimated liquidated damages for the unfinished minimum work programme as reasonably determined by DGH, keeping*

in view the relevant factors in computing cost of such unfinished minimum work programme;

- *The Contractor would be required to relinquish the area in terms of the provisions of the PSC at the beginning of this extension period.*
- *This period of extension will be set off from the next exploration phase*

c) Any extension beyond 12 months and up to 18 months may be considered subject to the following:

- *The Contractor would be required to relinquish the area as applicable at the end of relevant phase.*
- *The Contractor would be required to give 100% bank guarantee for unfinished minimum work programme and deposit a cash payment as agreed pre-estimated liquidated damages of 30% of the unfinished minimum work programme as reasonably determined by DGH, keeping in view the relevant factors in computing cost of such unfinished minimum work programme. This period of extension will be set off from the next exploration phase.”*

5. The respondent vide its letter dated 10.09.2006 sought extension of time to complete the MWP under Phase II by one month from 16.09.2006 to 15.10.2006.

6. The Director General of Hydrocarbons vide its letter dated 12.09.2006 pointed out that any extension beyond the provisions of PSC is to be dealt as per NEP laid down by the Government and called upon the respondent to submit 100% bank guarantee for unfinished work, deposit liquidated damages of 10% as agreed in the pre-estimated budget for unfinished work programme, relinquish the area

in terms of PSC provisions and that the period of extension would be set off from the next Exploration Phase. In the said letter it was also stated that as per the Revised Estimate (R.E.) 2007, cost of one exploratory well is US\$ 14,245,000 and US\$ 3,43,8000 for testing of well and that amount of liquidated damage comes as US\$ 1,425,500.

7. The respondent vide its letter dated 13.09.2006 represented to the petitioner that by the close of 15.09.2006 it would have drilled the well to the depth of 825 meters, thereby leaving unfinished MWP of 475 meters. The respondent further represented that for this unfinished MWP, it is likely to take seven additional days from 15.09.2006 and incur expenditure of USD 1.194 million at day spread of US\$ 170,573. It also attached with letter basis of its calculation of the above amount.

8. The petitioner vide its letter dated 14.09.2006 called upon the respondent, confirming acceptance of condition of submitting 10% pre-estimated liquidated damage amounting USD 119,401. In the letter it further stated as under:

“We are examining the details of cost submitted by you with respect to the R.E. 2006-07. At present we do not have any documentary evidence of the cost estimate on account of actual cost incurred: However, at present we agree with the details for calculation of LD on unfinished job. As per the calculation, the estimated cost to be incurred to reach 1300 mtr. Committed well depth comes to be US\$1,194,011

Please confirm acceptance of condition of submitting 10% pre-estimated liquidated damage amounting US\$ 119,401 IMMEDIATELY. Otherwise, block stands relinquished on 16.9.2006 and any activity thereafter will be violation of PSC. You may deposit demand draft of US\$ 119,401 in favour of Pay & Accounts Officer, MOP&NG, payable at New Delhi. Further this cost of unfinished work programme has been accepted taking your submission that HOEC will be able to drill 825mtrs. By 15.9.2006. In case it is not achieved, pre estimated LD will be changed accordingly.

Please convey your acceptance immediately so that your request for extension of one month can be processed.

9. The respondent under cover of its letter dated 15.09.2006, while pleading force majeure condition, deposited the above demanded liquidated damages with the petitioner albeit under protest.

10. The respondent thereafter, vide its letter dated 12.10.2006 conveyed its final decision to grant an extension of Phase II by one month i.e. from 16.09.2006 to 15.10.2006. This letter is of some importance and is quoted herein below:

“This refers to the application of M/S Hindustan Oil Exploration Ltd for 2nd extension of phase-II by one month (16.9.2006 to 15.10.2006).

In accordance with new extension policy issued by Government of India, extension of one-month in phase-

II period (i.e. from 16.9.2006 to 15.10.2006) in the block CY-OSN-97/1 is granted subject to fulfillment of the following conditions, if not fulfilled earlier.

- Submission of Pre estimated Liquidated damage for an amount equal to 10% of the unfinished work programme amounting to USD 119,401 only.
- Submission of 100% BG for unfinished work programme amounting to USD 1,194,011 only.
- Relinquishment of requisite area at the start of 2nd extension period.
- Period of extension will be set off from the remaining period of phase III.

