

(2011) 03 DEL CK 0011

In the Delhi High Court

Case No : O.M.P. 514 of 2010 and I.A. No. 1371 of 2011

Canoro Resources Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Constitution of India, 1950 — Article 10, 14, 15, 16, 19
English Arbitration Act, 1996 — Section 48(5)
Oil Fields (Regulation and Development) Act, 1948 — Section 21, 26
Petroleum and Natural Gas Rules, 1959 — Rule 5
Specific Relief Act, 1963 — Section 10, 14, 14(1), 41, 42

Citation : (2011) 2 ARBLR 20 : (2011) 179 DLT 72

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : C.A. Sundaram, Rohini Musa, Zafar Inayat, Abhishek Gupta, Anandh Kanna, Akshay Chandra, Siddharth Barua and Sharan Thakur, for the Appellant; Mohan Parasaran, ASG, Neeraj Chaudhari, Zoheb Hossain and Mohit Auluck, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This petition is preferred by the Petitioner u/s 9 of the Arbitration and Conciliation Act, 1996 to seek the following reliefs:

(a) An ad interim injunction restraining the Respondent from directly or indirectly and in any manner whatsoever acting under its letter of termination dated August 27, 2010 of the Production Sharing Contract (PSC), and taking any other steps detrimental to the interests of the Petitioner till the matter is finally disposed off by an arbitral tribunal.

(b) An ad-interim order of injunction restraining the Respondent from directly or indirectly and in any manner whatsoever considering the termination of the PSC as being effective on and from August 29, 2010.

(c) An order of status quo ante pending the award of the Arbitral Tribunal.

The Petitioner had sought the reliefs ex parte as well.

2. The Petitioner claims that it is an oil and gas exploration and production company incorporated under the laws of the Province of Alberta, Canada. The Respondent is the Union of India, represented by the Joint Secretary, Ministry of Petroleum and Natural Gas.

3. The President of India entered into a Production Sharing Contract (PSC) dated 23.02.2001 in respect of the Amguri oil field in the state of Assam, with one Assam Company Limited (ACL) and one Joshi Technologies International Inc. (JTI). The participating interest (P.I.) of ACL was 75% and that of JTI was 25%. The Petitioner acquired the participating interest in the PSC to the extent of 60% i.e 25% of JTI's P.I. and 35% of ACL's P.I. vide amendment agreement 26.07.2004. The Petitioner, apart from being a "contractor" under the PSC was also appointed as the "operator". ACL remained the other contractor with 40% P.I.

4. The primary dispute which has arisen between the parties under the PSC is whether the Petitioner is in breach of Article 29 of the said agreement which deals with the aspect of assignment of PI of any party comprising the contractor. The said dispute would necessarily have to be determined by the Arbitral Tribunal upon an interpretation of the contractual terms and their application to the facts of this case. As the Respondent has sought to terminate the PSC vide letter dated 27.08.2010 on the premise that the Petitioner is in breach of Article 29 of the PSC, the Petitioner has preferred this petition to seek interim measures of protection. I will, therefore, examine and evaluate, in the course of this order, prima facie, the submissions made by the parties to the extent it is necessary, and it is made clear that any observation made by me in this order would not come in the way of the Arbitral Tribunal in arriving at its own conclusions upon the interpretation of the PSC.

5. I may, at this stage, take note of a few relevant provisions of the PSC. The recitals contained in the PSC dated 23.02.2001 set out the background in which that agreement was executed. The same read as follows:

WITNESSETH:

WHEREAS

(1) The Oil Fields (Regulation and Development) Act, 1948 (53 of 1948) (hereinafter referred to as "the Act") and the Petroleum and Natural Gas Rules, 1959, made thereunder (hereinafter referred to as "the Rules") make provision, inter alia, for the regulation of Petroleum Operations and grant of licenses and leases for exploration, development and production of Petroleum in India;

(2) The Rules provide for the grant of licenses and leases in respect of land vested in a State Government by that State Government with the prior approval

of the Central Government and JTI and ACL will apply for a Lease to carry out Exploration Operations, Development Operation and Production Operations in that area onshore identified as Field Amguri and more particularly described in Appendix-A and Appendix-B.

(3) Rule 5 of the Rules provides for an agreement between the Central Government and the Lessee containing additional terms and conditions with respect to the lease;

(4) The Government desires that the Petroleum resources which may exist in India be discovered and exploited with the utmost expedition in the overall interest of India in accordance with Good International Petroleum Industry Practices;

(5) JTI and ACL have committed that they have, or will acquire and make available, the necessary financial and technical resources and the technical and industrial competence and experience necessary for proper discharge and/or performance of all obligations required to be performed under this Contract in accordance with Good International Petroleum Industry Practices and will provide guarantees as required in Article 30 for the due performance of its obligations hereunder;

(6) As a result of discussions between representatives of the Government, and JTI and ACL on the proposal of JTI and ACL, the Government had agreed to enter into this Contract with JTI and ACL with respect to the said area referred to in paragraph(2) above on the terms and conditions herein set forth.

(emphasis supplied)

6. "Participating Interest? under Article 1.70 means in respect of each party Constituting the contract, the undivided share expressed as a percentage of such party?s participation in the rights and obligations under this contract.

7. Article 2 defines the duration/term of the contract to be 25 years from the effective date, unless the contract is terminated or expires earlier in accordance with its terms. However, the term may be extended upon mutual agreement of the parties. Article 3.2 provides that each party comprising the Contractor shall contribute its participating interest share of all contract costs with respect to the contract area and assume its participating interest share of all rights and obligations from the effective date. These rights and obligations include the right to take cost petroleum and the share in profit petroleum (Article 3.3). Under Article 8, the contractor, inter alia, has the exclusive right to carry out the petroleum operations and to recover costs and expenses as provided under the contract. Article 10 deals with the aspect of discoveries, development and production of and from oil-wells. Article 15 deals with the recovery of cost petroleum. Article 16 provides the mechanism of production sharing of petroleum. Article 16.4 gives the option to the Government to take its entitlement to profit petroleum either in cash or in kind in any year. Article 19

deals with the aspect of "domestic supply, sale and disposal and exports of crude oil and condensate?". Article 19.1 provides that until such time as the total availability to the Government of crude oil and condensate from all petroleum production activities in India meets the total national demand, each constituent of the contract shall be required to sell to the Government or its nominee all of its entitlement to crude oil and condensate from each field in order to assist in satisfying the national demand and the Government shall have the option to purchase the whole or any portion thereof at the price determined pursuant to Article 20. Article 28.1 states that 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, condensate or gas, the title whereof has passed to the contractor or any other person in accordance with the provisions of this contract." Article 29 deals with the aspect of assignment of interest. Since the same is central to the dispute between the parties and the discussions in this order, it is reproduced hereinbelow:

ARTICLE 29 ASSIGNMENT OF PARTICIPATING INTEREST

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.

29.7 An assignment or transfer shall not be made where the Participating Interest to be retained by the proposed assignor or the percentage interest of assignee shall be less than ten per cent (10%) of the total Participating Interest of all the constituents of the Contractor, except where the Government, on the recommendations of the Management Committee may, in special circumstances, so permit.

29.8 Nothing contained in this Article 29, shall prevent a Party comprising the Contractor from mortgaging, pledging, charging or otherwise encumbering at its own risk and cost all or part of its Participating Interest for the purposes of security relating to finance to the extent required for performing its obligation under the Contract, provided that:

- i) such Party shall remain solely liable for all its obligations relating to its Participating Interest to the exclusion of the other participants thereto;
- ii) the encumbrance shall be expressly subordinated to the rights of the other Parties under this Contract. The obligations occurring from the said encumbrance shall be the sole responsibility of the original Party and shall in no manner compromise the rights of other Parties to the Contract;
- iii) such Party has given reasonable notice of such encumbrance and furnishes to all other Parties (including, for the avoidance of doubt, the Government) a certified copy of the executed instrument(s) evidencing the encumbrances;

iv) keeping in view the national interest of India, prior consent of the Government shall be required (which consent shall not be unreasonably withheld) of the list of potential lenders with whom such Party can consider hypothecation;

v) the Party creating the charge shall ensure that such charge shall not in any way affect the interest of other Parties or result in interference with joint operations. In the event of any claims or liabilities imposed on other Parties because of the creation of such charges, the Party having created charge on its Participating Interest shall indemnify the other Parties; and

vi) in case of foreclosure or default by a borrowing Party, the mortgagee shall not be deemed to have acquired a right to carry on either by itself or through an agent, the Petroleum Operation, without the written consent of the Government of India.

29.8.1 The Parties acknowledge that to obtain financing a Party ("Borrower") will be required to secure for a permitted chargee the right to receive a copy of any notice served on the Borrower and the Parties agree that they shall serve a copy of any such notice on any such permitted chargee in accordance with the provisions of Article 38 at the same time as such notice is served on the Borrower. For the purposes of Article 38 the address for service of notices of the permitted chargee shall be that specified in the instrument or instruments referred to in Article 29.8(iii).

29.8.2 The financing arrangement referred to above, shall be subject to the rights of Government as contained in Article 29.1 of Contract and the pre-emptive rights of the Parties as may be contained in Operating Agreement. Any Party which wishes to exercise the said pre-emptive rights will explicitly assume the obligation on the same terms and conditions as the Borrower.

8. Article 31 deals with the term and termination of the PSC. In particular, Article 31.3 entitles the Government to terminate the contract "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 or a party comprising the contractor ("the defaulting party").

(a) xxx

(b) xxx

(c) xxx

(d) xxx

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

(f) xxx

(g) has failed to comply with or has contravened the provisions of this contract in

a material particular; or x x x x x x x x

9. Article 31.6 is a rather peculiar clause and is heavily relied upon by the Petitioner. The same reads as follows:

31.6 If the circumstance or circumstances that would otherwise result in termination are the subject matter or 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.

