
(2012) 07 DEL CK 0549
In the Delhi High Court
Case No : O.M.P. 56 of 2012

Assam Company India Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2012) 3 ARBLR 168

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Mukul Rohtagi and Mr. Ciccu Mukhopadhyaya, s with Mr. Ayush Agrawal and Mr. Anish Maheshwari, for the Appellant; Harin P. Raval, ASG with Mr. R. Sasiprabhu, R. Chandrachud and Mr. Saqib, for the Respondent

Final Decision : Disposed Off

Judgement

S. Muralidhar, J.—The Petitioner Assam Company India Limited ("ACIL") has filed this petition u/s 9 of the Arbitration and Conciliation Act, 1996 ("Act") seeking to restrain the Respondent Union of India [hereafter referred to for uniformity as Government of India (GOI)] through Ministry of Petroleum and Natural Gas ("MoPNG") from taking a final decision on the bids received by it pursuant to the International Competitive Bidding ("ICB") under a bid document for complete surface and subsurface assets valuation of the Amguri field. A further order is sought to restrain the MoPNG from taking any decision to auction the 60% Participating Interest ("PI") in the Amguri field and allowing to induct any third party to the existing Production Sharing Contract ("PSC") or from creating any third party rights in respect of the 60% PI of Canoro Resources Limited ("CRL") which has been assigned to ACIL. A third relief sought is to permit ACIL to operate the Amguri field (including operating production from the wells, maintain and undertake such activities to ensure that the field is operational) on such terms and conditions as the Court may determine.

Background Facts

In 1993, the Respondent GOI invited bids under the ICB for the development of various medium and small sized oil and gas fields in India, including in the State of Assam. The Notice Inviting Offers clearly stated that since the fields were small sized, public sector oil companies like Oil and Natural Gas Commission ("ONGC") or Oil India Limited ("OIL") would not acquire any PI nor participate in the development of these small sized fields which were to be reserved for private/joint venture companies. ACIL earlier known as Assam Company Limited along with Joshi Technologies International Inc. ("JTI"), USA submitted a bid as a consortium for the Amguri field in Assam. ACIL's consortium bid was accepted and on 23rd February 2001, a PSC was entered into between the UoI, ACIL and JTI for the development of hydrocarbon resources in the Amguri field and the PI of ACIL and JTI was specified as 75% and 25% respectively. Under the PSC, the JTI was specified as the Operator for carrying out petroleum operations. It was to provide to the UoI a copy of the duly executed Operating Agreement ("OA") within thirty days of the effective date. The agreement provided for production sharing of petroleum. ACIL as well as JTI were collectively referred as the Contractor. Article 15 provided for the rights in relation to cost petroleum recovery and Article 16 in relation to production sharing of petroleum. The clauses relating to assignment of interest were specified in Article 29 of the PSC. The relevant clauses of the said Article read as under:

29.1 Subject to the terms of this Article and other terms of this Contract, any Party comprising the Contractor may assign, or transfer, a part or all of its Participating Interest, with the prior written consent of the Government, which consent shall not be unreasonably withheld, provided that the Government is satisfied that:

(a) the prospective assignee or transferee is of good standing, has the capacity and ability to meet its obligations hereunder, and is willing to provide an unconditional undertaking to the Government to assume its Participating Interest share of obligations and to provide guarantees in respect thereof as provided in the Contract;

(b) the prospective assignee or transferee is not a company incorporated in a country with which the Government, for policy reasons, has restricted trade or business;

(c) the prospective assignor or transferor and assignee or transferee respectively are willing to comply with any reasonable conditions of the Government as may be necessary in the circumstances with a view to ensuring performance under the Contract; and

(d) the assignment or transfer will not adversely affect the performance or obligations under this Contract or be contrary to the interests of India.

29.2 In case of any material change in the status of Companies or their shareholding or the relationship with any guarantor of the Companies, the Company(ies) shall seek the consent of the Government for assigning the

Participating Interest under the changed circumstances.

29.3 An application for consent to assign or transfer shall be accompanied by all relevant information concerning the proposed assignment or transfer including detailed information on the proposed assignee or transferee and its shareholding and corporate structure, as was earlier required from the Companies constituting the Contractor, the terms of the proposed assignment or transfer and the unconditional undertaking referred to in Article.

29.4 The applicant shall also submit such information relating to the prospective assignee or transferee of the assignment or transfer as the Government may reasonably require to enable proper consideration and disposal of the application.

29.5 No assignment or transfer shall be effective until the approval of the Government is received or deemed to have been received. Approval may be given by the Government on such terms and conditions as it may deem fit. Provided that such terms and conditions may not increase the obligations of the Parties comprising the Contractor. Upon assignment or transfer of its interest in this Contract, the assignor or transferor shall be released and discharged from its obligations hereunder only to the extent that such obligations are assumed by the assignee or transferee with the approval of the Government.

29.6 In the event that the Government does not give its consent or does not respond to a request for assignment or transfer by a Party comprising the Contractor within one hundred and twenty (120) days of such request and receipt of all information referred to in Article 29.3 above, consent shall be deemed to have been given by the Government.

2. Article 31 dealt with termination of the contract and read as under:

31.1 The term of this Contract shall be for the period of the license and any Lease granted thereunder, unless the Contract is terminated earlier in accordance with its terms, and shall be deemed to have been terminated, if for any reason, the Contractor ceases to hold such License or Lease.