This issues with the approval of competent authority.”

11. A reading of the above letter would show that “pre-estimated liquidated damages” had been quantified by the Petitioner on basis of the estimated cost, without reserving any right to the sense the same on basis of actual cost at a later date.

12. The petitioner, finally vide its letter dated 10.09.2012 levied the liquidated damages of USD 1,013,192 on the respondent and called upon it to pay the balance, after taking into account the earlier deposited liquidated damages.

13. Learned counsel for the petitioner submits that Arbitral Tribunal in the impugned Award has erred in interpretation of the New Extension Policy by holding that the expression in “agreed pre-estimated liquidated damages for the unfinished Minimum Work Programme to mean” a fixed proportion of agreed pre-estimated cost of unfinished MWP. He submits that the word “pre-estimated” does

not relate to the “pre-estimated liquidated cost” but to the “10%” which is agreed as a pre-estimated liquidated damages. He further submits that the interpretation adopted by the Arbitral Tribunal would leave huge amount of discretion in the hands of the petitioner, whereas the course adopted by the petitioner, which is to determine such liquidated damages on the basis of actual cost derived from the audited accounts of the respondent, would leave no scope of discretion and would be more transparent and non discriminatory. Relying upon the judgment of Supreme Court in ***Board of Control for Cricket in India v. Cricket Association of Bihar and Ors.***, (2015) 3 SCC 251, he submits that “public policy of India” would include an interpretation given to the New Extension Policy that would be just, fair and is guided by equity and objectivity, rather than vesting un-bridled power with the contractual party, in this case, the petitioner itself.

14. I am unable to accept the arguments of learned counsel for the petitioner. Arbitral Tribunal, after quoting the relevant provision of the New Extension Policy, has held as under:

“The expression 'Liquidated Damages' used in Clause A.1 (b) and (c) of NEP does not have the same connotation as this expression has in the context of damages under Section-74 of the law of Contract. Under the law of Contract at the stage of formation of contract the parties may agree to a sum to be paid in case of breach of Contract and while assessing compensation in case of breach of contract the Court would award only reasonable compensation not exceeding the amount stipulated. Such compensation

has to be ascertained having regard to the conditions existing on the date of the breach. (Fateh Chand v. Balkishan Das, AIR 1963 SC 1405). Under NEP, breach of Contract has taken place at the stage of non-completion of MWP for an Exploration Phase at the end of the period prescribed for that Phase and to undo the said breach further extension is sought. The requirement regarding payment of Liquidated Damages is introduced at the intermediate stage of performance of PSC when extension is sought for the period required for completion of unfinished MWP for the relevant Exploration Phase. The amount payable as Liquidated Damages is a fixed proportion (10%) of the estimated cost of completing the unfinished MWP at that stage. Liquidated Damages under NEP saddle the Contractor / Operator with the liability of a fixed amount for the failure to perform its obligation regarding completion of MWP for the relevant Exploration Phase.

In Clause A.1 (b) of NEP the expression "agreed pre-estimated Liquidated Damages for the unfinished MWP" has been used. Since the Liquidated Damages constitute a fixed proportion (10%) of the cost of unfinished MWP, the expression "agreed pre-estimated Liquidated Damages" has to be construed to mean a fixed proportion of agreed preestimated cost of unfinished MWP.

The extent of unfinished MWP for an Exploration Phase would be known only at the end of that Exploration Phase and an estimate of the cost of the unfinished MWP for an Exploration Phase can be made only at the end of the Exploration Phase. The

amount of agreed pre-estimated Liquidated Damages can, therefore, be arrived at the stage of end of such phase only. An agreement regarding pre-estimated Liquidated Damages for the unfinished MWP could not be entered at the stage of the formation of the PSC.