10. Article 34 contains inter alia the arbitration agreement between the parties.

11. Article 35.1 provides that:

35.1 The parties comprising the contractor shall notify the Government of any material change in their status, shareholding or relationship of that of any guarantor of the companies, in particular, where such change would impact on performance of obligations under this contract.

12. I may now take note of the background facts of the case which have given rise to the dispute between the parties. The Petitioner entered into an investment agreement dated 16.04.2010 with one MASS Financial Corporation (hereinafter to be referred as "MASS?"), a Corporation organized under the laws of Barbados. Under this investment agreement, MASS agreed to make a private placement for 24,798,000 common shares and also to apply against the rights offering made by the Petitioner company, equal to the total rights offering commitment, less the number of common shares purchased by the holders of rights pursuant to the exercise of rights under the rights offering. The Petitioner agreed with MASS that the funds infused by MASS would be utilized at least to the extent of US\$1,500,000/- to meet the expenditures relating to the Amguri condensate recovery and gas re-injection project. The balance of the proceeds from the equity financing were agreed to be used for working capital and in conjunction with the exploration and development of its oil and gas projects, such projects including but not limited to inter alia: (i) the Amguri condensate recovery and gas re-injection project; (ii) Amguri LPG plant; (iii) Amguri gas-fired power plant. On the private placement being made by MASS, the company agreed to appoint two nominee directors of MASS on its Board of Directors. It was further agreed that the Board of Directors shall be comprised of no more than five persons, and the said Board shall reflect the percentage of shareholding of MASS. After the private placement closing, the name of the Petitioner was agreed to be changed to one approved by MASS. The reason for inviting investment from MASS is stated to be the failure of the other partner, viz. ACL.

13. While the process of investment by MASS in the Petitioner company was underway, the Petitioner issued a communication dated 29.04.2010 to the Respondent. In this communication, the Petitioner stated that "While the private placement itself does not constitute a material change in the status of the Company with respect to the performance of Canoro's obligations under the

Amguri PSC, we nevertheless thought it appropriate to bring the matter to the attention of the Ministry of Petroleum & Natural Gas". The Petitioner also stated that as a result of the private placement, MASS did not become a new control person for Canoro, and there would not be any material effect on the control of the Petitioner company. The Petitioner disclosed that as a part of the transactions contemplated under the investment agreement, the Petitioner would carry out a rights offering and that MASS had agreed to take up all the shares not subscribed by the holders of rights.

14. Upon issuance of the said communication, the Respondent issued a show-cause notice dated 01.06.2010 to the Petitioner alleging breach of Article 29.2 of the PSC. In this show-cause notice, it was stated that as per Article 29.2 of the PSC, the contractor had to seek the consent of the Government in case of any material change in the status or shareholding of the company. It was stated that the material change in the shareholding of the company amounts to assignment of the P.I., for which the Petitioner had not obtained prior consent of the Government, thereby breaching the provisions of the PSC, and, in particular, Article 29.2. It was stated that the contravention of the PSC provisions had been viewed very seriously and the Petitioner was called upon to explain as to why the PSC in respect of the contract area identified as Amguri field should not be terminated as per Article 31 of the PSC.

15. The Petitioner responded to the show-cause notice on 06.06.2010 and again on 09.06.2010. A further detailed response was sent by the Petitioner on 23.06.2010. While the matter was still hanging fire, vide communication dated 01.07.2010, the Petitioner communicated that as a result of the rights offering made by the Petitioner and the subscriptions received there against the shareholding of MASS had increased to nearly 53%. The summary of changes in the share capital, ownership and directorship as communicated in this letter reads as follows:

Item

Particulars

Pre-funding position

Post-funding position

1

Number of Common Shares issued and subscribed in the Canadian Market

138,771,162

277,542,324

2

Number of directors

5

5

3

Details of new directors joining Canoro's Board post-transaction

Mr. RavinPrakash Mr. NowrozJalCama

4

Details of outgoing directors

Mr. James N. Smith Mr. Harley Winger

5

Principal shareholders

Trapeze Asset Management (18%) MASS Financial (18%)

MASS Financial (52.9%) Trapeze Asset Management (8.6%)

6

Equity Capital in US\$ millions

\$104.94

\$118.02

16. This communication also informed the Respondent that in addition, MASS had the right to purchase an additional 34,692,791 shares in terms of the "standby warrants" issued to it.

17. Finally, on 27.08.2010, the Respondent by a 16-page order terminated the PSC in relation to the Petitioner by rejecting the various explanations furnished by the Petitioner. Consequently, the Petitioner has preferred this petition.

Petitioner's submissions:

18. The submission of Mr. Sundaram, learned senior counsel for the Petitioner firstly is that, prima facie, there is no breach of Article 29 committed by the Petitioner by allocating about 53% shareholding in the Petitioner company to MASS without seeking the prior permission or consent of the Respondent. He submits that Article 29.1 and 29.2 contemplate two different situations. Article 29.1 is applicable, when a party comprising the contractor assigns or transfers a part, or all its participating interest to another entity. In this case, the Petitioner has not transferred or assigned any part of its participating interest in favour of MASS. The participating interest of the Petitioner prior to entering into the investment agreement with MASS was 60% and it continues to remain so.

19. He submits that Article 29.1 requires the party comprising the contractor to

obtain "prior written consent of the Government". However, Article 29.2 is applicable when the twin conditions, namely, that of a material change in the status of the companies or their shareholding takes place, and the company seeks to assign its participating interest under the changed circumstances. He submits that even if the mere change in the status of the company or its shareholding is taken to amount to assignment of participating interest, all that is required is that the company has to seek the consent of the Government which could be ex-post facto consent and need not be a prior written consent. He submits that the words "prior written consent of the Government" in Article 29.1 have deliberately not been used in Article 29.2, which merely requires the seeking of "the consent of the Government".

20. Mr. Sundaram further submits that the assignment of the participating interest under Article 29.1, or the material change in the shareholding pattern of the party comprising the contractor is not unusual and is clearly permitted by the PSC. He submits that earlier the participating interest was shared between ACL and JTI. The same was changed, with the prior written consent of the Respondent, and the Petitioner took over 60% of the participating interest from JTI and ACL.

21. He submits that even the direct assignment of the participating interest under Article 29.1 cannot be unreasonably withheld. The guidelines for the exercise of its discretion by the Respondent to grant or refuse the grant of consent are contained in Clauses (a) to (d) of Article 29.1. He submits that it is not even the case of the Respondent that MASS falls foul of any of the criteria contained in Clauses (a) to (d) of Article 29.1.

22. Article 35 is also referred to by Mr. Sundaram at this stage. He submits that the obligation to notify the government of any material change in the shareholding is cast on the contractor only "where such change would impact on performance of obligations under this contract". He submits that the induction of MASS as the majority shareholder in the Petitioner would in no way impact the performance of its obligations by the Petitioner. The said performance would only improve with the infusion of funds for the specific purpose of implementing the PSC. He submits that the language of Article 35 further establishes that the obligation to seek consent does not necessarily precede the change of the shareholding in a party comprising the contractor.

23. Mr. Sundaram further submits even if it were to be assumed that the Petitioner had not obtained the approval/consent of the Government for the assignment or transfer of the shareholding in favour of MASS, the only consequence thereof could be that the said assignment or transfer shall not be effective. However, the PSC cannot be terminated for this reason. In this regard, he places reliance on Article 29.5 of the PSC.

24. Mr. Sundaram submits that the right to terminate the PSC vested in the Government by virtue of Article 31.3(e) relates to the assignment of the

participating interest in the contract under Article 29.1. It does not relate to a case falling under Article 29.2.

25. Mr. Sundaram submits that even prior to the issuance of the show cause notice by the Respondent on 01.06.2010, the Petitioner had communicated to the Respondent the factum of the Petitioner entering into an investment agreement with MASS. By then, the Petitioner had received the consideration for the private placement which had resulted in 18% of the paid up equity of the Petitioner being allotted to MASS. The rights offering, and the offering by way of convertible debentures had not been made by then. He submits that only after the acceptance of the rights offering by MASS, the shareholding of MASS in the Petitioner company rose to about 53% which was after the issuance of the communication dated 29.04.2010. He submits that if the Respondent had any genuine and legitimate reasons to refuse or object to the induction of MASS as the shareholder, the Respondent should have objected to the same or rejected the same by a reasoned order. However, no reasons were furnished by the Respondent as to why MASS could not be brought in as a shareholder. It is not disclosed as to why the Respondent considers the induction of MASS as the majority shareholder in the Petitioner company, as not acceptable. It is not the Respondents case that MASS does not meet the criteria laid down in Article 29.1. During his submissions, Mr. Sundaram repeatedly contended that the issuance of the show cause notice was engineered by the other partner, viz. ACL. It was submitted that ACL was interested in acquiring the PI of the Petitioner, and was behind the impugned action of the Respondent.

26. Mr. Sundaram submits that upon issuance of the show cause notice dated 01.06.2010, the Petitioner invoked the arbitration agreement on 14.08.2010. He submits that the controversy and differences which have arisen between the parties with regard to interpretation of Article 29, and in particular, Article 29.2 of the PSC would need not to be resolved through arbitration. Even if it is assumed that the circumstance of the Petitioner permitting the infusion of equity by MASS to the extent of nearly 53% or more tantamounts to a breach of Article 29 of the PSC, which would otherwise result in termination, the said 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" (see Article 31.6). He submits that with the invocation of the arbitration agreement, the arbitration proceedings have commenced by virtue of Section 21 of the Act. Reliance is placed on *Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd.*, . Consequently, the termination of the PSC, qua the Petitioner, cannot be given effect to during the pendency of the arbitral proceedings and the termination of the PSC by the Respondent vide its letter dated 27.08.2010 would eventually be governed by the arbitral award.