31.2 Subject to the provision of this Contract and without prejudice to the provisions of Article 31.7 or any other provisions of this Contract, the Contractor shall have the right to terminate this Contract:

(a) with respect to any part of the Contract Area other than a Developmental Area then producing, or that prior thereto had produced Petroleum, upon giving ninety (90) days written notice of its intention to do so; and

(b) with respect to any Developmental Area in which Petroleum is being produced, or that prior thereto had produced Petroleum, upon giving at least one hundred and eighty (180) days written notice of its intention to do so.

31.3 This Contract may, subject to the provisions herein below and Article 31, be terminated by the Government upon giving ninety (90) days written notice to the other Parties of its intention to do so in the following circumstances, namely, that

the Contractor ("the Defaulting Party")

(a) has knowingly submitted any false statement to the Government in any manner which was a material consideration in the execution of this Contract; or

(b) has intentionally and knowingly extracted or authorized the extraction of hydrocarbon not authorized to be extracted by the Contract or without the authority of the Government except such extractions as may be unavoidable as a result of operations conducted hereunder in accordance with generally accepted Good International Petroleum Industry Practices which, when so extracted, were immediately notified to the Government or

(c) is adjudged bankrupt by a competent court or enters into or scheme of composition with its creditors or takes advantage of any law for the benefit of the debtors; or

(d) has passed a resolution to apply to a competent court for liquidation of the Company unless the liquidation is for the purpose of amalgamation or reconstruction of which the Government has been given notice and the Government is satisfied that the Company's performance under this Contract would not be adversely affected thereby and has given its approval thereto;

(e) has signed any interest in the Contract without the prior consent of the Government as provided in Article 29; or

(f) has failed to make any monetary payment required by law or under this Contract by the due date or within such further period after the due date as may thereafter be specified by the Government; or

(g) has failed to comply with or has contravened the provisions of this Contract in a material particular; or

(h) Has failed to comply with any final determination or award made by a sole expert or arbitrators subject to Article 34; or

(i) Has failed to carry out or observe any of the terms and conditions of the License or Lease or the provisions of the Acts or Rules in force thereunder, subject however, to Article 32.

(j) on notice of cancellation as provided in Article 30.4.

(k) contractor has failed to commence the Petroleum Operations within one hundred and eighty 180 days of the Effective Date.

PROVIDED THAT

Where the Contractor comprises two or more Parties, the Government shall not exercise its rights of termination pursuant to Article 31.3, on the occurrence, in relation to one or more, but not all, of the Parties comprising Contractor, of an event entitling the Government to terminate the Contract,

(a) if any other Party or Parties constituting the Contractor (the Non-Defaulting Party or Parties) satisfies the Government that it, or they, is/are willing and would be able to carry out the obligations of the Contractor.

(b) where the non Defaulting Party or Parties with the consent of the Government has/have acquired the Participating Interest of the Defaulting Party pursuant to the provisions of the Operating Agreement and has/have procured and delivered to the Government a guarantee or guarantees as referred to in Article 30.1 in respect of the Participating Interest of the Defaulting Party acquired by the non Defaulting Party or Parties.

31.4 This Contract may also be terminated by the Government on giving the requisite notice specified above if the events specified in Article 32.3 (c) and (d) occur with respect to a company which has given a performance guarantee pursuant to Article 30 subject however to Article 31.5.

31.5 If the circumstance or circumstances that give rise to the right of termination under Article 31.3(f) or (g) or (i) or Article 31.4 are remedied (whether by the Defaulting Company or by another Party or Parties in its behalf) within the ninety (90) day period, or such extended period as may be granted by the Government, following the notice of the Government's intention to terminate the Contract as aforesaid, such termination shall not become effective.

31.6 If the circumstance or circumstances that would otherwise result in termination are the subject matter of proceedings under Article 34, then termination shall not take place so long as such proceedings continue and thereafter may only take place when and if consistent with the arbitral award.

31.7 On termination of this Contract, for any reason whatsoever, the rights and obligations of the Contractor shall cease but such termination shall not affect any rights of any Party which may have accrued or any obligations undertaken or incurred by the Contractor or any Party comprising the contractor and not discharged prior to the date of termination.

31.8 In the event of termination pursuant to Articles 31.2, 31.3 or 31.4:

(a) The Government may require the Contractor, for a period not exceeding one hundred and eighty (180) days from the date of termination, to continue, for the account and at the cost of the Government, Crude Oil or Natural Gas production activities until the right to continue such production has been transferred to another entity;

(b) a Foreign Company, which is a constituent of the Contractor, shall have to remove and export all its property subject to Article 28 and the provisions hereof provided that in the event that ownership of any property is in doubt, or disputed, such property shall not be exported unless and until the doubt or dispute has been settled in favour of the Foreign Company.

31.9 Within ninety (90) days after the termination of this Contract, pursuant to

Article 31.2, 31.3, or 31.4, or such longer period as the Government may agree, the Contractor shall comply with Article 14.9 and any reasonably necessary action as directed by the Government to avoid Environmental Damage or hazards to human life or to the property of others.

