

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

Reserved on: 31.07.2018

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Pronounced on: 28.11.2018

+ **LPA 48/2017, CM APPL. 2395/2017, CM APPL. 27489/2017**

VEDANTA LIMITED & ORS

..... Appellants

Through: Mr. C.A. Sundaram, Sr. Adv. Mr.
Gopal Jain, Sr. Adv. with Mr. Anish Kapur &
Mr. Dhritiman Roy, Adv.

Versus

DIRECTORATE GENERAL OF FOREIGN TRADE & ORS

..... Respondents

Through: Mr. Tushar Mehta, Ld. ASG, Mr.
Anurag Ahluwalia, CGSC, Ms. Tejaswita
Sachdeva, Adv. with Mr. N.P. Puranik,
Representative, Ms. Shipika Gandhi,
Representative, Mr. Subhash, Representative.
Mr. Nikhil Mundeja, Adv. for IOCL.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT

1. The present appeal impugns the findings and judgment of a learned single judge, rejecting a writ petition preferred by M/s Cairns (now succeeded by Vedanta Ltd, hereafter called "Vedanta"). Vedanta sought a direction to the Director General, Foreign Trade (hereafter "DGFT") to itself regarding the necessary permissions/approvals/authorisations for direct export- or in the alternative, permission/facilitation for canalised export through the third respondent (hereafter "IOL") of its share of crude oil extracted from the Rajasthan Block RJ-0N-90/1 (for short "Rajasthan Block"), to the extent not lifted by the

second respondent (Union Petroleum Ministry-hereafter “UOI”) or its nominee Public Sector Undertakings (for short "PSUs").

2. Vedanta had alleged that it invested more than thirty thousand crores rupees in the Rajasthan Block and have brought world class technology to India. According to it, approximately sixty to seventy per cent of the price realized from the Rajasthan Block production of crude oil production flows back to the public exchequer in the form of profit petroleum, *inter alia* through a share of the Government's nominee, royalty (paid to the State Government) and cess. It claimed that every additional US\$ 1 per barrel of Rajasthan Block Crude Oil realized would fetch the public exchequer an additional US\$ 41 million/₹ 258 crores (₹ 63/ per US\$) on account of the Union's share of profit from petroleum, share of its nominee, royalty and cess.

3. Vedanta claimed that the Central Government’s Foreign trade policy permits canalized export of crude oil through IOL or direct export with the approval of DGFT. In this respect Sr. No. 113 of Chapter 27 of Schedule 2 of ITC (HS) Classification of Export and Import was cited to say that they provide for the procedure for export of crude oil and it is permissible to export the crude oil. Consequently, Vedanta claimed an *entitlement to export*; the writ petition claimed directions to enforce that right.

4. The brief facts are that on 15.05.1995 a “Production Sharing Contract ("PSC") was executed between the Union, the Oil and Natural Gas Corporation Ltd. ("ONGC") and Shell India Production Development NV ("Shell"), for the Rajasthan Block. On various dates between 1999 and 2003, Cairn Energy India Pty. Ltd. ("CEIL") acquired 50% of Shell's interest in the PSC, followed by Cairn Energy Hydrocarbons Ltd. ("CEHL") acquiring the remaining 50% of Shell's interest in the PSC. Commercial Discovery, in relation to the Rajasthan Block, occurred on 15.09.2004, and Commercial Production began in 2009. The Rajasthan Block Crude Oil is waxy highly paraffinic, with low Sulphur content.

Not many refineries in India (whether public sector or private sector) possess requisite refining capability. In these circumstances, its best potential lay in securing a price in the international market, which had a ready requirement for such crude oil. During September 2005, MRPL, a subsidiary of ONGC, was designated as the Union's Nominee to lift the entire crude oil from the Rajasthan Block. MRPL declined to off-take the entire volume. No agreement could be reached on the crude oil price, in view of heavy discounts sought by MRPL on account of transportation costs. Accordingly, a cost benefit analysis was done regarding shifting of the Delivery Point, leading to nominating other Public Sector Undertaking ("PSU") refineries, so that the entire quantity of Rajasthan Block Crude Oil could be lifted by UOI No.2's nominees.