27. Mr. Sundaram submits that in the light of the aforesaid provisions in the PSC, the Petitioner has made out a prima facie case. He submits that the Petitioner is entitled to the interim injunctions as prayed for.

28. Mr. Sundaram submits that the PSC is a contract, the performance of which can be specifically enforced, and consequently, an injunction can be granted by the court to prevent its breach. He submits that there does not exist any standard for ascertaining the actual damages that the Petitioner may suffer, if the Respondent is permitted to enforce the termination of the contract.

29. In this regard, he submits that if the Respondent is permitted to bring in another party in place of the Petitioner, the quantum of profits or losses that the said party may generate would depend entirely upon the expertise and performance of that party. Therefore, even if a third party is introduced as a constituent of the contractor in place of the Petitioner, and the Petitioner is eventually held as being entitled to damages for wrongful termination of the PSC, the Petitioner would not be adequately compensated, as there are no standards for ascertaining actual damages. It would be highly dependent upon how much oil and condensates are produced from the oil wells in question, and at what cost. It would also depend on how much investment the third party may make in the project.

30. Mr. Sundaram submits that the PSC is not a determinable contract. By its very nature the contract postulates very high and irretrievable investment by the contractor. He submits that Article 31.6 of the PSC provides that even if the contract is purported to be terminated due to existence of circumstances which would entitle its termination, termination shall not take effect so long as the arbitration proceedings continue and even thereafter the termination shall take place when and if consistent with the arbitral award. Consequently, if the Arbitral Tribunal concludes that the termination is illegal, the same would not take effect.

31. Mr. Sundaram submits that the PSC is a contract, for the non-performance of which compensation in money can never be an adequate relief. It is argued that this is not only because there exist no standards for ascertaining actual damages that may be caused by the non-performance of the PSC, but also because the termination of the PSC would gravely affect the reputation and future business potential of the Petitioner worldwide, which is incalculable.

32. Petitioner submits the provisions of Section 41(e) Specific Relief Act, 1963 shall not be applicable in present case because as per Section 10, PSC is specifically enforceable, being a contract where actual damages on non performance cannot be ascertained. Petitioner further submits that the present contract does not fall under any of the clauses of Section 14 Specific Relief Act, 1963 i.e. it is not a contract where non performance can be compensated in money, nor is it a determinable contract in its nature, nor it is a contract dependent on personal volition.

33. He further submits that if injunction cannot be granted to enforce the clauses of the contract, then by virtue of Section 42, courts can enforce the negative agreement i.e. not to terminate the contract during the subsistence of arbitral proceedings.

34. Mr. Sundaram submits that the decision of the Supreme Court in Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, is largely misunderstood as the Supreme Court was dealing with a case wherein the agreement could be terminated by either party by giving thirty days notice to the other party "without assigning any reason for such termination". This clause was independent of the clause which permitted the Indian Oil Corporation to terminate the agreement on the happening of any of the certain specified events. He submits that it is for this reason that the Supreme Court concluded that the agreement was determinable.

35. He submits that in the present case, the PSC cannot be terminated by either of the parties by giving notice for specified period without any cause. The right to terminate the PSC is based upon the existence of one or more of the circumstance enumerated in Article 31.2 and 31.3. Few other decisions relied upon by Mr. Sundaram shall be referred to in the course of my discussion of the submissions. Respondent's Submissions:

36. Learned Additional Solicitor General, Mr. Mohan Parasaran, who appears for the Respondent submits that Article 29.2 of PSC is attracted in the facts of the present case. It is settled law that what cannot be done directly, cannot be done indirectly. Therefore, if prior consent is required for direct assignment or transfer of Participating Interest as contemplated in Article 29.1, then prior consent is also necessary for indirect transfer of participating interest by resort to change in the status of companies or their shareholding or the relationship with any guarantor of the companies as envisaged in Article 29.2.

37. Respondent further submits that the Petitioner's interpretation of Article 29.2 based on the absence of the word "prior" in Article 29.2 will render the provision otiose and such an interpretation is not permissible. Contract must be so interpreted to give effect to all provisions as practically and reasonably as possible. Article 29.2 when read in conjunction with the Article 29.3 and Article 29.4 makes it amply clear that the contractor, in fact, requires prior consent of the Government for indirect transfer of participating interest by virtue of change in status/shareholding.

38. Article 29.3 requires the contractor to submit an application for consent to assign or transfer accompanied by relevant information on 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. Article 29.4 requires that 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 enabling proper consideration and disposal of the application.

39. Article 29.5 of the PSC qualifies the aforesaid provisions and further states

that no assignment or transfer shall be effective until the approval of the government is received or deemed to have been received. It is, therefore, argued that the Petitioner's argument that prior consent is not required is wholly misplaced on a reading of Article 29 in its entirety.

40. Respondent further submits that Article 31.3(e) refers to assignment of "any" interest in the contract, i.e. direct or indirect assignment of Participating Interest without the prior consent of the government as provided in Article 29. The Petitioner cannot choose to conveniently restrict the scope of Article 31.3(e) merely to a direct transfer or assignment of Participating Interest, especially in light of the well settled principle of law that what cannot be done directly, cannot be done indirectly.

41. Respondent submits that there has been an indirect assignment of Participating Interest in breach of Article 29.2 of the PSC arising due to the material change in controlling interest in the Petitioner company by virtue of a transfer of a block of shares whereby MASS now holds 52.9% shareholding in the Petitioner company. It is further submitted that contrary to the Petitioner's submission, it is not a mere trading of shares in the open market or a loan agreement simplicitor. The Investment Agreement dated 16.4.2010 between the Petitioner and MASS involved a private placement of 24,798,000 common shares, rights offering and debenture placement.

42. Mr. Parasaran has referred to the various clauses of the investment agreement dated 16.04.2010 between the Petitioner and MASS to submit that the said agreement is not merely an investment agreement by a financial institution, but that, in fact, it is an agreement whereunder MASS has taken complete control over the Petitioner. In particular, he refers to Article 3.2(a) which entitles MASS to have a majority in the Board of Directors of the Petitioner company. Under Clause (g) of the said Article, the Petitioner has also agreed to change its name to such name as approved by MASS. Respondent drew attention to the following provisions of the Investment Agreement between the Petitioner and MASS, to point out the extent of shareholding and controlling interest held by MASS over the Petitioner Company.

Purchaser's Interest" means the cumulative ownership interests of the Purchaser and its Affiliates in Common Shares, expressed as a percentage of the total issued and outstanding Common Shares, at the time of calculation.

Article 3.1(x)(i) states that The company or the Subsidiaries have good and marketable title to, or the irrevocable right to produce and/or sell, their petroleum, natural gas and related hydrocarbons (for the purposes of this clause, the foregoing are referred to as the "Interest") and represents and warrants that the Interests are free and clear of all liens, charges, encumbrances, restrictions or adverse claims;

It is submitted that plain reading of the above provisions show that Participating Interest is also being transferred, and that oil and gas operations are also part of

the "interests".

Article 3.2(c) "Rights Offering. The company covenants and agrees to offer the Rights Offering shares to Shareholders pursuant to the Rights Offering and to conduct the Rights offering in accordance with all applicable securities Laws and the terms of this Agreement. The Purchaser will be entitled to participate in the preparation of the Prospectus and such other Rights Offering documents ... and the company will promptly provide drafts of such documents to the purchaser for its review, and will provide the purchaser with a reasonable time to review and provide comments on such documents. The company will ... not amend the terms or the Rights offering set forth in this Agreement and as described in the draft Preliminary Prospectus provided to the Purchaser without the prior written consent of the purchaser (such consent not to be unreasonably withheld or delayed)."

MASS is entitled to participate in the preparation of the Prospectus and such other Rights Offering documents.

The purchaser is given board representation through two nominee directors, or such as are necessary to represent its shareholding in the Petitioner company.

43. Respondent submits that controlling interest is effective, if MASS group owns 51% of the total shares. Respondent further submits that management rights of the Petitioner having been transferred, the same tantamounts to the transfer of control of the business itself.

44. Mr. Parasaran submits that this is a suitable case for lifting of the corporate veil of the Petitioner company, to determine the economic realities behind the legal facade, in the interest of justice and public interest. The doctrine of lifting of corporate veil postulates the existence of a dualism between the corporation or company on the one hand and its members or shareholders on the other. Reliance is placed on New Horizons Limited and Another Vs. Union of India (UOI) and Others, and CIT v. Meenakshi Mills, (1967) 1 SCR 934. He submits that Mr. Ravi Prakash who is the CEO of the Petitioner is a nominee of MASS.

45. The submission of learned ASG is that the interpretation which is sought to be given by the Petitioner to Article 29 of the PSC is different from its own understanding of the said Article as contained in its communications to the Respondent. In this regard, he submits that in the communication dated 09.06.2010 issued in response to the show cause notice, the Petitioner had stated:

It is abundantly clear that the material change in status or shareholding should have indirectly resulted in a transfer or assignment of Participating interest. As mentioned above the Mass financing transaction does not have this effect

46. He refers to para 2 of the letter of the Petitioner dated 23.06.2010 issued in response to the show cause notice, wherein the Petitioner stated as follows:

2. It is reiterated at present Mass holds only 18% of the shareholding of Canoro. Therefore, no material change in shareholding of Canoro has occurred as on date. Under the provisions of the Companies Act, 1956, voting rights at shareholder meetings become somewhat meaningful only when the voting block is at least 26%. Even then, a 51% shareholding block is the bare minimum to afford any kind of positive control.

47. He submits that this constitutes an admission on the part of the Petitioner that there was an indirect assignment of participating interest in favour of MASS by the Petitioner.