3. Pursuant to certain agreements entered into between ACIL, JTI and certain other parties it was agreed that JTI would transfer its entire 25% PI to CRL and that ACIL will transfer 35% of its PI to CRL such that the remaining PI holders would be - ACIL with 40% PI and CRL with 60% PI. Pursuant to the transfer and assignment agreement entered into between ACIL, CRL and JTI, an application was made to the UoI for consent in accordance with Article 29 of the PSC which consent was granted by a letter dated 19th February 2004. Pursuant to the said consent, Amendment No. 1 to the PSC was executed on 26th July 2004 recording the transfer and assignment of JTI's PI to CRL and 35% of ACIL's PI to CRL.

4. It is stated that pursuant to Article 7.4 of the PSC, ACIL and CRL entered into a Joint Operating Agreement ("JOA") on 5th May 2004. The said agreement was filed with the Government of India. It is stated that the Director General of Hydrocarbons ("DGH"), the nodal agency of the GOI controls and monitors the petroleum operations in the oil field as per the PSC and the JOA. In terms of Clause 13.3 of the JOA in the event of either of the consortium members i.e. ACIL or CRL deciding to exit the PSC by transfer or assignment of the PI, the other parties to the JOA would have the first right of refusal over that PI. Further, in case of sale of stocks of a party, if the subject PI of the PSC was a primary asset or the sole asset of such a party at that time, the right of first refusal would apply in respect of such shares as well. It is asserted that at the relevant period, the primary and sole asset of CRL was the 60% PI under the PSC. It is stated that in view of CRL's representations as to its capability and ability to be an Operator, ACIL agreed to CRL being the Operator under the PSC as part of the transfer/assignment by JTI and ACIL of the respective PI in favour of CRL.

5. Pursuant to the PSC, a Petroleum Mining Lease ("PML") dated 27th November 2003 was executed for the Amguri field by the State of Assam in favour of both ACIL and JTI. Later, on 1st September 2004, the MPL was amended and it stood in the name of both ACIL and CRL. After the exit of CRL in the circumstances hereinafter mentioned, ACIL claimed that it was the only PML holder remaining to carry out the petroleum operations in the Amguri field. According to the GOI, however, the PML could certainly be further amended and need not be exclusively in the name of ACIL.

6. According to ACIL, in the initial two or three years of the operation under the PSC it became apparent that CRL's technical competence as an operator was deficient. ACIL claims to have raised various operational issues with CRL. It is contended by ACIL that CRL wrongfully withheld certain gas sales venues representing ACIL's 40% shares and various disputes arose between them. ACIL claims that by 2010 its extent of contribution had exceeded 70 million US Dollars ("USD"). According to ACIL, on 19th April 2010 it came across a press release

posted on CRL's website which disclosed that on 16th April 2010 in breach of Clause 13 of the JOA as well as Article 29 of the PSC, CRL had entered into an Investment Agreement ("IA") with one Mass Financial Corporation ("Mass"), a Chinese company. CRL had under the IA agreed to sell to Mass in two tranches, shares of CRL such that in the first tranche Mass would acquire 18% equity shares of CRL and subsequently pursuant to rights issued, Mass would get an aggregate equity shares control of 52.9% of majority interest in CRL. Thus, Mass indirectly sought to acquire 60% PI in the Amguri field, which was the primary asset of CRL at that time.

7. ACIL states that immediately upon coming to know of the IA, it made a written offer to CRL on 19th April 2010 pursuant to Clause 13.3 of the JOA to acquire not only what was proposed to be sold to Mass, but even the 100% shareholding of CRL. By a separate letter dated 20th April 2010, ACIL brought the above facts to the notice of the DGH. When CRL did not respond to the bid offer, ACIL filed OMP No. 234 of 2010 in this Court u/s 9 of the Act seeking an interim order restraining CRL from transferring or assigning its PI to Mass. On 18th May 2010, this Court directed that the proposed transaction would abide by the outcome of the petition.

8. On 19th August 2010, ACIL invoked the arbitration clause against CRL under the JOA. On 15th February 2011, ACIL sent a notice of breach to CRL calling upon to remedy the said breaches in terms of the JOA. CRL on its part filed OMP No. 514 of 2010 against the GOI terminating its rights in the Amguri field. On 7th March 2011, the Court dismissed CRL's OMP No. 514 of 2010 and vacated the interim order passed on 31st August 2010. FAO (OS) No. 142 of 2011 filed by CRL against the said order was unconditionally withdrawn by it on 16th May 2011.

9. In the meanwhile, on 7th March 2011, ACIL requested GOI to appoint it as Operator for the Amguri field. On 8th March 2011, in a meeting of the Operating Committee, ACIL was appointed as Operator subject to the requisite consent being obtained by GOI. ACIL informed GOI of the aforementioned decision of the Operating Committee on 9th March 2011. On 16th March 2011, a Memorandum was signed between ONGC, ACIL and CRL recording CRL's consent to hand over its assets and relevant contractual equipment assets. The operation as well as existing manpower was allowed to be managed by ACIL with effect from 16th March 2011 for smooth and uninterrupted operation. ACIL was to submit a daily progress report to both ONGC and DGH. On 20th May 2011, ACIL wrote to GOI stating that pursuant to the Memorandum dated 16th March 2011, ACIL was to take charge of the day-to-day operations of the Amguri field and further that without being formally appointed as Operator it was unable to undertake any petroleum activities in the Amguri field. In order that the petroleum operations at the Amguri field, which had come to a standstill, could commence without further delay, ACIL requested that it be appointed as an Operator "with the transfer of PI of CRL".