5. It is stated that on 20.04.2007, the then Operator of the Rajasthan Block, viz. CEIL, intimated UOI that the Operating Committee under the PSC had passed resolutions to recommend to the Government that it may (a) nominate multiple public sector refineries for the Rajasthan Block Crude Oil; (b) shift Delivery Point(s) and (c) approve the pricing formula for the Rajasthan Block Crude Oil. Later, on 17.10.2008, CEIL wrote to UOI requesting to call for a meeting to discuss and agree on the reference basket of Crude Oil, to calculate the price of crude oil to be produced from the Rajasthan Block and sold to UOI's nominees. This request was reiterated by CEIL letter dated 26.11.2008, where it was also requested to discuss the volume allocations to Government nominees. It is stated that the IOL, HPCL and MRPL were nominated by the Union for lifting the Rajasthan Block Crude Oil. Pricing, in terms of the mechanism stipulated in the PSC, came to be agreed only with IOCL, while MRPL and HPCL sought additional discounts due to transportation costs. Accordingly, the Union was requested to advise further course of action as production could not start till crude offtake was agreed with the buyers/nominees. Vedanta complained that PSUs were not forthcoming and the Union could not arrange for lifting of the entire

production of 30,000 bpd by its nominated PSUs, CEIL issued a letter dated 22.07.2009 to the Union requesting for unfettered free marketing rights, so as not to curtail production by supplying Crude Oil to private buyers in India and to export smaller parcels through Kandla. The petitioner claimed that nominations had fallen short, i.e. there was requirement of additional nomination of 1.9 MMT for 2009-10, 4.4 MMT for 2010-11 and 8.9 MMT for 2011-12 on the basis of then production levels and forecasts. Eventually, production of crude oil from the Rajasthan Block for financial year 2009-10 was 2.6 MMT.

6. Vedanta refers to a meeting of the Empowered Committee of Secretaries ("ECS"), held under the Chairmanship of the Union Petroleum Secretary, convened on 17.08.2009, whereby the Union dispensed with the requirement of notifying self-sufficiency before permitting export, but permitted it (Vedanta) to sell the excess Rajasthan Block Crude Oil only to domestic private refineries, conditional *inter alia* upon:

(a) ascertaining from public sector refineries, the additional quantity of crude oil that can be allocated to them based on technological upgradation undertaken by them, and thereafter, to allow marketing freedom to the Contractor under the PSC to sell the remaining quantities (over and above those allocated to the Union or its nominees) to other domestic private refineries, by dispensing with the requirement of notifying the Contractor that India has attained self-sufficiency;

(b) stipulation that 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 not less than the international arms-length price for benchmarked crude oil price, which will be used for all calculations under the PSC such as cost petroleum, profit petroleum, royalty etc.

7. On 19.09.2009, the Union constituted a committee to finalize terms of reference for the tender for appointment of an international pricing expert for valuation of the PSC Crude Oil. Pursuant to the constitution of this committee, one

Jacobs Consultancy Inc. was appointed as independent international pricing experts. It is submitted that since crude oil storages of the contractor were filling up, and there lay a distinct shortfall in nomination of PSUs by the UOI to lift the entire crude oil produced from the Rajasthan Block, Vedanta applied to Respondent No.2 on 24.09.2009 for export of Rajasthan Block Crude Oil to the extent not lifted by the Union and/or its nominee PSUs or to take an early decision on additional nomination, citing a shortfall of 1.5 MMT in Government allocation for lifting by PSUs, on the basis of production forecast. It was pointed out that in the national interest the Rajasthan Block Crude Oil had a good market in the South-East Asian refineries, which was bound to lead to the best price realization. It is alleged that in line with the Union's decision to allow marketing freedom to the Operator to sell balance crude oil (beyond that allocated to the Union's Nominees) to domestic private refineries, pending the grant of approval for direct export. The appellants arrived at an in-principle agreement with domestic private refineries for a cumulative quantity of 0.3 MMT at pricing levels agreed with MRPL and IOCL. This was intimated to the Union by letter dated 12.11.2009. It was pointed out that that even if purchase by the private domestic refineries were taken into consideration, 0.2 MMT of the Rajasthan Block Crude Oil would still remain unsold.

