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

\+ O.M.P.(I) (COMM.) 399/2023

ESSAR EXPLORATION AND PRODUCTION INDIA LIMITED
..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Dayan Krishnan, Sr. Adv. with Ms.Amita Katradadda, Ms. Anuradha Mukherjee, Mr. Praful Goyal, Ms.Niyati Kohli, Mr. Pratham Agarwal, Ms. Kamakshi Puri, Advs.

versus

NAYARA ENERGY LIMITED ..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.Rishab Gupta, Ms. Shreya Gupta, Ms. Shruti Sabharwal, Ms. Juhi Gupta, Mr. Abhijeet Sadikale, Mr. Rachit Bansal and Ms. Riya Kumar, Mr.Sumer Dev Seth, Advs.

% ***Date of Decision: 07th March, 2024***

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

I.A. 24471/2023 (exemption)

Exemption is allowed subject to all just exceptions.

O.M.P.(I) (COMM.) 399/2023

1. The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (herein referred to as '*A&C Act*') with the following prayer:

> *"(a) Pass an order directing the Respondent to not utilise the Advance Amount to the extent of INR 214,72,40,970/-, i.e. the amount remaining after the amount payable (and accordingly paid) by the Respondent under the Arbitral Award viz INR 651,61,96,8280, which is the TOP Amount;*
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> *(b) Pass an order directing the Respondent to deposit with this Hon'ble Court the Estimated Balance Price of INR 84,27,58,989/- along with accrued interest of INR 12,86,70,107/- (calculated on the basis of SBI base rate applicable in the due date, plus 5 percentage points compounded quarterly till the date of this Petition) and any additional amount that would accrue till the date of deposit, to be kept in an interest bearing account and subject to the outcome of the arbitration proceedings;*
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> *(c) Pass an order directing the Respondent to deposit with this Hon'ble Court the Excess Interest Amount of INR 125,30,92,845/- along with accrued interest of INR 19,13,18,743/- (calculated on the basis of SBI base rate applicable in the due date, plus 5 percentage points compounded quarterly till the date of this Petition) and any additional amount that would accrue till the date of deposit, to be kept in an interest bearing account and subject to the outcome of the arbitration proceedings:*

(d) Pass an order directing the Respondent to pay the undisputed amount of INR 5,13,89,136/- along with accrued interest of INR 78,45,951/- and any additional amount that would accrue till the date of payment;

(e) Pass an ex parte ad-interim and interim reliefs in terms of the prayer clauses (a) to (d) above; and

(f) Pass such other order and/or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice."

2. In brief, the case of the petitioner is that the arbitral award dated 23.03.2022 in respect of a take-or-pay dispute under a gas supply agreement between the Respondent and Indian Oil Corporation Limited ('IOCL') (the 'Arbitral Award') was passed. The Arbitral Award directed the Respondent to pay IOCL an amount of approximately INR 288 crores together with specified interest and cost ('TOP Amount') and directed IOCL to tender re-gasified liquified natural gas of 45,45,755 MMBTU ('Make-Up Gas') to the Respondent. Pursuant to the Arbitral Award, the Petitioner and the Respondent entered into an Agreement for Sale dated 28.09.2022 in relation to the implementation of the Arbitral Award whereby the Respondent agreed to assign, transfer and sell the Make-Up Gas to the Petitioner and the Petitioner agreed to provide the Advance Amount to be utilised towards making payments in terms of the Arbitral Award to IOCL.

3. As per the case of the petitioner, there was no independent price discovery or price agreement for the Make-Up Gas. Further, the case of

the petitioner is that the balance amount remaining after utilization of the Advance Amount of INR 866,34,37,799/- (Indian Rupees Eight Hundred and Sixty-Six Crores Thirty-Four Lakhs Thirty-Seven Thousand Seven Hundred and Ninety-Nine Only) for the specified purpose of making payments in terms of the Arbitral Award was to be promptly returned by the Respondent to the Petitioner.