10. On 30th May 2011, the GOI referred ACIL's claim to the Ministry of Law & Justice ("MoLJ") for its opinion. On the same day, the Deputy Legal Adviser in the MoLJ gave an opinion that there was a provision in the PSC enabling the non-defaulting parties to claim their pre-emptive right rights and the Government had an obligation to consider the same if satisfied as to their technical and financial capability in carrying out the obligations of the defaulting partner/Contractor in terms of Articles 31.3 and 31.7 of the PSC and that the same needed to be considered in a fair and reasonable manner. The Director (Exploration) of the GOI, upon considering the opinion of the MoLJ, also made a noting on the file on 23rd June 2011 recommending the appointment of ACIL as Operator.

11. On 30th June 2011, the Under Secretary in the Ministry of Finance made a noting on the recommendation of the MoLJ as well as of the DGH by its letter dated 28th July 2010 that ACIL was technically qualified to be an Operator under the PI found in six rounds of bidding. Accordingly, the advice of the IFD was that "ideally, with a view to maximizing the Government take, 60% of the PI which now vests with the Government, ought to be auctioned to the highest bidder." The note ended with the following recommendation:

However, as recommended by DGH and Exploration Division, in order to ensure smooth functioning of the field, IFD may have no objection to the proposal at para 63/ante subject to approval by the competent authority. Regarding the proposal at para 65/ante, Exploration Division may like to examine the suggestion at para 70(iii) above, keeping in view PSC provisions, etc.

12. It appears that on the basis of the above note of the Ministry of Finance, the Minister, MoPNG made a noting on the file on 12th July 2011 that "the process of auctioning be accelerated. In the meanwhile, the present arrangement may continue." On this basis, on 27th July 2011, a letter was written to the DGH or MoPNG requesting that the DGH should "take all necessary steps for auctioning the PI on a priority basis." It was further stated: "Prior to auctioning, DGH may get the asset valued to arrive at a base/floor price for the 60% PI held by Government. You are also requested to inform ONGC and M/s. Assam Company India Limited about the continuance of the present arrangement till the auctioning of the PI." However, what was communicated by the DGH to ACIL and ONGC by letter dated 28th July 2011 was to continue the present arrangement for the Amguri field governance till the 60% PI was finalized by GOI. In other words, ACIL was not told by the DGH that a conscious decision had been taken by the GOI to auction the 60% PI of CRL.

Order and Award of the Tribunal in the dispute between ACIL and CRL

13. Meanwhile, a development took place in the arbitral proceedings between ACIL and CRL. The Arbitral Tribunal ("AT") passed an order dated 14th September 2011 holding that ACIL had made out a prima facie case that the transfer of shares by CRL was in breach of the JOA and that under Clause 13.2 of the JOA, CRL was liable to transfer its 52.9% shares currently held by Mass (now

Terra Nova). However, since the AT did not have the power to issue directions in respect of rights of the parties under the PSC, it permitted ACIL to approach the UoI for assignment of the 60% shares held by the CRL including operating rights in its favour.

14. On the basis of the above order, ACIL addressed a letter dated 23rd September 2011 to the Minister in the MoPNG seeking his intervention so that ACIL could be recognized as the assignee of 60% PI including Operatorship of the Amguri field without any further delay. MoPNG did not reply to this letter. It must be mentioned at this stage that right from 14th July 2010 onwards, ACIL had been seeking the assignment of the 60% PI of CRL in its favour so that the operations at the Amguri field could be handled in an efficient manner without interruption. On 20th October 2011, ACIL renewed its plea. However, no decision was taken on the above representations by the MoPNG.

15. On 21st November 2011, the AT passed a unanimous Award in the disputes between ACIL and CRL. The AT declared that CRL was in breach of Clause 13.3 of the JOA and further declared that ACIL was entitled to transfer of the 60% PI of CRL as also to the transfer of 52.9% shares of CRL which were sold to Mass. The relevant operative portion of the reliefs granted by the AT in the said Award reads as under:

...

(iii) It is hereby declared that ACIL is entitled to transfer/assignment of all rights, title and interest that CRL has in respect of the said 60% Participating Interest in satisfaction or and in adjustment of USD 4.16 Million out of the total damages awarded to ACIL such that ACIL is placed in a position that it would have been had CRL not breached its obligations under the JOA and to step-in rights in relation to the said Participating Interest;

(iv) It is hereby declared that ACIL is the assignee of CRL's rights, title and interest of the 60% Participating Interest under the terms of the JOA such that ACIL is placed in a position that it would have been had CRL not breached its obligations under the JOA and for which ACIL may approach the GOI to recognize the assignment and to grant consent as may be required in terms of the PSC;

(v) It is hereby declared that this Award shall constitute the Deed of Assignment of the 60% Participating Interest pursuant to the JOA in the Amguri Field from CRL to ACIL on the consent of the Union of India under the PSC being obtained;

(vi) It is declared that ACIL is entitled to acquire and we hereby direct the transfer of 52.9% shares of CRL in favour of ACIL which were sold to Mass at a total cost payable of USD 2.2071 Million which amount has been adjusted from the damages awarded;