8. It is submitted that Vedanta had at the relevant time received several spot enquiries from international buyers on terms better than the PSC pricing agreed to with the PSUs (MRPL and IOL), as also with the private domestic refineries. It sought permission for export of the Rajasthan Block Crude Oil to avoid production constraints, and with a view to enable it to realize the best price for the said crude oil, which would be in the nation's best interest. It was pointed out that the private refineries export a significant portion of the refined products, which in effect would translate to export of the Rajasthan Block Crude Oil. Vedanta, on 8.1.2010, applied to the UOI for permission to supply the Rajasthan Block Crude Oil not

lifted by it (i.e. the Union), through its nominee PSUs to a private SEZ refinery, as also export trial parcels to sustain production levels, as it was producing at a constrained production level of 22,000 barrels(bbls) per day as against a capacity of 50,000 barrels (bbls) per day, due to low off take.

9. In this background, a Crude oil off take and sales Agreements ("COSA") was entered into by Vedanta with IOL on 3.3.2010 and with two other domestic private refineries at prices below those available in the international market for the Rajasthan Block Crude Oil. It is alleged that the appellants had no option but to accept such low prices. During May 2010, Jacobs Consultancy Inc. submitted its report, *inter alia*, regarding valuation of the Rajasthan Block Crude Oil, which established that the price ought to be substantially higher than being paid by PSUs/domestic refineries. This report was provided by the Petroleum Planning & Analysis Cell of the Union to IOL, HPCL, MRPL, CEIL, ONGC and certain private refineries under cover of letter dated 29.07.2010, but was not accepted by any of the PSUs. The price valuation formula ascertained in 2009 thus remained unrevised. Thereafter, CEIL wrote to UOI on 17.06.2010, seeking arm's length pricing. The UOI responded on 15.7.2010. It is stated that later a meeting was convened to deal with pricing aspects.

10. The appellant then alludes to a series of correspondence between the UOI, the CIEL and other bodies with respect to treating sale of crude oil to SEZ as deemed exports; it is also stated that an application was also made to the DGFT on 25.01.2011, seeking permission to directly export the Rajasthan Block Crude Oil to a private SEZ refinery. The rationale for seeking permission for direct export by CEIL, and not through the STE (state trading entity) was also set out emphasizing that CEIL had a commercial contract in place with such private refinery for supply to its Domestic Tariff Area ("DTA") refinery and as an Operator would be in a better position to ascertain the volume available for the SEZ refinery on a day-to-day basis. It is stated that CEIL is also duly experienced in moving and handling

Rajasthan Block Crude Oil which is waxy in nature with a high pour point and which requires a specialized transportation system with requisite heating facilities and that CEIL is in the best position to negotiate commercial terms with buyers, and that it had already established an effective system for selling Crude Oil, subject to various internal /external audits under the PSC for sharing of revenue with the UOI and other JV partners. Apparently CEIL addressed a letter dated 19.07.2011 to IOL seeking NOC (no objection certificate) for export of Rajasthan Block Crude Oil to an SEZ refinery. The *rationale* for effecting direct supply rather than through IOL was explained. It was emphasized that commercial contracts for supply to an SEZ refinery had been negotiated and finalized by CEIL and it would be in the best position to ascertain volumes available for the SEZ refinery on a day-to-day basis. The commercial terms for supply to the SEZ refinery were also likely to be similar to a DTA refinery. Therefore, CEIL would be in a better position to directly supply the Rajasthan Block Crude Oil to the SEZ refinery and also finalize commercial terms for it. On 10.08.2011, IOL expressed its inability to increase offtake of the Rajasthan Block, but expressed willingness to facilitate Vedanta to export crude oil to a SEZ refinery, subject to UOI's permission.