4. It has been submitted by learned senior counsel for the petitioner that through the construct of the AFS, the Respondent admits that the Advance Amount is the Petitioner's money entrusted with the Respondent, and the Respondent agreed, accepted and assumed the responsibility to act as a pass-through and trustee in relation to the Advance Amount and the 'Make-Up Gas'. It has further been submitted that the Respondent now in breach of the arrangement between the parties, unilaterally and contrary to the instructions and interests of the Petitioner has released the payment to the IOCL over and above the amount due under the Arbitral award. The petitioner has submitted that the respondent has made this payment to IOCL only to strengthen its further relationship with IOCL at the detriment and cost of the petitioner.

5. The petitioner's case is that out of the total payment of INR 866,34,37,799/ (Indian Rupees Eight Hundred and Sixty-Six Crores Thirty-Four Lakhs Thirty-Seven Thousand Seven Hundred and Ninety-Nine Only) an amount of Rs. 288,61,75,474/-was in respect to Principal Payment which was paid by the Petitioner and is not in dispute. In

addition to this, a sum of INR 363,00,21,355/- has been paid towards interest and legal costs which is also not in dispute.

6. The dispute raised by the petitioner is with respect to the sum of Rs. 209,58,51,834/- and accrued interest as this amount was not payable under the Arbitral Award by the Respondent to IOCL and could not have been utilised from the Advance Amount. The case of the petitioner is that despite receiving full payment of the TOP Amount and interest as prescribed under the Award, IOCL refused to supply the Make-Up Gas unless it was paid as per its unilateral demand which demand was based on a contention that was already rejected by the Arbitral Tribunal in the proceeding under Section 33 of the Arbitration Act.

7. The petitioner has submitted that the parties agreed that an under protest payment to IOCL is made to secure the supply of gas subject to the resolution of disputes in a fair, bonafide and speedy manner. The petitioner's plea is that the respondent ought to have protected the interest of the Petitioner by initiating appropriate proceedings against IOCL to compel compliance with the Arbitral Award. The petitioner submitted that while the first two instalments of Rs.3,73,43,196/- were paid by the Respondent towards the "balance price" under protest and also to ensure that the outstanding issues between 1OCL and the Respondent will be resolved amicably and the Respondent also proposed to appoint an impartial third party to mediate the issues. However, for subsequent instalments, the Respondent suddenly and unilaterally commenced simply paying the amount to IOCL and jeopardizing the

interest of the Petitioner. The petitioner submitted that it is the process of taking steps to initiate arbitration against the Respondent and recover the said amounts.

8. The respondent has filed a detailed reply for the limited purpose of opposing the grant of interim reliefs / ad-interim reliefs sought by the Petitioner in the present Petition. All the allegations, averments, statements, implications, and insinuations were denied. The respondent stated that the petitioner has failed to make out any case for urgency in the petition. Respondent submitted that after detailed deliberations, the AFS was executed on 28.09.2022 and pursuant to this, the Parties continued their discussions with IOCL to agree to (a) assignment of the Arbitral Award to the Petitioner; (b) the amounts to be paid to IOCL by the Respondent under the Arbitral Award; and (c) the modalities for the supply of Gas (as defined in the AFS).

9. The case of the respondent is that the Respondent (on the Petitioner's instructions) paid the Award Amount to IOCL in two tranches – Rs. 651,61,96,829 on 26.12.2022, and Rs. 125,30,92,845 on 25.01.2023 while the discussions on payment of Balance Price (as defined in the AFS) and assignment of the Arbitral Award continued.

10. The respondent submitted that in June 2023 the Petitioner indicated that it was not desirous of proceeding with the assignment of the Arbitral Award, and directed the Respondent to commence the supply of Gas. The Petitioner also agreed to the Respondent providing a bank guarantee to IOCL (out of the Estimated Balance Price (as defined in the AFS)

component of the Advance Amount (as defined in the AFS), and to payment of Balance Price (albeit under protest). The respondent submitted that therefore, the Respondent has been paying the Balance Price to IOCL and supplying Gas to the Petitioner since June 2023. It was submitted that the Respondent unambiguously indicated that it would not agree to make Balance Price payments to IOCL under protest as far back as July 2023.