The letters of DGH dated February 12, 2006 and February 14, 2006 and the letter of HOEC dated September 13, 2006 show that the preestimated cost of the unfinished MWP had been arrived at on the basis of R.E. 2006-07 submitted by HOEC. The said R.E. 2006-07 was submitted by HOEC as per requirement of Article 5.10 of PSC whereunder before the commencement of each year the Contractor was required to submit to the Management Committee the Work Programme and Budgets relating to Petroleum operations to be carried out during the relevant year and that the Work Programme and the Budgets for the Exploration Period shall include work sufficiently to meet the relevant MWP with respect to each Exploration Phase specified in Article-5.. The expression "agreed preestimated Liquidated Damages for the unfinished MWP" would, therefore, have to be construed as the estimate arrived at on the basis of the Work Programme and Budgets submitted by the Contractor before commencement of each year.

The estimated cost of completing the unfinished MWP as determined on the date from which extension is sought under NEP may be less than the actual cost of computing the unfinished MWP for the reason that during the course of drilling the well to complete the unfinished MWP the Contractor/ Operator may face structural problems which may consume more time and

increase the cost. It can also be that the estimated cost is higher than the actual cost due to the Contractor/Operator facing problems at the initial stages of the drilling taking more time and the drilling operation being smoother at the subsequent stage taking less time and thereby reducing the actual cost of completion.

The NEP does not make provision for waiver or reduction of the amount of Liquidated Damages which is a fixed amount. It is also not subject to variation depending on the final outcome of exploration endeavour. Since Liquidated Damages determined under NEP does not depend on the outcome of the exploration endeavour refund of the amount deposited towards Liquidated Damages for grant of extension under NEP cannot be sought on the basis that no oil or gas was discovered in block after exploration and the Government did not suffer any loss or damage pm account of failure on the part of the Contractor I Operator to complete the MWP for the relevant exploration phase as per the requirement of PSC.”

15. In my opinion, the interpretation given by Arbitral Tribunal to the terms of NEP cannot be said to be perverse. In fact, as the fact narrated above would show, this was the interpretation given to the Clauses of NEP by the parties themselves in their subsequent conduct. In any case, Supreme Court in the case of **Associate Builders v. Delhi Development Authority**, (2015) 3 SCC 49, has again cautioned that construction of the terms of the contract is primary for an arbitrator to

decide, unless the arbitrator construed the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. Even if a clause in an agreement is capable of two interpretations, if the view taken by the arbitrator was a possible one, High Court in exercise of its power under Section 34 of the Act, cannot interfere with the Award and substitute its view in place of the interpretation accepted by the arbitrator.

16. Learned counsel for the petitioner further submits that the Arbitral Tribunal has erred in granting interest @ 12% p.a. with effect from 15.02.2013. Relying upon Clause 1.7.3 of Appendix C to the PSC, he submits that the contract between the parties provide for interest compounded daily at the applicable LIBOR plus two percentage point. He submits that Arbitral Tribunal has, therefore, erred in granting interest @ 12% p.a. in favour of the respondent.

17. On the other hand, learned counsel for the respondent submits that Clause 1.7.3 would have no application to the fact of the present case inasmuch as that said Clause would be applicable only where the payment is to be made during the period of contract. He further submits that the petitioner itself had claimed interest @ 18% p.a. in its counter claim and therefore, cannot now rely upon the above Clause to challenge the Award passed by the Arbitral Tribunal.

18. I have gone through the contents of the objection petition and I find that there is no reference to Clause 1.7.3 in the objection petition. Only ground raised in the objection petition is to the vague effect, which is reproduced herein under:

“v. The award of interest, being contrary to the terms of the contract itself, is bad in law and liable to be set aside.

3. By the Impugned Award, the DGH was directed to refund the liquidated damages amounting to INR 4,48,67,345.72 (Rupees Four Crores Forty Eight Lacs Sixty Seven Thousand Three Hundred Forty Five and Paise Seventy Two). The DGH was also directed to pay interest at the rate of 12% per annum on the aforesaid amount with effect from 15.02.2013 till the date of the Impugned Award and future interest at the rate of 12% per annum on the aforesaid amount from the date of the Impugned Award till the payment. The Counter Claims made by the Petitioner were also rejected.”

19. The petitioner itself having claimed interest @ 18% p.a. and no submission, relying upon clause 1.7.3, having being made before the Arbitral Tribunal or in the Objection Petition, in my opinion, the petitioner cannot be allowed to assail the Award on this ground.

20. I, therefore, find no merit in the present petition and the same is accordingly dismissed, however, with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 20, 2017/vp