11. Eventually on 11.07.2014, Vedanta received several international expressions of interest with offers approximately US\$ 3-5 per barrel higher than that offered by the PSUs and domestic private refineries. They applied to the UOI for permission to export Rajasthan Block crude oil citing improved realization of US\$ 3-5 per barrel. The request was renewed by another letter of 10 March, 2015, followed up by another letter of 8 April, 2015. Thereafter, a meeting was held between the appellants and IOL on 22.04.2015 to enable the latter to act as the canalizing agent to facilitate export; the appellants even made a written request on 29.04.2015. In these circumstances, since Vedanta did not see any outcome in the correspondence, it approached the court through a writ petition, claiming

directions. It relied upon the stipulations in the Foreign trade policy as well as provisions of the PSC to say that it had a right to export crude oil in law and the inaction of the Union was arbitrary.

12. The learned single judge, recorded that the Union wished to clarify its stand; on 6 February, 2018, the UOI issued the following order, rejecting Vedanta's request to export crude oil:

“Request of M/s Cairns Oil 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 CM No.01/91/110/95/AM16/EC/1029 dated 26.1.2016 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 NOG to the proposal.”

13. The learned single judge considered the provisions of the PSC as well as the EXIM Policy and concluded that the writ petitioner/appellants could not claim entitlement to export crude oil. The relevant findings of the learned single judge are as follows:

“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 the Union, 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, MANU/SC/0341/2010 : (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.”

14. Mr. C.A. Sundaram, learned senior counsel argued that the learned single judge fell into error in overlooking that despite the UOI and its nominated PSUs being unable to lift beyond 30% of the annual Rajasthan Block Crude Oil production (Respondent No. 2 has been able to lift only 16.2% (approximately) of the entire Rajasthan Block crude oil produced till November 2011), DGFT and IOL in failing to take any action on the petitioners’ applications for canalized export through IOL or direct export overlooked the substantial loss running into several hundred crores per annum to the public exchequer. Counsel also stated that the learned single judge overlooked that the UOI, had as far back as on 17.08.2009, dispensed with the requirement of notifying self-sufficiency before permitting export of Rajasthan Block Crude Oil.

15. Counsel submitted that the inaction on the part of DGFT constrained the Petitioners to continue to sell the Rajasthan Block Crude Oil to domestic private refineries, and such restrictions on marketing rights available to the

petitioner/appellants, given the small domestic market for the Rajasthan Block Crude Oil with few domestic refineries capable of processing such oil, renders it unable to access the international market and obtain the best price they would be able to fetch for the crude oil in the international market. Senior counsel stated that an estimated 60% to 70% of the price realization for the Rajasthan Block Crude Oil flows to the public exchequer in the form of Profit Petroleum and Profit Gas, share of the nominee, royalty (paid to the State Government) and cess. Correspondingly, 60% to 70% of losses suffered due to lower prices realized for the Rajasthan Block Crude Oil as a direct consequence of inaction on the part of Respondents are borne by the public exchequer, contrary to national interest.

16. It is argued that Articles 14 & 19 of the Constitution of India mandate that Respondents must provide a level playing field for the Petitioners, failing which such discriminatory action on the part of the Respondents cannot be sustained. It is argued that the Foreign Trade Policy read with the ITC (HS) Classification requires DGFT to consider the petitioner/appellant's application to export Crude Oil, either through IOL, as the STB, or for direct export. In fact, DGFT was writing to UOI seeking a no-objection. Although the statute does not require DGFT to take any such approval from UOI while granting approval, yet the inter-ministerial approval sought has been delayed on one pretext or the other.