48. He further submits that the Petitioner had itself filed a "material change report" in Form 51-102 F3 dated 27.04.2010 with TSX Venture Exchange, Canada upon entering into its agreement with MASS, admitting that there is a material change in the shareholding of the Petitioner company. He submits that, therefore, even according to the Petitioner's understanding, there was a material change in the status of the Petitioner at the time when the Petitioner entered into the agreement with MASS.

49. Mr. Parasaran further submits that in larger public interest, this Court should not grant any injunction in the present case. Oil is a national resource of strategic importance. The PSC pertains to an oil field in the State of Assam, which is a border State. He submits that if the interpretation given to Article 31.6 by the Petitioner were to be accepted, it would mean that under no circumstance, the Respondent would be able to terminate the contract by giving a requisite notice, even if there is clear and gross breach of Article 29.1 or 29.2 of the PSC. For instance, if a party comprising the contractor were to assign its participating interest to an enemy State, or a State which is not having friendly relations with India, the Respondent would remain helpless till so long as the arbitration proceedings continue. Such an interpretation, according to Mr. Parasaran, would be completely opposed to Public Policy and would render Article 31.6 void, and therefore such an interpretation should not be accepted by the Court. It is submitted that the natural resource is owned by the Government till it reaches the delivery point. The contractor is entitled only to get cost petroleum and profit petroleum in proportion to his participating interest. He also places reliance on Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd., . In this decision the Supreme Court extended the public trust doctrine to apply to natural resources and the governments rights over the same, which was also fettered by constitutional necessity. Reliance is also placed on M.P. Mathur and Others Vs. D.T.C and Others, .

Reliance is also placed on Mahadeo Savlaram Shelke and Others Vs. Puna Municipal Corporation and Another, wherein court held that public interest is one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction.

50. Mr. Parasaran further submits that Article 31.6, in any event, does not

contain any negative covenant which could be enforced by resort to Section 42 of the Specific Relief Act. He submits that the present case squarely falls u/s 41(e) as the performance of the PSC cannot be specifically enforced.

51. Respondent submits that even assuming that the arbitral tribunal returns a finding that the termination was invalid, the Petitioner can always be compensated for loss suffered i.e the cost petroleum and profit petroleum they would have been entitled to under the PSC. Under the PSC, the Petitioner is not entitled to anything more than the cost and profit petroleum and does not have any vested right in the crude oil or natural gas in the Amguri field. The calculation of the cost and profit petroleum being in accordance with the PSC, the Petitioner cannot claim that it is not possible to calculate the monetary loss suffered as a result of the termination. He submits that under Clause 10.1 of the PSC, the agreement provides that the Amguri Field contains 10 wells. The contract was valid for a fixed term of 25 years, unless terminated earlier. Amguri is a small sized discovered field producing gas and crude oil. The planned reserves are available and an estimate of actual output can be easily made, at least on a conservative basis. He submits that under the contract, all that the Petitioner was entitled to was, cost petroleum and its share in profit petroleum. Even these shares are to be monetised at least till so long as India does not become self sufficient in oil production. He submits that it is well known that India is far from becoming self sufficient in oil production and demands for oil are ever increasing. He, therefore, submits that the contention of the Petitioner that its damages cannot be quantified and there are no standards for ascertaining actual damages is not correct. He submits that the PSC is a commercial contract and the objective thereof is that the contractor shall make an investment, employ its expertise and generate profits by producing petroleum. He submits that the Respondent shall maintain full and complete accounts of the investments made, costs incurred and petroleum produced from the oil field in question, to enable quantification of the damages, if any, awarded to the Petitioner. The objective is eventually to earn profits in monetary terms. Therefore, the contract cannot be specifically enforced as compensation in money is an adequate relief.

52. In support of this submission, Mr. Parasaran relies on Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan and Another, and submits that this case is similar to the one in hand on facts as well. Respondent submits that "irreparable injury" means an injury which cannot be adequately remedied by the payment of damages to the aggrieved party.

53. Mr. Parasaran has also placed reliance in decision of the Supreme Court in Amritsar Gas Company (supra). He submits that as the agreement between the parties is determinable under Article 31 of the PSC, it makes no difference whether or not the same is determinable for reasons, or upon merely giving a notice without assignment of reasons. The sufficiency of reasons cannot be gone into by this Court in these proceedings. As the contract is determinable, the same cannot be specifically enforced by virtue of Section 14(c) of the Specific

Relief Act, and consequently, no injunction can be granted to prevent its breach.

54. In answer to the submission of the Petitioner founded upon Article 31.6, Mr. Parasaran submits that the invocation of the arbitration agreement by the Petitioner vide notice dated 14.08.2010 itself is invalid, and cannot constitute a notice for the purposes of Section 21 of the Act, as Article 34.3 obliges the parties to attempt an amicable settlement within 90 days after disputes have arisen, before resorting to arbitration. He submits that after the disputes arose, upon issuance of the termination notice dated 27.08.2010, the period of 90 days had not expired when the Petitioner sought to involve the arbitration agreement. Consequently, the Petitioner was not even permitted to invoke the arbitration agreement.

55. Petitioner in rejoinder submits that the Union of India having once granted the concession in the Amguri field, cannot, without proper cause and reason, and in a high handed manner, withdraw such concession since such concession, once made, is a valuable commercial right. This is especially so when the Petitioner has invested more than US\$ One Hundred Million to exploit this right. The termination of such right can only be strictly in accordance with the terms of the PSC and the question of whether such decision to terminate was warranted under the terms of the PSC and made with due application of mind in accordance with the terms of the PSC is a matter which will be resolved by the arbitral tribunal, pending which, the Petitioner has prayed for the subject matter of the arbitration to be protected and preserved.

Discussion:

56. Having heard and considered the arguments of the learned Counsel and upon giving my due consideration to the materials relied upon by them, I am of the view that prima facie, Article 29.2 requires the party Constituting the contractor to obtain prior approval and consent of the government. Mere omission to mention the word "prior" before the word "consent" in Article 29.2 does not make any difference. In this regard, reference may be made to Article 29.3 which states that the application for consent to assign or transfer shall be accompanied, inter alia, with "detailed information on the proposed assignee or transferee", the terms of the proposed assignment or transfer". The use of the expression "proposed assignee" and "proposed assignment" shows that the application for consent to assign or transfer had to be made prior to the assignment or transfer, and not ex post facto. It is not a mere intimation that the party comprising the contractor is required to give to the government, but it is an application to seek the consent and permission of the government for the "proposed" assignment or transfer of shareholding. Article 29.1 prohibits direct transfer or assignment of PI without prior consent. The whole purpose of inserting Article 29.2, after Article 29.1, appears to be to plug the transfer or assignment of the PI through an indirect mode without prior permission. Article 29.4 also uses the expression "prospective assignee or transferee". While making the application, the party comprising the contractor is required to make various

disclosures about the proposed assignee or transferee, so that the government is enabled to properly consider and dispose of the application. The Government has to apply its mind at the time of granting or refusing consent or approval. Such consent or approval can also be conditional as provided in Article 29.5. The consent/approval can also be denied in appropriate cases, and it is not necessary for the government to grant the same in all cases. Prima facie, there appears merit in the submission of the Respondent that what cannot be done directly, cannot be permitted to be done indirectly. Direct transfer of PI without the prior consent of the Respondent is prohibited. So also, indirect transfer of the PI, by adopting the *modus operandi* of transfer/vesting of majority stake in the contractor/party Constituting the contractor, without prior consent of the Respondent, cannot be permitted.

57. The use of the expression "for assigning the participating interest under the changed circumstances" used in Article 29.2, prima facie, refers to a material change in the shareholding of the party comprising the contractor. The material change in the shareholding itself constitutes an assignment of the participating interest. As noticed above, this position also appears to be the Petitioners understanding of Article 29.2.

58. Breach of Article 29.2 is not capable of remedy. In this regard, reference may be made to Article 31.5, which provides that if the breaches mentioned in Article 31.3(f) or (g) or (i) or Article 34 are remedied within 90 days of issuance of notice, or such extended period as may be granted by the government, such termination shall not become effective. However, the mention of Article 31.3(e) is conspicuous by its absence in Article 31.5.

59. Prima facie, Article 35.1, which obliges the party comprising the contractor to notify the government of any material change in their status, shareholding or relationship of that of any guarantor of the companies, in particular, where such change would impact on performance of obligations under the PSC, does not whittle down the requirement of Article 29. The two provisions have to be read together. Whereas Article 35 merely talks about the government being notified, Articles 29.1 and 29.2 oblige the party comprising the contractor to obtain prior consent/approval of the government before the assignment of the participating interest either directly or indirectly.

60. In the light of the prima facie interpretation given to Article 29.2 of the PSC, there is no need to go into the issue whether the corporate veil of the Petitioner should be lifted or not. However, I may note that, prima facie, there appears to be merit in the submission of Mr. Parasaran that this may be a fit case for lifting the corporate veil of the Petitioner to determine the real identity of the entity which is hiding behind the facade of the Petitioner. This is so because this enquiry is necessary to determine whether the acts of the Petitioner fall within the mischief of Article 29.2 of the PSC. In *Meenakshi Mills* (supra) the Supreme Court has held that "But in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal

fa?ade". In *New Horizons (supra)* the Supreme Court noted its earlier decision in *State of U.P. and Others Vs. Renusagar Power Co. and Others*, wherein it has been observed:

It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation... The horizon of the doctrine of lifting of corporate veil is expanding.

61. The Petitioner's submission that the Respondent has not given the requisite 90 days notice, *prima facie*, appears to be fallacious. Article 31.3 enables the government to terminate the PSC "upon giving ninety (90) days written notice to the other party of its intention to do so". The said notice was given by the government at the time of issuance of the show cause notice dated 01.06.2010.