11.The respondent submitted that the parties have been negotiating with each other since long and the present petition is premature as the petitioner should have waited for the final determination of the dispute by the arbitral tribunal. The respondent submitted that the relief sought by the petitioner is monetary in nature and there is no material on the record that in arbitration, if the issues are decided in favour of the petitioner the respondent will not be in a financial condition to pay the same. The respondent has denied that AFS is a trusteeship agreement. The malafide of the petitioner was also detailed in the reply saying that the facts have been mentioned selectively. The respondent submitted that the IOCL commenced supply on 10.06.2023 which will be completed by the end of March 2024. The respondent submitted that it has already paid approximately Rs. 40.4 crore *(out of the estimated balance price of Rs.84.27 Cr.)* against IOCL's invoices. The respondent submitted that they paid Rs. 125,30,92,845/- in January 2023 which the petitioner has alleged to be an excess interest amount. However, the respondent stated that the petitioner consented to these payments being made, but only insisted on the Respondent reserving rights to claim a refund from IOCL

(contrary to the AFS). The Respondent's case is that it was not obligated to recover these amounts and (rightly) refused to reserve any such rights as far back as in July 2023. The respondent submitted that though the petitioner continued to enjoy the supply of Gas, while the Gas prices were volatile. However, now the Petitioner seeks to resile from the express terms of the AFS that there would be no challenge to the Arbitral Award, or IOCL's entitlement to claim Balance Price, or IOCL's interest calculation, and recover the amounts paid to IOCL by the Respondent.

12. Mr. Rajiv Nayyar and Mr. Dayan Krishnan, learned senior counsels for the petitioner have argued vehemently and in detail that the urgent intervention of this Court is required to secure the petitioner's money entrusted with the respondent and to seek an injunction to prevent the respondent from misusing the money entrusted to the respondent. Learned senior counsels have reiterated the factual background and have submitted that the respondents have misused the advance amount towards the payment of invoices raised by the IOCL. It was submitted that no "balance price" can be paid from the Advance Amount under the AFS. It was submitted that the IOCL wrongfully raised invoices under the head of 'balance price' for delivery of Make Up Gas, constrained by the volatility of gas prices and to avoid delay in delivery of Gas, the Petitioner merely agreed that payment of IOCL's invoices may be made from the entrusted Estimated Balance Price subject to a suitable agreed form cover letter recording protest requiring the issue to be determined.

13. It has been submitted that though the respondent made payment against the invoices for June and July, 2023 under the agreed form cover letter of protest. However, suddenly, the Respondent through its email dated 20.07.2023 communicated to the Petitioner that it had unilaterally decided that it no longer wished to dispute the 'balance price' invoices raised by IOCL. Learned senior counsel submitted that this change in stance was motivated by self-interest, i.e. its '*reputation', 'credibility'* and '*ongoing relationship with IOCL*'. Learned senior counsel submitted that the respondent misused the entrusted money only to protect his interest. Learned senior counsel submitted that the payment of Differential Interest/ Excess Interest Amount was made on 25.01.2023 with the express understanding recorded in the agreed form letter issued by the Respondent to IOCL that the payment was subject to a fair, bonafide and speedy resolution of the issues. Learned senior counsel submitted that thus, the respondent made the payment under a promise held out to the petitioner that the Respondent would pursue a speedy resolution of the issues with IOCL. However, the respondent failed to take up any issue with the IOCL.

14. Learned senior counsel submitted that clause 4.2 expressly records the liability of the respondent to repay within 2 business days the excess of the Advance Award Amount post payment of the Award Amount to IOCL. It has also been submitted that without prejudice to the submission of the amount payable to IOCL, a difference of INR 5,13,89,136/- remains with the Respondent after the payment was actually made to IOCL.

15.Sh. Rajiv Nayyar, and Mr. Dayan Krishanan, learned senior counsel submitted that the petitioner delivered the notice of the breach on 25.09.2023 calling for an immediate refund of Rs.214 Cr. plus interest. Learned senior counsel submitted that the respondent owes a fiduciary duty to the petitioner and ought not to utilize the estimated balance price of Rs.84 crore. It has further been submitted that the respondents failed to recover the excess interest of amount of Rs.125 crores which amounts to a breach of the promise to the petitioner.

16.Sh. Sandeep Sethi, learned senior counsel for the respondent has refuted all the arguments of the petitioner emphatically. Learned senior counsel submitted that a total of Rs.866 Crores was paid by petitioner as an advance amount to the respondent out of which an advance award amount of 782,06,78810/- was paid on account of principal amount and interest.