ACIL's case

16. The case of ACIL is that in terms of Clause (a) of the Proviso to Article 31.3

of the PSC, the automatic consequence of termination of CRL's PI was that, subject to ACIL being willing to carrying out the obligations of the Contractor and the GOI recognizing that ability, the PI of CRL vested absolutely in ACIL. It is contended that PSC did not contemplate the vesting of the PI of CRL in the GOI on termination of the PSC vis-?-vis CRL. As already noticed ACIL had made numerous representations to the GOI to assign the 60% of PI of CRL in its favour. These included representations made on 14th July 2010, 7th September 2010, 29th September 2010, 9th December 2010, 14th December 2010, 7th and 8th March 2011, 20th May 2011, 2nd August 2011, 3rd August 2011, 8th and 9th September 2011, 16th and 23rd September 2011. After the arbitral Award dated 21st November 2011, ACIL made representations on 24th, 25th and 26th November 2011 and 21st December 2011. None of these representations received any response.

17. ACIL states that ONGC made a request for reopening of the Amguri field and permitting it to operate the said field. In response thereto the Directorate General of Mines Safety by a letter dated 3rd January 2012 observed that the said field could be only opened in favour of a party which has the PML. According to ACIL it is only thereafter that it came across the notification issued by the DGH titled "Invitation For Bid ("IFB") - International Competitive Bidding ("ICB")" inviting bids from experienced contractors for "complete surface and subsurface Amguri field asset valuation" in monetary terms to be further subject to PSC terms "for arriving at floor price in proportion of 60% to be put under auction." It is submitted that in terms of the PSC, the GOI had no right to put the 60% PI of CRL to a public auction. If GOI went ahead with the processing of the bids, it would cause serious prejudice to the rights of ACIL. It is contended that with ACIL already having invested over 70 million USD in the Amguri field pursuant to the PSC, GOI should not be allowed to arbitrarily and unfairly deny ACIL its rights. It is submitted that ACIL has already suffered financial loss amounting to USD 17.830 million and USD 7.132 million being 40% due to loss of production of oil and gas since 4th December 2010 when petroleum operations in Amguri field were suspended due to GOI's failure to consent to ACIL being the Operator. ACIL further states that it was in the process of taking steps for appointment of an arbitral tribunal in terms of the PSC. In the circumstances, on 17th January 2012 it filed the present petition u/s 9 seeking reliefs as mentioned hereinbefore.

18. On 18th January 2012, this Court passed a detailed order noting the above facts and submissions. On that date, the UoI was represented by the counsel who sought time to take instructions as to whether any decision had been by it on the numerous representations made by ACIL seeking its consent to the assignment of the 60% PI of CRL in its favour in terms of the Award dated 21st November 2011 of the AT. The Court directed that "till the next date of hearing the Respondent will not finalize the bids received by it pursuant to the Bid Document No. DGH/MM/Asset Valuation/076/ 2011/ENQ/047 and the decision if any taken in that behalf will be subject to further orders of this Court."

Case of the GOI

19. A reply was filed by GOI on 30th April 2012. In the said reply it was, inter alia, stated that when the contract with CRL was terminated by GOI, ACIL had not acquired 60% shares of CRL in the consortium. Consequently, ACIL could not have applied for GOI's consent owing to non-fulfillment of the conditions stipulated in Clause (b) of the Proviso to Article 31.3. It was submitted that in such circumstances 60% PI vested with the GOI. It was contended that unless ACIL was able to establish that the conditions under Clauses (a) and (b) of the Proviso to Article 31.3 were fulfilled, particularly the acquisition of CRL's 60% PI with prior consent of GOI, ACIL's assertion that it had become the holder of 100% PI could not be accepted.

20. It is further contended by GOI that JTI exited from the PSC and ACIL did not claim to be appointed as the Operator. CRL was introduced into the PSC with a 60% PI at the instance of JTI and ACIL. Consequently, ACIL's PI came down from 75% to 40% and it was CRL which was appointed as the Operator. It is submitted that since CRL was chosen as a partner and the consortium so formed had miserably failed in getting the desired result from the field thus causing huge loss, GOI decided to auction the 60% PI of CRL. It is contended that GOI through the MoPNG wrote to ONGC on 16th March 2011 calling upon it to take charge of the Amguri field. During the period from 16th to 19th March 2011, ONGC took possession of the assets of the Amguri field. The Amguri field geo-scientific, administrative and financial data was taken from CRL at Delhi between 14th and 19th April 2011. It is stated that subsequently GOI decided to auction the 60% PI which now vested in it and then wrote on 27th July 2011 to the DGH to take all necessary steps for auctioning the PI on a priority basis. Prior to such auctioning, DGH was asked to get the assets evaluated at the base/floor price for the 60% PI held by the GOI. In view of the letter dated 27th July 2011, DGH floated a Global Open Tender on 15th October 2011 inviting bids for valuation of the Amguri Estate. A pre-bid conference with various contractors was held on 15th November 2011. It is stated that 10 bids were submitted on 12th December 2011. On 2nd January 2012 ACIL emails were sent to bidders seeking clarification prior to final evaluation and these clarifications were received on 12th January 2012.