62. The submission of Mr. Sundaram that *Amritsar Gas Service (supra)* has no application in the facts of the present case as, in that case, the contract was terminable by giving a fixed time notice without assigning reasons, and this not the position in the present case, is not acceptable. The discussion in the judgment shows that the Supreme Court held the contract to be determinable by virtue of both the clauses, and not merely because the agreement was terminable without cause, upon giving of a fixed time notice. Reference may be made to para 12 of this decision which reads as follows:

The arbitrator recorded finding on issue No. 1 that termination of distributorship by the Appellant-Corporation was not validly made under Clause 27. Thereafter, he proceeded to record the finding on issue No. 2 relating to grant of relief and held that the plaintiff-Respondent No. 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given slate that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the Agreement and, therefore, the plaintiff-Respondent No. 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

This award will, however, not fetter the right of the Defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the Agreement dated 1.4.1976, which contains the aforesaid Clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with Clauses 27 and 28 of the Agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance

with Clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is "a contract which is in its nature determinate". In the present case, it is not necessary to refer to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the Appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to "the law governing such cases". The grant of this relief in the award cannot, therefore, be sustained.

63. Reliance placed by Mr. Sundaram on para 14 of the aforesaid decision appears to be misplaced, as the Supreme Court in that paragraph was considering the aspect of quantification of damages, and not the aspect whether the contract was determinable or not. Para 14 of this decision reads as follows:

The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under Clause 27 of the Agreement. No doubt, the notice of termination of distributorship dated 11.3.1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the Appellant-Corporation; and such acts would permit exercise of the right of termination of distributorship under Clause 27. However, the arbitrator having held that Clause 27 was not available to the Appellant- Corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the Agreement being revokable by either party in accordance with Clause 28 by giving thirty days" notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-Respondent No. 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of thirty days instead of restoration of the distributorship. The award has, therefore, to be modified accordingly. The compensation for thirty days notice period from 11.3.1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd.

64. I may refer to the Division Bench judgment in Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company, . The Appellant had raised an identical argument in that case to say that unless the contract can be terminated by giving a specified period notice, without any cause, the same would not be considered to be a determinable contract. Para 3 of the decision records the Appellants submission and, so far as it is relevant, it reads as follows:

3. The Appellant's case is that the contracts in question are not determinable in nature as contemplated by Section 14(1)(c) of the Specific Relief Act since there is no clause in the agreement, which permits the Respondent to terminate the agreements by giving a notice of a few days. The contracts, which are determinable in nature have always been understood to mean those contracts, which can be put to an end to sending notice implicate of a few days. It was contended that contracts in question do not contain such a clause. To the contrary, the contracts in the present case specifically state and recognise that the Respondent has granted to the Appellant an exclusive license to produce Stroh Beer for a term of seven years. Which term was renewable successively for a period of three years at each time. It has also been contended that if the decision rendered by learned Single Judge is taken to be correct law, then in almost all commercial contracts the remedy of injunction would be barred. Another ground urged is that the arbitration proceedings in the present case have to be conducted in accordance with English law and since procedural law is the English Arbitration Act, the same will govern the rights of the parties. Section 48(5)(b) of the English Arbitration Act, 1996 specifically empowers the Arbitrator to order specific performance of a contract. This aspect was not considered in its right prospective.

65. The submission of the Appellant was again noticed in para 16, which reads as follows:

16. Learned Counsel for the Appellant contended that the word "determinable" used in Clause (c) to Sub-section (1) of Section 14 means that which can be put an end to. Determination is putting of a thing to an end. The clause enacts that a contract cannot be specifically enforced if it is, in its nature, determinable not by the parties but only by the Defendant. Although clause does not add the word "by the parties or by the Defendant" yet that is the sense in which it ought to be understood. therefore, all revocable deeds and voidable contracts may fall within "determinable" contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant. Specific performance cannot be granted of a terminable contract.

66. The Division Bench rejected the aforesaid submissions by placing reliance on Amritsar Gas Service (supra) and also approved the decision of this Court in Classic Motors Ltd. Vs. Maruti Udyog Ltd., . The relevant extract from the Division Bench decision reads as follows:

17. We are unable to persuade ourselves to accept the submissions put forth on behalf of the Appellant that when a contract is determinable by the parties, the same cannot be treated as such a contract as is referred to in Clause (c) to Sub-section (1) of Section 14 id a contract, which in its nature is determinable.

18. In Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, , the

Supreme Court had an occasion to consider the terms of agreement of distributorship. The agreement could be terminated in accordance with the terms of the agreement as per clauses 37 and 28 thereof. The Arbitrator had also held the distributorship to be revocable in accordance with clauses 27 and 28 of the agreement. The distributorship agreement was held for indefinite period, namely, till the time it was terminated in accordance with the terms contained therein. It was the case of the Respondent therein that since the contract had not been terminated in accordance with Clause 27 thereof, under which termination had been made, the firm was entitled to continuance of distributorship in the special circumstances of the case, which contention was upheld by the Arbitrator. Supreme Court set aside the award of the arbitrator on the ground that there is error of law apparent on the face of the record and grant of relief in the award cannot be sustained. It was held:

The arbitrator recorded finding on issue No. 1 that termination of distributorship by the Appellant Corporation was not validly made under Clause 27. Thereafter, he proceeded to record the finding on issue No. 2 relating to grant of relief and held that the plaintiff-Respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-Respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

This award will, however, not fetter the right of the Defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revocable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is a contract which is in its nature determinable. In the present case, it is not necessary to refer to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with

reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the Appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is no error of law apparent on the face of the award which is stated to be made according to the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained.

The facts of the present case are identical to those in aforementioned decision of the Supreme Court in as much as the agreements in the instant case are also terminable by the Respondent on happening of certain events. In Indian Oil Corporation's case (supra) also agreement was terminable on happening of certain events. Question that whether termination is wrongful or not; the events have happened or not; the Respondent is or is not justified in terminating the agreements are yet to be decided. There is no manner of doubt that the contracts by their nature determinable.

In *Classic Motors Ltd. Vs. Maruti Udyog Ltd.*, relying upon number of decisions, learned Single Judge of this Court rightly observed:

In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reasons with a reasonable period of notice in terms of such a Clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

67. Therefore, prima facie, the PSC is determinable in its nature. But, in all fairness, I must take note of the line of decisions cited by Mr. Sundaram, i.e. *Koshika Telecom Ltd. v. Union of India*, 2002 (3) ArbLR 141 *Softline Media Ltd. v. Delhi Transport Corporation*, 2002 Suppl. ArbL.R. 632, *Atlas Interactive (India) Pvt. Ltd. v. BSNL and Anr.* 2006 (126) DLT 504 and *Newage Fincorp (India) Ltd. v. Asia Corp Securities Ltd.*, 2000 (3) ArbLR 687). These decisions were rendered keeping in view the fact that the Petitioner had incurred substantial expense towards performance of the contract, and the Court was of the view that prima facie, there was no breach of the contract by the plaintiff/Petitioner, or that it being a mere technical breach, did not justify the termination of the contract. In *Atlas* (supra), the learned Single Judge also observed that *Rajasthan Breweries* (supra) was a decision rendered in the factual background that both the parties were private parties, and that it did apply where one of the contracting parties was a state instrumentality. Without getting embroiled into this debate, I may only note that *Amritsar Gas Service* (supra), on which the decision in *Rajasthan Breweries* (supra) is based, was a case involving a state instrumentality. Moreover, prima facie, there is breach of Article 29 by the Petitioner, which may render the PSC terminable.

68. No doubt, the quantum of investment made by the Petitioner would be a germane consideration while considering whether or not to grant an injunction against the termination of the PSC. However, prima facie, the termination of the PSC by the Respondent cannot be said to be illegal at this stage, in the facts of this case. The fact that the Petitioner has already made substantial expenditure under the PSC, by itself, cannot insulate it from the consequences of its breach of the PSC. Moreover, the level of investment has to be viewed in the context of the transaction to which it pertains. It is not the Petitioner's case that the investment made is a very high proportion of the returns that the Petitioner would derive if the PSC is allowed to be acted upon by the Petitioner as the operator. Consequently, the decision in *Koshika Telecom* (supra), *Softline Media* (supra), *Atlas Interactive* (supra) and *Newage Fincorp* (supra) are not attracted in the facts of the present case.

69. In *Sriman Narayan* (supra), Hindustan Petroleum Corporation had entered into a commercial contract with the Respondent Sriman Narayan for sale of petroleum products manufactured by the said corporation. Under the terms of the agreement, it was stipulated that the Respondent shall not change the structure of the firm without the permission of the Appellant. Concededly, Respondent No. 1 had changed the structure of the firm from a proprietary firm to a partnership firm. Under the agreement, the said violation entitled the termination of the license.

70. The Supreme Court in para 8 observed as under:

8. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. (See *M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others*,)

(Emphasis supplied)

71. The Court held that, prima facie, the Appellant was entitled to take action for revoking the agreement entered into with the Respondent. The validity or otherwise of the revocation of the license could be considered at the stage of interim injunction only for the limited purpose of ascertaining whether there is a

prima facie case in favour of the plaintiff. The Supreme Court placed reliance on the earlier decision in *Amritsar Gas Service* (supra). While examining the relief granted by the High Court to the Respondent, the Supreme Court observed:

Most importantly, the High Court has not considered the question whether on the facts and circumstances of the case, if the prayer for interim injunction is refused the plaintiff-Petitioner will suffer irreparable loss which cannot be adequately compensated by damages. As has been held by this Court in *Dorab Cawasji Warden* case ordinarily the relief to be granted to a plaintiff in such a matter is awarding of damages and interim injunction or a mandatory nature is not to be granted"

The Supreme Court vacated the injunction granted by the High Court in favour of the Respondent.