17. The appellant states that failure to grant approval for export of the Rajasthan Block Crude Oil, whether directly, or canalized through IOL, infringes and is in violation of Article 14 of the Constitution of India, as also violates the fundamental right of the second petitioner under Article 19(1)(g) of the Constitution of India. The UOI and IOL through by limiting the appellants to the domestic market for the Rajasthan Block Crude Oil, are not providing a level playing field as the domestic private refineries to which the Rajasthan Block Crude Oil is sold are allowed to export refined products. It is particularly highlighted that in a market scenario where the global crude oil prices are as low

as US \$ 40-45 per barrel, the inaction on the part of the DGFT and IOL is constraining the appellants to continue selling their share of the Rajasthan Block Crude Oil at a price lower by US\$3-4/barrel than that which they can fetch in the international market, and is thus in violation of their fundamental rights.

18. Learned senior counsel for petitioners submitted that though Article 18.1 of the PSC provides that until India attains self-sufficiency, the contractor is obliged to sell to the UOI or its nominee, the entire share of crude oil, yet Article 18.7 of the PSC entitles it to freely lift, sell and export any portion of its share of the Rajasthan Block Crude Oil which the UOI or its nominee PSUs are unable to lift. He argued that as UOI, and its nominee PSUs were unable to lift the entire quantity, Article 18.7 of the PSC operates and the appellants have the unfettered right to lift and export the Rajasthan Block Crude Oil to the said extent. Furthermore, urged Mr. Sundaram, Article 18.7 (of the PSC) is independent of Article 18.1. Therefore, that India has not attained self-sufficiency is irrelevant. It was also argued that Article 18 of the PSC does not provide for partial waiver/dispensation of the condition of India attaining self-sufficiency. Additionally, it was emphasized that the embargo was dispensed with in the meeting of the Empowered Committee of Secretaries held on 17.08.2009.

19. Mr. Tushar Mehta, learned Solicitor General appearing for respondents argued that the relationship between the parties, which is governed by the provisions of PSC executed between the parties, is purely contractual. The Solicitor General contended that UOI had entered into the contract under its power to trade as part of the executive power under the Constitution of India, as it deals with natural resources of the country. He submitted that this Court should not interpret the contract. It was also argued 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.

20. The learned Solicitor General maintained that Article 18 of PSC confers a right to apply for permission to export the oil produced from the subject block only- *and if only*- self-sufficiency is realized by India. This implies that total consumption of oil in India has to be either equal to or less than the total production of oil and gas within India. The UOI argued that Article 18.4 provides for deemed election in case of failure by UOI to exercise the option for a specific year and obliges the UOI 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. It was argued that in this case even if the appellants' version is credible, their only remedy is to compensation.

21. It was highlighted that the choice of permitting export of crude oil exploited from oilfields within India is in the realm of an executive policy decision, to be taken by the UOI keeping in mind the national and larger public interest. The learned Solicitor General relied on the National Policy to say that, export of crude oil is not permitted till India attains self-sufficiency. He argued that the policy has been incorporated in PSC as it prohibits export till India attains self-sufficiency. By permitting export of the oil produced from the subject fields, the citizens of the country would be deprived from enjoying the benefits of such oil. The grant or refusal of permission to export is to be seen from the fact that there is vast mismatch between indigenously produced oil and the energy demands within the country. It was submitted that the domestic requirement of crude oil is presently met partly with domestic production including Rajasthan Block Crude Oil and mainly from import.