21. GOI referred to the decision of the Supreme Court in *Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd.*, in which it was explained that the constitutional mandate was that the natural resources belong to the people of this country and the nature of the word "vest" in Art. 297 must be seen in the context of the public trust doctrine. GOI contended that the PSC is subservient to the constitutional mandate. Accordingly, it was erroneous for ACIL to contend that on termination of the PSC qua CRL, the PI of CRL automatically vested with ACIL. It is submitted that transfer of PI is pursuant to Article 29 and not Article 31 of the PSC. The reliance placed by ACIL on Article 31 of the PSC to claim an exclusive/pre-emptive right over the PI of the defaulting party was without basis.

It is contended by GOI that the PSC does not recognize any preemptive right to PI transfer under any provision and that the GOI being the owner of the field and not the natural resources within the contract area, is free to take a decision which will best serve the public interest. It is stated that if in GOI's wisdom, the only way to maximize the benefits was to auction the 60% PI in the Amguri field, no fault could be found with it and it did not call for interference by the Court. GOI contended that its decision to put the 60%PI of CRL on auction was not arbitrable inasmuch as in the PSC there was no pre-emptive right in favour of ACIL in that regards. GOI was not a party to the JOA which gave ACIL such a pre-emptive right. In fact on 24th April 2012, after the passing of the interim order by this Court, the DGH wrote to ACIL in reply to the arbitration notice denying that there existed any arbitrable dispute between ACIL and GOI capable of being referred to arbitration.

Submissions of Counsel

22. Mr. Mukul Rohtagi and Mr. Ciccu Mukhopadhyaya, Senior Advocates appearing for ACIL reiterated all of the above submissions on its behalf. It was submitted that the PSC was being wrongly interpreted by GOI. It was obligatory for the GOI to have considered, within a reasonable time, the numerous representations made by ACIL for assignment of the 60% PI of CRL in its favour. The recommendations made by the DGH as well as MoLJ showed that ACIL was assessed as being capable of carrying out the obligations of the defaulting party i.e. CRL. In fact, in FAO (OS) No. 142 of 2011 the GOI had filed an affidavit stating that the presence of ACIL in the Amguri field was necessary for smooth operations. Till date no response was received by ACIL to its numerous representations and, therefore, it came as a surprise to ACIL during the course of hearing of the present petition that GOI had decided to reject ACIL's representation without even communicating to ACIL such rejection. It is submitted that as long as the PSC continued, the GOI was bound to honour its clauses and could not act unilaterally. There was no provision in the PSC by which the 60% PI of CRL could vest in the GOI as claimed by it. It is submitted that Article 31.3(e) negates the vesting of the PI in the GOI. Consequently the question of GOI outing the 60% PI to auction and compelling ACIL to continue the consortium with a third party not of its choice did not arise.

23. It was further submitted on behalf of ACIL that the pre-emptive right of ACIL for vesting of 60% PI of CRL in its favour flowed not only from the JOA but from the PSC itself. The JOA was anticipated in the PSC. Article 7.4 of the PSC, in fact, stipulates that a JOA should be executed and should be consistent with the PSC. It was emphasized that under Article 29.6 of the PSC if GOI failed to respond to ACIL's request for assignment of the 60% PI within 120 days, the GOI's consent must be deemed to have been given.

24. In reply it was contended by Mr. Harin P. Raval, learned Additional Solicitor General ("ASG"), that there was no vested right in ACIL to claim assignment of the 60% PI in its favour. As regards the Award dated 21st November 2011 by the

AT, Mr. Raval submitted that the Tribunal could not have passed any award in respect of the 60% PI of CRL's since the PSC as far as CRL was concerned stood terminated as on 29th August 2010. It was not open to ACIL to treat the Award itself as a deed of assignment. The said Award was not binding on the GOI which was not a party to it. Further, even the directions issued by the AT in favour of ACIL were not unconditional. The assignment of the 60% PI in favour of ACIL was subject to GOI's consent. GOI could well refuse consent in terms of Articles 29 and 31 of the PSC. In the understanding of GOI it was only CRL which could seek the assignment of its 60% PI in favour of ACIL and once CRL went out of the picture, there was no question of ACIL requesting for such assignment in its favour. Mr. Raval submitted that there was no prima facie case made out by ACIL for grant of an interim relief. In effect ACIL was seeking the relief of specific performance in the context of the PSC which was impermissible in law. Moreover, ACIL could definitely be compensated in monetary terms for any alleged loss or damages suffered by it. He referred to the observations in the order dated 7th March 2011 passed by this Court dismissing CRL's OMP No. 514 of 2010 u/s 9 of the Act. He submitted that the balance of convenience was in favour of GOI in not granting ACIL the interim reliefs prayed for.

25. During the course of arguments, in response to certain specific queries by the Court, the learned ASG clarified by way of written note (which is placed on record) that as per audited accounts, the total investment till the financial years 2008-09 i.e. as on 31st March 2009 was USD 99.7 million. The revenue generated from the production of oil in the Amguri oil field till 31st March 2009 was USD 30 million. Oil production from the Amguri field had stopped since 4th September 2010. Gas production had stopped since 8th October 2011. As on date there was neither oil nor gas being produced from the said field.