72. Mr. Sundaram has fairly conceded the position that considerations of larger public interest will overrule the limitation contained in Article 31.6 of the PSC on the right of the government to terminate the PSC. He concedes that if there are genuine serious objections to the transfer of participating interest by a party Constituting the contractor, to an undesirable entity, the government would be entitled to step in and terminate the PSC.

73. I am, even otherwise, of the prima facie view that the State, as a sovereign, cannot be understood to have irretrievably given up all its rights while entering into a contract, such that it is rendered helpless in a situation which threatens the national interest or security of State. An interpretation, either of a law or a contract, which impinges on the sovereign power of the State to safeguard its vital and strategic interests (and not just commercial interests), would be eschewed by the Court to save the law, or the contract, from voidity on the ground of it being opposed to public policy. In *Reliance Natural Resources Ltd.* (supra), the Supreme Court commented on the rights vested in *Reliance Industries Ltd (RIL)* under the production sharing contract entered into by the Government as follows:

117. RIL's right of distribution is based on the PSC, which itself is derived from the power of the Government under the constitutional provisions. Thus, the very basis of RIL's mandate is the constitutional concepts that have been discussed by now, including Article 297, Articles 14 and 39(b) and the public trust doctrine. Therefore, it would be beyond the power of RIL to do something which even the Government is not allowed to do. The transactions between RIL and RNRL are subject to the overriding role of the Government

In para 252, the Supreme Court observed:

252. The PSC itself specifically recognises that the interests of India are of paramount importance. Recital 6 of the PSC states that the "Government desires that the petroleum resources ... be discovered and exploited with utmost expedition in the overall interests of India and in accordance with good

international petroleum industry practices". Further, the PSC also places an affirmative obligation on the contractor, in Article 8.3(k) to "be always mindful of the rights and interests of India in the conduct of petroleum operations". Article 32.2 specifically states that nothing in the PSC shall "entitle the contractor to exercise the rights, privileges and powers conferred upon it in a manner which will contravene the laws of India". We fail to appreciate, given such a clear linkage between the PSC and the constitutional imperatives, Shri Jethmalani's argument that the GoI's policy initiatives violate the terms of the PSC and sanctity of contracts.

74. I may note that in the PSC in question similar recitals and conditions are found, as contained in the PSC interpreted by the Supreme Court in *Reliance Natural Resources Ltd.* (supra). (See Recital 4 as quoted above, Article 8.3(k) and Article 33.2 of the PSC in question). At the same time, I may note that the decision in *M.P. Mathur* (supra) does not appear to be relevant because that case did not deal with contractual rights, but the rights were founded upon promissory estoppel.

75. So what would be the considerations that would go into making of the decision of the Respondent, whether or not to grant its consent for the indirect assignment or transfer of participating interest by resort to a material change in the shareholding of the party comprising the contractor? Prima facie, it appears to me that the same guidelines and considerations would be germane for the purpose of grant/refusal of permission under Article 29.2, as are germane for consideration of a request for transferring of participating interest under Article 29.1. Consequently, the prospective assignee/transferee should be of good standing, having capacity and ability to meet its obligation under the PSC and should be willing to provide an unconditional undertaking to the government to assume the participating interest share of obligations and provide guarantees in respect thereof as provided under the PSC. Moreover, the prospective assignee/transferee should not be a company incorporated in a country with which the government, for policy reasons, has restricted trade or business. The prospective assignor or transferor, and assignee or transferee respectively should be willing to comply with any reasonable conditions of the government, as may be considered necessary in the circumstance, with a view to ensure performance under the PSC. Lastly, the assignment or transfer should not adversely affect the performance or obligations under the PSC, or be contrary to the interests of India.

76. A party comprising the contractor cannot be permitted to present a fait-accompli to the government, by failing to take consent of the government under Article 29.2, and assigning its participating interest, through the indirect method of transfer of shareholding amounting to a material change in the shareholding, and creating a situation which falls foul of either one or more of Clauses (a) to (d) of Article 29.1. Clause 31.6 relied upon by the Petitioner is very pertinent to the Petitioner's case for the sake of convenience, the same is reproduced once again hereinbelow:

31.6 If the circumstance or circumstances that would otherwise result in termination are the subject matter or 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

77. Prima facie, the circumstance of the Petitioner having transferred its participating interest without the prior consent of the Respondent as required in Article 29.2 exists. Prima facie, the said circumstance would result in termination of the PSC under Article 31.3(e). Prima facie, the breach of Article 29 cannot be remedied upon issuance of notice and it is not even the Petitioner's case that the said breach has been remedied. On the contrary, after the issuance of the show cause notice, the Petitioner has permitted MASS to subscribe under the rights issue which has raised the stake of MASS in the Petitioner to nearly 53%. At the same time, the issue whether Article 29.2 has been breached is the subject matter of proceedings under Article 34, namely, of arbitration proceedings. The arbitration proceedings in respect of the aforesaid dispute with regard to interpretation of Article 29.2 stood commenced on the date on which the Petitioner gave its request to the Respondent for that dispute to be referred to arbitration, i.e., 14.08.2010.

78. The submission of Mr. Parasaran that the invocation of arbitration agreement was premature because the Petitioner did not attempt an amicable settlement within 90 days after the disputes had arisen and before invoking the arbitration agreement, in my view, has no merit. If it becomes eminent that a dispute has arisen between the parties which cannot be amicably settled, a party is not obliged to wait for the expiry of 90 days period before invoking arbitration. The Respondent had issued the show cause notice dated 01.06.2010. This show cause notice recited that the termination of Article 29.2 of the PSC had been viewed seriously by the Respondent. The manner in which the mind of the Respondent was working was evident from the fact that the show cause notice was given to enable the Petitioner to show cause as to why the PSC be not terminated. The Petitioner sent its responses on 06.06.2010, 09.06.2010 & 23.06.2010. It sent further communication on 01.07.2010. From the communications of the Petitioner it appears that the Petitioner also met the officers of the Respondent to discuss the issue. It, therefore, cannot be said that the Petitioner did not make an endeavour to arrive at an amicable settlement. If it became eminent to the Petitioner that a settlement was not possible and that the Respondent was intent upon terminating the PSC, the Petitioner cannot be accused of jumping the gun by invoking the arbitration agreement without waiting for the expiry of 90 days period from the time that the dispute arose.

79. In the present case, the Respondent in its reply has not pleaded that MASS is an undesirable entity. The Respondent had given no reason whatsoever for objecting to the induction of MASS as the majority shareholder in the Petitioner. Therefore, I may have been inclined to give effect to Article 31.6 in the absence of circumstances giving rise to public and national interest considerations.

80. After the matter had been heard and judgment reserved on 06.12.2010, and while the present judgment was under preparation, the matter was mentioned by the learned ASG Mr. Parasaran to move an application for the purpose of bringing on record subsequent facts and events. According to the Respondent, a team from Directorate General of Hydrocarbon (DGH), which is a Technical Wing under the Ministry of Petroleum & Natural Gas, had conducted a technical audit/surveillance of Amguri field from 08.11.2010 to 11.11.2010. After conducting the technical audit/surveillance, this team has submitted a report dated 20.12.2010 to the Ministry of Petroleum & Natural Gas. It is stated that the report had been received by the Respondent after 06.12.2010, i.e., the date on which judgment in this case was reserved. Along with the application, the Respondent has filed an affidavit of Mr. Partha Das, working as Director (Exploration), Ministry of Petroleum & Natural Gas, Government of India. Along with this affidavit, the Respondent has placed on record the report on technical audit/surveillance on the basis of audit/surveillance conducted between 08th & 11th November, 2010, prepared by DGH along with the forwarding letter dated 20.12.2010. The conclusions drawn in the said report on technical audit/surveillance read as follows:

Conclusion

1. The delay in gas Compression & injection facilities has caused damage to Reservoir Health affecting productivity and ultimate condensate recovery from Barail Main retrograde gas condensate reservoir.
2. The continued production from Barail Main reservoir below dew point pressure has led to condensate drop out of around 551,000 barrels in the reservoir during last two years which has caused a significant revenue loss to Government of India/ Government of Assam.
3. The operator continued to produce the wells from Main Barail (A-6, 10B & 11) till June 2010 resorting to flogging of reservoir and hiding the facts to DGH/GOI. The operator admitted the fact during the technical audit that flogging of reservoir was resorted to ensure minimum cash flow for smooth running of the project.
4. Increase in water cut in A-6 (Main Barail) & A-11 (Middle Barail) will be constrained for required gas production in absence of viable solution to water disposal problem and also meeting the production targets.
5. The infrastructure of A-6 EPS and the gas compression plant is in quite bad shape and needs immediate revamping. The petroleum measurement facilities are also obsolete and needs to be upgraded.
6. The Operator has been advised to expedite the gas compression and injection plant within the extended schedule of completion by January 2011 and restrict gas sales till dew point pressure is approached.

Concluding Remarks

During the process of finalization of the report, it was brought to notice that Amguri-11, the only well producing gas and condensate in Amguri field has been shut down w.e.f. 3.12.10. It shows lack of Good International Petroleum Industry Practice (GIPIP) and sound reservoir management practice by M/s Canoro Resources Ltd as elaborated in the Report. This further raises a doubt about technical capability of M/s Canoro Resources Ltd to effectively manage the Amguri field and PSC as an Operator. It is worth mentioning that during the meeting with CRL and ACIL at DGH on 17.6.2009 (Annexure-V), the performance of Amguri was discussed wherein DGH had expressed its displeasure over the overall performance of CRL as an Operator."