22. The learned Solicitor General stressed that the Empowered Committee of Secretaries was of the view that permitting export of crude oil, apart from being not intended under the PSC was also against the national policy of zero per cent export till India attain self-sufficiency. It was stated that the "energy security" would be adversely affected in light of the fact, firstly that 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 susceptible to recurrent supply disruptions which may occur for a variety of reasons, including conflicts, natural disasters as well as technical difficulties. It was argued, secondly that declining trends have been reported in domestic oil and gas production which would be further heightened if the export of scarce petroleum mineral viz. crude oil is permitted and would be detrimental to the Indian economy as an additional cost burden on account of two-side shipping tariff. It was also argued that permitting export of domestic crude can certainly compel 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.

23. It was argued 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. The learned Solicitor General argued that since in this case the PSU refineries were unable to lift the entire quantity of crude oil, the petitioners themselves requested the Government to permit the sale of crude oil to Essar and Reliance.

24. It was submitted that the decision (dated 17.08.2009) permitted the appellants to sell crude oil to all refineries in India and did not restrict to two companies i.e. Reliance or Essar as was alleged. Articles 19.4 and 19.5, it was said stipulate that the price of the crude oil shall be determined between the appellants and the buyers of crude oil and therefore, they have complete freedom to fix the price of crude oil at arm's length.

25. The learned Solicitor General urged 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 prescribe 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. In this regard it was stated that Chapter 27 merely means that if the Union Government permits export of crude oil, it can only be through "STE".

Analysis and Findings

26. Paragraph 2.20 and Chapter 27 of the Foreign Trade Policy 2015-2020 are relevant to the present case; that 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 nongovernmental 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.

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Chapter 27

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

The UOI's position further was that DGFT after taking assistance and advice of EXIM Facilitation Committee under Para 2.51 rendered its opinion, which is as follows:

"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."

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 (by its letter of 6 February 2016).

27. The relevant provisions of the PSC are as follows:

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

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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.

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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 ensuring 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 or 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 off take.

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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."

28. As is evident, the parties to the PSC agreed on certain terms. Clause 1.63 defined "self-sufficiency" in crude oil as the situation whereby *"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."* By clause 18.1 till self-sufficiency was attained *"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. Clause 18.2 obliged the contractor (the appellant) to *"shall sell to the Government [or its nominee] its total Participating Interest share of Crude Oil and Condensate to which it is entitled"*; the price for such sale was to be determined having regard to other provisions of the contract; furthermore, the UOI was obliged to purchase such quantities. In case, during subsistence of the agreement, if "self-sufficiency" were attained (per Clause 18.3) the UOI had to issue a written notice intimating this either within that given year or not later than the first quarter of the next year, in writing to the contractor. It then stipulated that *"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."*

29. Two things emerge from a reading of these provisions: one, that self-sufficiency is a state of affair that is ascertainable, having regard to objective facts; two, that in the event it were achieved, the UOI was obliged to give notice in

writing to the contractor; in such case, the latter was relieved of its obligation to sell the quantities to the UOI and *“lift and export”* its “participating interest share crude oil and condensate” it. The right to first opt for purchase was given even then, to the UOI, through notice under Article 18.4. The further consequences are spelt out in Article 18.4; the UOI

“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 ensuring 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..”

30. Articles 18.5 and 18.6 are the mechanism for payments – to the contractor, and consequence of the failure to pay. In case of the default event- i.e omission to pay in accordance with Article 18.5, the contractor has the option to sell or condensate quantities produced and even export, by virtue of Article 18.6. Then comes Article 18.7; it states that *“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 destination restrictions.

31. A joint reading of Articles 18.3 to 18.7 would show that:

- (a) self-sufficiency is to be declared by the UOI, in a given year having regard to the objective material;
- (b) self-sufficiency is the first contingency which can enable the contractor to suspend its obligation and proceed to lift and export the crude oil;

(c) Concededly it is not the appellant's contention that self-sufficiency was declared, nor that conditions for its declaration existed; no relief in that regard was sought.