26. Mr. Raval further clarified that the DGH never communicated to ACIL the fact of cancellation of the PSC vis-?-vis CRL. This only figured in its letter dated 16th March 2011 to ACIL after the judgment dated 7th March 2011 of this Court in OMP No. 514 of 2010. Neither the DGH nor the MoPNG ever communicated to ACIL about the auctioning of 60% PI of CRL. While MoPNG did inform the DGH of the above decision on 27th July 2011, which letter has been referred to hereinbefore, a copy of the said letter was not marked to ACIL. DGH on its part, on 28th July 2011, informed ACIL and the ONGC to continue "the present arrangement for Amguri field governance till 60% PI is finalized by GOI". Significantly, therefore, the DGH did not inform ACIL about the decision of the MoPNG to auction the 60% PI. Lastly, the GOI acknowledged that till date neither the DGH nor the GOI had communicated any decision to ACIL on its numerous representations.

Prima facie case

27. One of the principal issues to be considered by the Court at this stage in the present petition u/s 9 of the Act is whether ACIL has made out any prima facie case for continuance of the interim orders passed by this Court on 18th January

2012 in its favour.

28. At the outset it is made clear that the views expressed by this Court in its order dated 18th January 2012 as well as this order are only tentative and not intended to influence the final decision that may be taken by the arbitral tribunal or any other forum that might deal with the disputes between the parties.

29. The submissions made require the interpretation of Articles 29 and 31 of the PSC. Under Article 29.1 of the PSC, any party comprising the Contractor may assign or transfer a part or all of its PI with the prior written consent of the GOI "which consent shall not be unreasonably withheld" provided that the Government is satisfied with all the instances and certain factors outlined in Clauses (a) to (d) of Article 29.1. In other words, the GOI is required to take a conscious decision, applying its mind to the above factors when it is approached with the request by any party comprising the Contractor to assign or transfer a part or whole of its PI. The above situation would arise if CRL had approached the GOI for transfer of its PI, either wholly or in part, in favour of any other party. It is because CRL did not do so while seeking to transfer its PI to Mass that the GOI was constrained to terminate the PSC qua CRL. Strangely, however, the GOI never thought it fit to inform ACIL of such termination of the PI of CRL. ACIL was itself aggrieved by CRL committing breach of not only Article 29.1 of the PSC but also of Clause 13.3 of the JOA. ACIL brought the above facts to the notice of the GOI which then terminated the PSC vis-?-vis CRL.

30. Article 29.6 envisages the deemed consent of the GOI if it does not respond to a request for assignment or transfer made by a party comprising the Contractor under Article 29.3 read with Article 29.1 within 120 days of the making of such request. However, it prima facie appears to the Court that Article 29 would apply only where one of the contracting parties seeks to assign its PI wholly or in part to another entity and not where it seeks an assignment of a part of the PI in its own favour. Article 29.6 of the PSC does not appear to be applicable in the present case.

31. Turning to Article 31 which deals with termination of the contract, it appears that the parties to the PSC anticipated a situation where the termination of the PSC could be qua only one of the parties to the consortium. Under Article 31.3, the contract could be terminated by the GOI by giving 90 days written notice to the other party of its intention to do so, where the default is committed by either both parties comprising the Contractor or only one of them. Article 31.3 clearly makes a distinction between a "defaulting party" and a "non-defaulting party". There is no dispute that in the circumstances of the present case, it is CRL which is identified by the parties as the defaulting party and ACIL which is the non defaulting party.

32. There is also no dispute that the termination of the PSC qua CRL was on account of contravention of clauses (e) and (g) of Article 31.3 by CRL. The Proviso to Article 31.3 envisages the Contractor comprising two or more parties,

as in the present case. It states that in such event the GOI shall not exercise its right of termination "in relation to one or more, but not of all, of the parties comprising the Contractor" of an event entitling the GOI to terminate the contract in the event: (a) the non-defaulting party, in this case ACIL, satisfies the GOI that it is willing and would be able to carry out the obligations of the Contractor; (b) where ACIL with the consent of the GOI acquires the PI of CRL, CRL being the defaulting party, pursuant to the provisions of the JOA and (c) has procured and delivered to the GOI a guarantee or guarantees, as referred to under Article 30.1 in respect of the PI acquired by ACIL.

33. It does appear to the Court *prima facie* that in terms of the Proviso to Article 31.3 of the PSC there is a fetter on GOI's power to terminate the PSC even qua CRL. Prior to doing so, there is an obligation on the GOI to permit the non-defaulting party comprising the Contractor, i.e. ACIL, to satisfy the GOI that it is capable of fulfilling the obligations of the Contractor. From July 2010 onwards, ACIL has been writing to the GOI claiming that it can fulfill the obligations of the Contractor. In response to ACIL's numerous representations from 10th July 2010 till as late as December 2011 the GOI was obliged to take a decision on whether it was satisfied that ACIL could fulfill the obligations of the Contractor under the PSC. While it is correct that it was open to the GOI to take a decision one way or the other, it was definitely required to take a decision and not simply keep silent on the numerous representations made by ACIL. The fact remains that till date the GOI has not conveyed to ACIL its decision on the numerous representations made by ACIL. In fact, there is nothing to indicate that the GOI has taken a decision that it is not satisfied that ACIL would not be able to carry out the obligations of the Contractor under the PSC. GOI has sought to explain why it has decided to go in for an auction of the 60% PI but does not refer to any conscious reasoned decision taken by it in terms of Clause (a) to the Proviso to Article 31.3 of the PSC.