The DGH in its communication dated 20.12.2010 has observed as follows:

The Operator has not followed the Good International Petroleum Practices which has caused the irreparable damage to the Reservoir, leading to the loss of productivity from the wells, condensate recovery from the field and revenue to Govt. of India as well as to Govt. of Assam. The time and cost over run for Gas compression project is the result of Canoro's inability to provide Project Management skills. The Statutory HSE requirements have been neglected, kept on the back bench and not given due priority & attention. DGMS has also served notice to operator in Oct 2010, for serious violations of Oil Mines Regulation, 1984, Mines Rules 1955 and Mines Vocational Training Rules 1966

81. When the matter was mentioned on 28.01.2011, the following order came to be passed:

The matter has been mentioned by Mr. Mohan Parasaran, learned ASG, appearing on behalf of the Respondent. On his mentioning, the matter is taken up for consideration. He submits that the Respondent had attempted to move an application. However, as the matter has been reserved for judgment, the application has not been listed. Advance copy has been served on the Petitioner's counsel.

The application moved by the Respondent, if in order, should be listed before the Court on 31.01.2011. Learned Counsel for the Respondent should inform the Petitioner of the listing of this application on 31.01.2011, by recorded delivery. A copy of this order be given dasti to the counsel for the Respondent, under the signature of the Court Master.

82. The matter was again taken up on 31.01.2011, and the following order was passed:

I.A. No. 1371/2011

This application has been moved by the Respondent to place on record the additional affidavit along with the technical report relied upon by the Respondent in relation to the Amguri Oil Field.

Arguments in this case had been heard and judgment reserved on 06.12.2010.

The application has been moved while the judgment is under preparation.

Mr. Sundaram, learned senior counsel for the Petitioner, who appears on advance notice, submits that the Petitioner has already sent a detailed response to the notice issued by the Respondent founded upon the technical report. The Respondent has not yet considered the response and taken an informed decision, either accepting or rejecting the explanation furnished by the Petitioner.

Mr. Parasaran, learned Additional Solicitor General submits that the competent authority of the Respondent shall grant a hearing to the Petitioner, and after considering response of the Petitioner, the concerned officer shall communicate his decision by a speaking order. The said decision be taken and communicated, and also be placed on record along with an additional affidavit, preferably before the next date. List on 17.02.2011. Dasti.

83. The Respondent has filed an affidavit dated 15.02.2011 of Mr. Goutam Chakraborty, Chief Geologist and Nodal Officer for Amguri Field PSC in Directorate General of Hydrocarbons, Ministry of Petroleum and Natural Gas, Govt. of India. He states in this affidavit that pursuant to the directions dated 31.01.2011 of this Court, a hearing was granted to the Petitioner in the meeting held between the Petitioners representatives and DGH on 07.02.2011, and the decision of the DGH was conveyed to the Petitioner vide letter dated 14.02.2011. A copy of that decision has been enclosed with this affidavit as Annexure R-1/A. It is stated in the affidavit that DGH is a technical body under the Ministry of Petroleum and Natural Gas to monitor and manage all the oil and gas natural resources in the country. The letter dated 14.02.2011 has been issued by the Directorate General of Hydrocarbons to the Petitioner. This letter has also been signed by Mr. G. Chakraborty, Chief Geologist. It makes reference to the Petitioner's letters dated 4th and 13th January, 2011 in response to the technical audit/surveillance in relation to Amguri PSC, conducted by DGH during 8th to 11th November, 2010 and oral submissions made during the meeting with DGH on 07.02.2011. This letter asserts that DGH's conclusions, as contained in its technical audit/surveillance, are based on ground realities and facts. It is further stated that continued neglect of the field by the operator with regard to health of reservoir, meeting project schedule, production targets, cost aspects, non compliance with statutory obligations and other factors have led the DGH to resort to surveillance/audit as it is the responsibility of DGH being a nominee of the Government. The letter also refers to the earlier letter dated 22.12.2010, which, it is stated, clearly brings out the undeniable facts on record. The letter further states that the Petitioner is only trying to explain reasons behind all the lapses and one instance which is cited is, where the Petitioner has sought to explain 18 months delay in implementation of gas compression project, and cost escalation has been explained due to reasons like heavy monsoon, changes in scope of work, problems with vendors and JV partners, lack of infrastructure and resources in Assam etc. The letter states that conditions like heavy monsoon, infrastructure set up in Assam etc. were all well known before entering into the

contract. The letter further states that the project had been approved by the MC long back. It states that consequence of such delay resulting in damage to reservoir health of Barail main sand of Pool A have been brought out in detail in their letter dated 22.12.2010.

84. The Respondent has sought to rely upon the Petitioner's communication dated 07.09.2010, wherein the Petitioner had inter alia stated:

Not all the hydrocarbons that condense in the reservoir will re-vaporize post gas injection and increase of reservoir pressure above the dew point. Therefore, reservoir gas effective permeability and the well productivity will not fully recover to virgin state.

The percentage of condensate that will re-vaporize is not certain because of lack of core data (capillary pressures & interfacial tensions effect volume of re-vaporization

85. The letter further states that the Petitioner has sought to resort to damage control by producing a report from an independent consultant based on preliminary reservoir modeling, stating that the damage was reversible and all of the condensate that has dropped out in the reservoir will be revaporized. This is taken as an admission that the reservoir has been damaged. It is stated that case histories have not been presented in support of the report findings. The letter states that lapses relating to reservoir damage are very serious and result in permanent loss of nation's precious resources. Reference has also been made to an earlier meeting held on 17.06.2009 between the Petitioner, ACL and DGH, wherein DGH had expressed its displeasure over the overall performance by the Petitioner as the operator.

86. The letter also makes a point about the Petitioner not providing monthly reports. I may note that the contents of the letter, particularly under the heading "monthly reports" appear to be highly technical in nature and their interpretation is not only beyond the scope of the present proceedings, but also not required at this stage.

87. The Petitioner has responded to the said affidavit of the Respondent by filing its own detailed affidavit dated 22.02.2011. Mr. Sundaram submits that the oil field in question is dissimilar to oil fields as generally found, inasmuch, as, it is a retrograde condensate reservoir where production of gas below a particular dew point (3654 psi) results in reduced relative permeability of the rock formations. The lower the permeability, the lesser the gas production, since the gas is required to move to the well bore (i.e. surface) through permeable layers. He submits that Amguri field is first of its kind in India, and that the DGH has no experience of similar fields. It is further stated that the Petitioner discovered and declared the Amguri oil field to be a retrograde condensate reservoir very early in its production cycle. It is stated that ONGC, which previously owned and operated the said oil field was unable to identify it as a retrograde condensate reservoir in a span of around 25 years.

88. The affidavit states that on 07.02.2011, the relevant technical personnel of the Petitioner met with the DGH, furnished detailed explanations and placed on record the report of M/s. Exploration Technologies Inc. prepared by Mr. Greg Caswell, an international expert on the subject of reservoir engineering. It stated that the report is based on a scientifically prepared and validated simulation model.

89. It is further stated that in the meeting, the DGH sought from the Petitioner the international case studies on retrograde condensate reservoir since it was not aware of any such similar reservoirs in India. The case study in relation to Arun field Indonesia operated by Exxon Mobil was submitted by the Petitioner on 15.02.2011. The affidavit further states that on 11.02.2011, the Petitioner submitted a report prepared by Mr. S.K. Khazanchi, a renowned expert on reservoir engineering, who until recently, was the head reservoir engineering of the DGH itself. Mr. Khazanchi was also the General Manager (reservoir studies) at India's only reservoirs engineering institute, namely, the institute of reservoir studies established by ONGC. According to this report, no damage has been caused to the reservoir and it certifies that the Petitioner has consistently acted in conformity with good international petroleum industry practices. The affidavit discloses that to deal with the peculiar situation of the Amguri oil field, the Petitioner proposed that a gas compression project be established at Amguri. However, that project has been delayed by the Respondent as the Respondent has failed to accord its approval for the necessary budget even after the operating committee has done so. It is stated that as per Article 6.5 and 6.6 of the PSC, the gas compression project could not be provided with unless the approval of the Respondent was obtained.

90. The Petitioner disputes the Respondents' statement that the production had been approved by the MC long back, as the gas compression project, according to the Petitioner, has not been approved by the MC. The further submission of the Petitioner is that the report prepared by Mr. Greg Caswill, Mr. S.K. Khazanchi and the case studies of the Arun field Indonesia constituted scientific evidence which has not been considered by the Respondent while passing the order dated 14.02.2011. According to the Petitioner, the said order merely talks of "ground realities", but does not deal with the scientific evidence relied upon by the Petitioner to establish that the Petitioner has not caused any irreversible damage to the oil field; the Petitioner has adopted good international petroleum industry practices in operating the oil field in question, and; that the condensation in the reservoir can be revaporised and the damage, though not caused by the Petitioner, is reversible.

91. Mr. Sundaram has further objected to the affidavit being filed by Mr. Chakraborty, and not by a high ranking officer of the Directorate General of Hydrocarbons. He submits that a senior and responsible officer should take responsibility by filing an affidavit, as, according to the Petitioner, the technical audit/surveillance report, the communication dated 22.12.2010 and the decision

communicated vide letter dated 14.02.2011 have all been arrived at malafide and are not based on facts with a view to somehow oust the Petitioner from the PSC and to transfer the participating interest of the Petitioner in the PSC to another entity. Mr. Sundaram submits that the Petitioner has the technical knowhow and the resources to deal with the retrograde condensate reservoir and the Respondent should, in national interest, use the expertise and resources of the Petitioner, rather than dumping the Petitioner at this stage. He submits that even on considerations of public/national interest, it would be desirable to allow the Petitioner to continue as the operator in the interregnum till the disputes are resolved through arbitration.