(d) Article 18.6 provides that in the event of non-payment (of any quantity) the contractor is free to lift and export its quantities;

(e) Article 18.4 states that in the event of declaration of self sufficiency (under Article 18.3) the UOI has the option to "*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.*" In case the option is not exercised, the UOI shall be deemed to have exercised it.

32. If one examines Article 18.7 in the above light, it is apparent that the right to export crude oil, if it may be termed so, arises in two situations: one when self-sufficiency is declared and the deemed option conditions exist (clause 18.4) or when payment terms are infringed (Articles 18.5-18.6). No other situation of any contractor possessing a "right to export" can, in the opinion of the court, arise, on an overall consideration of the material terms of the contract. This is further reinforced by the fact that under Article 27 title to "*Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract*". Therefore, the right to export, contemplated under Article 18.7 is only where the UOI "*has elected not to purchase pursuant to this Article 18..*" It visualizes a situation where the consequence of declaration of sufficiency leads to the exercise of conscious option by the UOI (under Article 18.4) pursuant to its choice "*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.*" Thus, if the UOI, upon declaration of self-sufficiency of crude oil, elects not to purchase it, the contractor can be said to have an entitlement to export it. That eventuality did not arise in the

facts of this case. On this count, the petitioner/appellants' argument is insubstantial and has to fail.

33. The second point which requires consideration is whether under the FTP, the appellant could legitimately claim the entitlement they sought to enforce through writ proceedings.

34. The appellants argue that the right to export the crude oil is clearly governed by the FTP and, in particular Clause 2.11 of the FTP (27 August 2009 - 31 March 2014) and Clause 2.20 of the FTP (1 April 2015 - 31 March 2020) permits the free export of crude oil, subject to its being done through a canalizing agent which in terms of Chapter 27 S.No.87 of the FTP (1 April 2015 - 31 March 2020) is the IOL. It is therefore argued that IOL as the canalizing agent was bound in law to facilitate the export of crude by the appellants, and failure on its part obliged DGFT, the authority under the FTP, to direct it to do so. The appellants consequently point out that the learned single judge fell into error in assuming that merely because export of crude oil was through a canalizing agency, i.e. the third respondent, its export would be restricted, when in fact, the nomination of a canalizing agent was only a form of regulating the export and not restricting it. The learned single judge, however, went into the issue of whether contractually under the PSC, the appellant was entitled to export the crude. It was submitted that, if at all this issue was of any relevance, it could only be so if an *inter se* dispute arose between the appellant and the other parties to the PSC, i.e. the UOI and ONGC. The Respondents however, were bound to act by the FTP and could not abdicate their responsibility thereunder by saying that the UOI had not furnished its "no objection", given that, though the FTP, undoubtedly requires 'no objection' of the UOI, in certain cases it has been expressly left out as in the case of export of crude oil.

35. It was further argued that in terms of the FTP read with the Indian Trade Classification based on Harmonized System of Coding ["ITC (HS)"], though the

export of certain products expressly requires a no objection from UOI, there is no such requirement for the export of crude oil. The appellant, thus, urged that the learned single judge, erred in rejecting the appellants' case and in deciding on the correctness of UOI's position denying a "no objection" by holding that it was not arbitrary.

36. Chapter 27 of the FTP enumerates the following : "*Mineral Fuels; Mineral Oils and Products of their Distillation; Bituminous Substances; Mineral Waxes.*" The petitioner may be right in contending that the export of these is not prohibited. However, Clause 2.2 enjoins that those items which are to be dealt with by STEs in the first instance shall be exported by or through it (or them) and that such STEs "may" permit other parties to export or import the articles:

"2.20 State Trading Enterprises (STEs)

(a) State Trading Enterprise (STEs) are governmental and nongovernmental 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."

Chapter 27 of Schedule I which defines mineral oils, also provides for item 87, tariff description 270.900 w.r.t. "Crude oil" only that "*STE Export through Indian Oil Corporation Limited*" was permissible.