34. *Prima facie*, there is also merit in the contention of ACIL that in terms of the PSC, the question of vesting of the PI of the defaulting party in favour of the GOI does not arise. Under Article 31.7, on termination of the PSC, the rights and obligations of the Contractor shall cease but at the same time such termination "shall not affect any rights of any party which may have accrued or any obligations undertaken or incurred by the Contractor or any party comprising the Contractor and not discharged prior to the date of termination." Consistent with the policy of the GOI to keep out the public sector undertakings as far development of small oil fields was concerned, GOI decided to invite bids from private players and encouraged bidding by a consortium. In the above context, it appears that while it might be open to GOI to not continue a PSC with a consortium if it finds breaches having been committed of the PSC, it might not be feasible or even tenable for the GOI to compel one of the parties to the consortium to continue with the PSC by teaming up with another party not of its choice but that of GOI's. This explains the rationale behind clause (a) of the Proviso to Article 31.3 which requires the GOI to be satisfied whether the non-

defaulting party comprising the Contractor can, in fact, fulfill the obligations of the Contractor. If GOI is not so satisfied, then it can possibly only result in the PSC as such being terminated. However, that stage has not yet been reached in the present case.

35. It is not the case of the GOI that it wants to terminate the PSC as such. It wants to continue with the PSC with ACIL but introduce, ostensibly, through auctioning the 60%PI of CRL, another consortium partner to continue the PSC along with ACIL. As long as the PSC involving ACIL continues, GOI is obliged to abide by the clauses of the PSC. This factor singularly distinguishes the present case from that of *Reliance Natural Resources Limited v. Reliance Industries Limited*. Of course, it would be open to the GOI to take a decision either to accept the request of ACIL or to refuse it. The PSC obliges GOI to take such decision in reasonable time and in a fair manner. The facts narrated before show that the GOI has failed to act with promptitude. In fact GOI has failed to take any formal decision on ACIL's request and even if it has, such decision is yet to be conveyed to ACIL. The failure by GOI to take a decision is detrimental to public interest. Considerable revenue losses have ensued with the oil production from the Amguri field ceasing from 4th September 2010 onwards and gas production ceasing since 8th October 2011 on account of the indecisiveness on the part of the GOI. It was imperative for the GOI to have taken a timely decision on the question of reviving the Amguri field.

36. In the circumstances, this Court is of the view that ACIL has made out a prima facie case that it is entitled in terms of Clause (a) of the Proviso to Article 31.3 of the PSC to a decision by the GOI on its request for transfer/assignment of the 60% PI of CRL in its favour.

Balance of Convenience and undue hardship

37. The next question concerns the balance of convenience in continuing the interim order passed by the Court on 18th January 2012. The very purpose of inviting bids from joint ventures was to ensure maximum exploitation of the potential of the Amguri Field. The PSC, which provided for a Contractor comprising two parties, was to make sure that the joint efforts of both the parties would achieve the best results.

38. ACIL was a party to the consortium and it has remained so throughout the PSC with only the other partner changing. First, it was JTI and later CRL. If one were to accept the plea of GOI that it is free to auction the 60% PI to another party, then it would result in ACIL being compelled to remain in consortium with a third party with which ACIL may have no relationship at all. It is a moot point whether ACIL could be compelled to carry out work in consortium with a party, not of its choice. If this was the intention of the parties when they entered into the PSC, then there should have been an express clause evidencing it. Prima facie, it does not appear to this Court on a reading of different clauses of the PSC that GOI can simply sell the 60% PI of CRL in a public auction to a third party.

The legal justification offered by GOI for such decision is that the 60% PI of CRL vests in the GOI, which explanation prima facie appears to be of doubtful validity.

39. The upshot of the above discussion is that the GOI is obliged to deal with each of the representations made by ACIL seeking its consent to the assignment of 60% PI of CRL in its favour and definitely to take a decision in terms of Clause (a) of the Proviso to Article 31.3 of the PSC. Till such time GOI cannot proceed with its decision to auction the 60% PI since that would not only be contrary to the procedure envisaged under the PSC but severely prejudice the rights and interests of ACIL flowing therefrom. The Court is not at this stage satisfied that the resultant loss to ACIL can be suitable compensated in monetary terms. Consequently, it is held that the balance of convenience in continuing the interim order dated 18th January 2012 is in favour of ACIL at this stage. Also, the non-continuance of the interim order will cause it undue and irreversible hardship.

Directions

40. Consequently, it is directed that the GOI will decide ACIL's representations on the assignment/transfer of the 60% PI in its favour in terms of Clause (a) to the Proviso to Article 31.3 of the PSC within a period of six weeks from today after giving ACIL an opportunity of being heard. The GOI will communicate to ACIL at least 10 days in advance, the date of such hearing. The GOI will pass a reasoned decision within four weeks of such hearing and communicate it to ACIL within ten days thereafter. The interim order passed by this Court on 18th January 2012 will continue for a period of two weeks after the communication of GOI's decision to ACIL.

41. It is clarified that this Court has not expressed any view on the merits of the request made by ACIL in its numerous representations. It is for the GOI to take a considered and deliberated decision in view of the legal position emanating from the PSC and the JOA in accordance with law. Needless to say that if aggrieved by the decision of the GOI, it will be open to ACIL to take such appropriate remedy as may be available to it in accordance with law. It is further reiterated that the views expressed in the order dated 18th January 2012 and this order are tentative and are not intended to influence the final decision that may be taken by the AT or any other forum that might deal with the disputes between the parties. The petition is disposed of in the above terms but in the circumstances with no orders as to costs.