17.Sh. Sandeep Sethi, learned senior counsel submits that out of total payment of Rs.493,45,336/- on account of interest and sum of Rs.363,21,352/- is not disputed. However, the petitioners are wrongly raising the dispute regarding the payment of Rs.125,30192,845/- on account of interest. The other disputed component is Rs.84,27,58,989/- which was escalated balance price. Learned senior counsel submits that the petitioner's contention that the balance price was not payable is not correct. Learned senior counsel submits that as of date, a sum of Rs.64.15 Crore has already been paid to the IOCL towards supply of Gas between 10.06.2023 and 15.02.2024 under Clause 5.2 of the AFS.

18.Learned senior counsel submits that the petitioner admits that this amount was paid to IOCL towards the balance price and it has not disputed the calculation of the balance price. Learned senior counsel submits that the only condition raised by the petitioner was that this payment of IOCL invoice may be made from the entrusted estimated balance price subject to a suitable agreed form cover letter regarding the protest requiring the issue between to be determined. However, learned senior counsel submitted that the respondent was not bound to make this payment in the agreed form cover letter under protest. Learned senior counsel submits that in fact at the instance of the petitioner, the respondent had several communications with the IOCL and offered to make the payment under the protest as desired by the petitioner. However, IOCL refused to receive the payment under the protest. Learned senior counsel submits that in fact the entire payment was made under the instructions of the petitioner and has specifically invited the attention of the Court to the email dated 25.03.2023 and 28.03.2023 whereby the petitioner instructed respondent to issue an email to IOCL confirming that it would pay the balance price.

19.Learned senior counsel has further submitted that additionally respondent at IOCL's request, furnished a bank guarantee of Rs10.53 crore towards the balance price for three fortnightly invoices. It has been submitted that therefore balance price remaining with the respondent is only Rs.9.59 crore which is to be utilized towards the supply of Gas from 16.02.2024 to 31.03.2024. It has been submitted that any excess amounts out of the estimated balance price after making payments to IOCL under clause -5.1

of the AFS would be returned to the petitioner as per clause 5.4 of the AFS. Learned senior counsel submits that the total awarded amount paid to the IOCL is Rs.77,69,289,674 i.e., the Principal Amount + interest calculation as per the petitioner + additional interest amount claimed by IOCL inclusive of TDS was in line with the IOCL's demand of 02.09.2022 and 14.11.2022. Learned senior counsel submits that the total amount held by respondent out of the Advance amount is Rs.14.72 Crore i.e., the remaining advance award amount of Rs.5.13 crore + utilized estimated balance of Rs.9.59 crore. In addition to this, the IOCL hold the bank guarantee for Rs.10.53 crores. Learned senior counsel submits that as of now the gas supply will be concluded at the end of this month i.e. March 2024.

20. Sh. Sandeep Sethi, learned senior counsel has submitted that the respondent has already communicated to the petitioner for invoking the arbitration and the respondent is agreeable to expeditious arbitration. However, the petitioners have not responded in any manner to the arbitration.

21. Learned counsel has further submitted that the dispute in the present case is to be adjudicated by the arbitrator. Learned senior counsel submits that relief claimed in the present petition in the form of not utilizing the advance amount to the extent of Rs.214,72,40,978/- has become infructuous as most payments have already been made. It has further been submitted that the respondent is left only with Rs. 6.61 crores. Learned senior counsel submits that another prayer of the petitioner

directing the respondent to deposit with this Court the estimated balance price 84,27,58,989/- and Rs.12,86,70,170/-) calculated on the basis of SBI base rate (applicable on the due date) and further to deposit with this Court excess interest amount of Rs.125 crores along with accrued interest of Rs19 crores and Rs.5.13 crores along with interest of Rs. 78 lakhs cannot be passed as condition prescribed under Order 38 Rule 5 is not fulfilled. Learned senior counsel submits that there is no condition of trusteeship of the entire documentation between the parties.