92. Mr. Sundaram submits that the Petitioner is ready and willing to the appointment of a sole expert to examine as to whether the Petitioner has caused any irreparable loss or damage to the oil field in question by its acts or omissions in terms of Article 34.2 of the PSC, and states that the Petitioner would accept the decision of the sole expert. He submits that the appointment of a sole expert would resolve this controversy much faster, may be in a matter of few weeks, and save the parties avoidable wastage of time and effort. He submits that u/s 26 of the Act, the arbitral tribunal is empowered to appoint one or more experts to report to it on specific issues to be determined by it.

93. The criticism of the order passed by DGH on 14.11.2011 by Mr. Sundaram on the ground that the same only refers to "ground realities" and does not deal with the scientific evidence produced by the Petitioner, prima facie, may not be entirely correct. I say this for the reason that the said order has been passed in the context of the report of technical audit/surveillance prepared by DGH. It is the observations made in the said technical surveillance report which are referred to as "ground realities" in the communication dated 14.11.2011 of the DGH. The letter dated 14.11.2011 refers to the report from the independent consultant produced by the Petitioner at the time of hearing. The said report, it appears, did not find favour with the Respondent as no case history had been presented in support of the report findings. Even according to the Petitioner, the case study pertaining to Arun filed in Indonesia was furnished on 15.02.2011, i.e. after the issuance of the letter dated 14.02.2011.

94. The submission of Mr. Sundaram that the DGH is acting at the behest of some third party, who is interested in taking over the participating interest of the Petitioner under the PSC, is not substantiated in these proceedings. When senior government officials take their decision in the discharge of their official duties, the presumption is that they have acted bonafide, with honesty and in the national interest. There is no reason for me, at this stage, not to draw such a presumption or to act up on it.

95. At this stage, it is neither possible for me, nor required of me to come to any conclusion whether, or not, the Petitioner is guilty of causing irretrievable or irreparable damage to the Amguri oil field, as alleged by the Respondent. However, I cannot lose sight of the fact that the governmental decision has been

taken after hearing the Petitioner's version by a senior high ranking and responsible functionary. I would, therefore, not disregard the said decision/stand taken by the Respondent that the oil field in question has already been irretrievably and irreparably damaged by the conduct of the Petitioner. No doubt, the Petitioner has vehemently disputed the charge made by the Respondent against it. It would be for the tribunal to go deeper into the technicalities and factual controversy to determine whether, or not, the Petitioner has indeed irretrievably and irreparably damaged the oil field by its conduct, as alleged by the Respondent. The arbitral tribunal already stands constituted and its powers u/s 27 do not appear to have been curbed by the PSC. Therefore, the arbitral tribunal may, if, it considers appropriate and permissible, appoint one or more experts to satisfy itself, whether or not the Petitioner is guilty of causing irretrievable or irreparable damage to the oil field in question, if an issue in that respect arises between the parties. The question is, in these circumstances, where does the balance of convenience lie?

96. In *Mahadeo Savlaram Shelke* (supra), the Supreme Court quoted with approval, *inter alia*, the following extract from the Law Quarterly Review, Volume 109 at page 432 (at p. 446), A.A.S. Zuckerman under the title "Mareva Injunctions and Security for judgment in a Framework of Interlocutory Remedies" which reads:

12. In "Modern Law Review", Vol 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages". In "The Law Quarterly Review" Vol 109, at page 432 (at p. 446), A.A.S. Zuckerman under Title "Mareva Injunctions and Security for judgment in a Framework of Interlocutory Remedies" stated that "if the plaintiff is likely of suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the Defendant for any unwarranted restraint on the Defendant's right pending trial, the balance would tilt in favour of restraining the Defendant pending trial. Where both sides are exposed to irreparable injury ending trial, the courts have to strike a just balance". At page 447, it is stated that the court considering an application for an interlocutory injunction has four factors to consider: first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the Defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation (emphasis supplied)

97. If the Respondents allegations are to be believed, it would mean that the performance of the Petitioners obligations under the PSC have been breached, and that the continuation of the Petitioner as a party Constituting the contractor and the operator is contrary to the interests of India. If the said allegations are to be believed, the extent of damage already suffered by the Respondent, and the State of Assam would be immeasurable.

98. I cannot lose sight of the fact that the Petitioner is a foreign company. On the other hand, the Respondent is the Government of India. If the injunction as prayed for is granted, and eventually the Petitioner were to fail in the arbitration proceedings, looking to the nature and magnitude of the transaction, it would be extremely difficult for the Respondent to recover its losses and damages. There is a possibility that the damage may be irretrievable and irreparable, in case the Petitioner is allowed by way of an interim measure to continue to function as the operator or contractor under the PSC during the pendency of the arbitration proceedings. On the other hand, if the Petitioner succeeds before the Arbitral Tribunal, the Petitioner could be compensated in terms of money.

99. I may also observe that in a case like the present, it is practically impossible to quantify the amount of security that the party Constituting the contractor may be subjected to, even if a case for grant of an interim order of injunction to stay the termination of the PSC is made out. Pertinently, the Petitioner has not even volunteered to furnish any security to safeguard the interests of the Respondent, in case the injunction as prayed for is granted.

100. I, *prima facie*, agree with the Respondent's submission that all that the Petitioner is, under the PSC, entitled to is the monetary value of the cost petroleum and its share in the profit petroleum as, admittedly, the country is nowhere close to meeting its petroleum requirements. Reference may be made to Articles 19.1, 16.4 of the PSC (referred to above) and to the following observations of the Supreme Court in *Reliance Natural Resources Ltd.* (*supra*):

253. As discussed earlier, it is clear that a wide variety of instruments have come to be called Production Sharing Contracts and there is no specific concordance between that title and what is actually shared pursuant to a PSC. In light of that discussion and the general acceptance that revenues are also shared in the context of Production Sharing Contracts, the insistence of RNRL that only production i.e. physical volume of gas can be shared under any Production Sharing Contract may have to be held to be unsustainable. 254. One of the bigger sources of confusion has been the manner in which the word petroleum has been used in the specific PSC under consideration. The word petroleum, referring to crude oil or natural gas as the case may be, is used in two senses in different parts of the PSC: as a physical product and also in terms of the monetised value. However, when the word petroleum has been used in conjunction with the words cost and profit, the definitions in this PSC clearly indicate that reference is to the monetised value of the physical product i.e. the units of the physical quantity multiplied by the sale price at which the physical

quantity is sold at.

258. Inasmuch as the words "volume" and "value" have different connotations and meanings, though occasionally they may have some overlap, the fact that one was replaced by the other implies that the meaning ascribable in the context of this PSC should eliminate the overlap. Consequently, it can only be understood that the word "value" is being used, in the PSC, to mean the monetised value of the physical quantity that is a resultant of multiplying the quantity of petroleum (crude oil or natural gas) produced, saved and sold in the market (as discussed below) at a "price".

259. The words "produced" and "saved" are first used in the phrase "Petroleum operations" defined in Article 1.74 of the PSC, wherein it is stated that petroleum operations mean, as "the context may require, exploration operations, development operations or production operations or any combination of two or more of such operations, including construction, operation and maintenance of all necessary facilities ... environmental protection, transportation, storage, sale or disposition of petroleum to the delivery point... and all other incidental operations or activities as may be necessary".

260. Further, Article 21.6.1 specifically states that the contractor "... shall endeavour to sell all natural gas produced and saved...." This indicates that the entire set of all petroleum operations are to end in a sale at the delivery point; so it has to be concluded that the phrase "produced and saved" in the PSC encompasses the activity of sale of natural gas. Consequently, the phrases "total value", "cost petroleum" and "profit petroleum" can only be interpreted as having been used to denote the monetary value realised after the sale of natural gas at the delivery point.

(emphasis supplied)

101. Therefore, prima facie, the PSC is a contract for the non performance of which compensation in money would be an adequate relief.

102. However, I am of the prima facie opinion that there exists no standard for ascertaining actual damage that may be caused by the non performance of the PSC, if, eventually the Petitioner succeeds in its challenge to the termination to the PSC before the Arbitral Tribunal. As submitted by Mr. Sundaram, the recovery of petroleum would be dependant on various factors such as investment, expertise and efficiency of the operator and if any other operator is permitted to substitute the Petitioner, the profitability of the project would be affected, making it impossible to adopt a standard for measurement of damages that the Petitioner may suffer. But that factor, by itself, would not be sufficient for the Court to grant specific performance of a contract. The contract should first, and foremost, be specifically enforceable. This is clear from the opening words of Section 10 of the Specific Relief Act, which read "Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced". From the aforesaid, it appears that, firstly, the

mandate of Section 10 is over shadowed by that of Section 14, which also falls in Chapter II of the Specific Relief Act, and enlists cases in which the law prohibits the specific enforcement of contracts. Secondly, the relief of specific performance is itself a discretionary relief. The discretion of the Court can certainly not be exercised in breach of the mandate contained in Section 14.

103. The Respondents have undertaken that they shall maintain full and complete accounts of the operations carried out at the oil fields in question. They shall remain bound by this undertaking and they are accordingly directed to maintain the complete accounts and preserve the same.

104. In the light of the above considerations, the balance of convenience, in my view, lies in favour of the Respondent, and against the Petitioner.

105. In the face of the allegations that the Petitioner, post the indirect assignment of participating interest has caused irreparable and irretrievable damage to the oil field, leads me to prima facie conclude that Article 31.6 of the PSC cannot come in the way of the government to terminate the PSC qua the Petitioner, when the valuable national resource itself is in danger of being wasted and irretrievably lost by a contractor or its assignee. This is clear from a perusal of recital 4, Article 29.1(d) and Articles 8.3(k) and Article 33.2 of the PSC, and my discussion above. Consequently, I am not inclined to confirm the injunction granted by me initially. The same stands vacated. I dismiss this petition leaving the parties to bear their respective costs.