37. Now, it is not as though a private entity has unrestricted right to export or import articles. It would be relevant here, to notice that in the context of whether any individual or entity can carry on international trade when it is regulated, the Supreme Court held as follows, in *D. Navinchandra & Co. Bombay & Anr. Etc. v. Union of India & Ors*, [1987] 2 S.C.R. 989, wherein this Court has observed:

"Analysing the said order, it is apparent, (1) that the importation that was permissible was of goods which were not specifically banned, (2) such banning must be under the prevalent import policy at the time of import, and (3) whether items which were canalised or uncanalised would be imported in accordance with the relevant rules. These conditions had to be fulfilled. The Court never did and could not have said that canalised items could be imported in any manner not permitted nor it could have given a go-bye to canalisation policy"

In *Dava s/o of Bhimji Gohil vs Joint Chief Controller Of Imports* AIR 1962 SC 1796, the Supreme Court held as follows:

"the very narrow question for consideration is whether the restrictions and control for which provision might be made by Section 3 would not include a provision for canalising the trade in any particular commodity. We are clearly of the opinion that the restriction or control in the form of channelling or Canalising the trade is not outside the limitations which might be imposed on export trading by Section 3 and that consequently clause 6(h) in its present form is within the rule-making power conferred on the Central Government by Section 3 of the Act. The argument that the restrictions which could be imposed or the control which might be exercised on exports by orders made under Section 3 of the Act, could not extend to restrictions on persons who might be permitted to engage in the export trade has only to be stated. If the quantum of the export in a commodity could be restricted, the control that would

effectuate this must necessarily extend to the persons engaged in or desirous of engaging in the export of that commodity and this would a fortiori be so, if the restriction takes the form of a prohibition of exports in a commodity altogether. If therefore the control or restriction could legally extend to the persons who are engaged in the trade; it would appear to follow as a logical step that the restriction might take the form of classifying the persons who might participate in the trade and the conditions subject to which any particular class might be permitted to do so, It would be matter of policy for the Government to determine, having regard to the nature of the commodity and the circumstances attending the export trade in it, to lay down the basis for the classification between groups and fix their relative priorities etc.”

38. Similarly, it was held in *Daruka & Co v Union of India* AIR 1973 SC 2711, it was held that:

“Policies of imports or exports are fashioned not only with reference to internal or international trade but also on monetary policy, the development of agriculture and industries and even on the political policies of the country but rival theories and views may be held on such policies. If the Government decides an economic policy that import or export should be by a selected channel or through selected agencies the 'court would Proceed on the assumption that the decision is in the interest of the general public unless the contrary is shown.”

39. Given this position in law, in this case, the court notices that there is no right to export crude oil, *per se*. What the FTP enables is that if a case for export of crude oil is to be made, the canalizing agency, the IOL has to give the “no objection” certificate. The appellant’s position therefore, that 'crude oil' is mentioned as STE Export through IOL, supports that no entitlement for anyone else to export crude oil is created. The relevant chapter in FTP provides 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 the STE, which can enable exports. The Central Government in this case, states that permission to export cannot be given,

because the Empowered Committee of Secretaries in its letter dated 27th January, 2016 rejected the appellants' request for export of crude oil. The Committee *inter alia*, stated 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.”* The committee also stated that:

“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.”

40. The court is of opinion that the reasons given by the Central Government cannot be characterized as arbitrary or unreasonable. Since the appellant was permitted to sell quantities of crude oil to private refineries in India by the decision of the Empowered Committee of Secretaries, dated 17.08.2009, subject to certain conditions, it is evident 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.

41. The petitioner's argument about unreasonableness is premised upon the fact that it would be unable to make the level of profit that it otherwise would (if permitted to export), if it sells the crude oil to private refineries. However, while the right to trade and carry on a profession is a fundamental right, that right does not contain the further right to earn profit.

42. In view of the foregoing discussion, it is held that this appeal has no merit. It is therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

NOVEMBER 28, 2018