22. Learned senior counsel for the respondent has relied upon the judgment of the Division Bench of this Court in ***Skypower Solar India Private Limited v. Sterling and Wilson International FZE*** 2023 SCC OnLine Del 7240. Learned senior counsel relying upon the judgement has submitted that as per this judgment, the pre-requisite for passing an order alike under order 38 Rule 5 has been enumerated. Learned senior counsel submits that none of the conditions in the present case is fulfilled and not even pleaded. Learned senior counsel submits that the respondent is a solvent company and there is no possibility or even an apprehension of running away. Learned senior counsel submits that the dispute is to be adjudicated by the arbitrator under the SIAC Rules, and therefore the present petition is liable to be dismissed.

23. Sh. Rajiv Nayyar, and Sh. Dayan Krishanan, learned senior counsel(s) for the petitioner in rejoinder, have submitted that it is not necessary that "trust" is to be pleaded specifically in the documents executed between the parties. Learned senior counsel(s) have submitted that the Court has

to infer the same taking into the terms and conditions entered into between the parties. Learned senior counsel has relied upon the ***Protopacking Materials Industry v. Ravinder Kumar Chopra & Others*** (2003 SCC OnLine Bom 736) and submitted that the present case fulfils the requirement of Order 38 Rule 5. Learned senior counsel has also relied upon Section 66 of the Indian Trusteeship Act and Section 38 (3) of the Specific Relief Act.

24. I have considered the submissions and perused the record carefully. As per Section 9 of the Arbitration and Conciliation Act, 1996 the legislature has conferred the jurisdiction upon the Court for the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement. It also provides the securing of the amount in dispute in the arbitration.

25. Without going into the minute detail of the present case, the admitted case is that the amount of Rs. INR 866,34,37,799/- (Indian Rupees Eight Hundred and Sixty-Six Crores Thirty-Four Lakhs Thirty-Seven Thousand Seven Hundred and Ninety-Nine Only) was paid by the petitioner to the respondent pursuant to the arbitral award dated 23.03.2022. The payment of the principal amount of Rs. 288,61,75,474/- and interest of Rs. 363 crores are not in dispute. The only dispute is regarding the payment of the disputed excess amount on the account of interest of Rs.125 cores and utilization of balance payment in the sum of Rs. 84 crores. The plea of the petitioner is that this amount was paid wrongly by the respondent to the IOCL without their consent and

therefore, an appropriate order is liable to be passed by this Court for preservation of the money and for securing the same. Learned senior counsel(s) have submitted that this amount was paid in good faith to the respondent and the respondent should not have paid this amount to the IOCL.

26. Per contra, the plea of the respondent is that the alleged excess amount for the sum of Rs.125 crores on account of interest and the balance payment was utilized by the respondent under the instructions of the petitioner. The plea of the respondent is that in fact petitioner consented to making this payment, so as to avoid the volatile fluctuation in the gas prices. The respondent's plea is that they tried to make this payment under the protest to the IOCL but IOCL did not agree to this and, therefore, they had to make the payment.

27. This Court has no doubt in its mind that whether the payment was made under consent / permission or in the interest of the petitioner or whether the respondent made the payment unilaterally to secure his own interest is to be decided by the arbitrator. This Court will not go into the threadbare examination of various clauses of the AFS which have been read out by both the learned senior counsel(s) for the parties. The matter has to go to arbitration for adjudication. It has specifically been stated at the BAR by learned senior counsel for the petitioner is that as per instructions, the petitioner is agreeable to the final resolution through arbitration.

28. Now, the question is that allegedly certain amount has been paid by the respondent in excess to the IOCL contrary to the terms of the AFS and without securing the interest of the petitioner. Thus, till this issue is decided by the learned Arbitrator, I consider that since the respondent is a solvent company and may not be termed as a flight by night, therefore, in order to secure the interest of the petitioner, this Court is of the considered view that the respondent be directed to deposit Rs. 214,72,40,970/- with the Registry of this Court within six weeks. However, it is made clear that this Court has not gone into the merits of the case. All the questions/issues have been left open to be the finally determined by the learned Arbitrator. The Court has only made ad-interim arrangement. Learned Arbitrator may take his independent view without being influenced by the decision of this Court. The deposit Rs. 214,72,40,970/- with the Registrar of this Court shall also be retained/released in terms of the order of learned Arbitrator.

29. In view of this, the present petition stands disposed of.

DINESH KUMAR SHARMA, J

MARCH 7, 2024/*Pallavi/sj*