

(2001) 06 DEL CK 0026
In the Delhi High Court
Case No : F.A.O. (OS) No. 148 of 2001

M/s Niko Resources Ltd.

APPELLANT

Vs

Union of India
 M/s Niko Resources Ltd. Vs Gujarat
State Petroleum Corporation

RESPONDENT

Date of Decision : 01-06-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(5), 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Joint Operating Agreement, Schedule — Article 13, 3.1
Production and Sharing Contract, Schedule — Article 1.20, 31

Citation : (2001) 93 DLT 12

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. P. Chidambram and Mr. Kapil Sibbal and Mr. T. Andhyarjuna, Mr. Sachin Datta and Mr. Rakesh Sood, for the Appellant; Mr. Mukul Rohtagi A.S.G., Mr. B. Sen Mr. R.G. Srivastava, Ms. Meenakshi Brar and Ms. Sangeeta Srivastava, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—These appeals arise from a common order passed by the learned Single Judge on 8th March, 2001 dismissing the applications of the appellants filed u/s 9 of the Arbitration and Conciliation Act, 1996(Act No.26 of 1996), hereinafter referred to as the Act).

2. The Government of India invited bids for the development of petroleum resources in the "Hazira Fields" which culminated into a Production Sharing Contract being signed on 23rd September, 1994 between the President of India, Gujarat State Petroleum Corporation Limited, respondent No.2 and the appellant. The appellant and respondent No.2 were collectively defined under the said Production Sharing Contract (PSE in short)as the contractors. The said contract provided for arbitration for settlement of disputes under Article 31 of the contract. The said article required that initially all disputes, differences or claims arising out of or in connection with any of the terms and conditions of the

contract or concerning the interpretation or performance thereof, shall be settled by the parties amicably. In the eventuality of the disputes remaining unresolved the same are liable to be referred to an Arbitral Tribunal of three Arbitrators. The said clause requires the party or parties instituting the arbitration to appoint one Arbitrator and the party or parties responding to appoint another Arbitrator. The two arbitrators appointed are to appoint the third Arbitrator.

3. A Joint Operating agreement (JOA in short) was also executed on 5th December, 1994 between the appellant and respondent No.2 for the purpose of defining the respective rights and obligations of the said two parties with respect to the operation to be conducted under PSC. The said agreement also contained an arbitration clause incorporated in Article 13.

4. The controversy relating to the present disputes arises from the appellant and respondent No.2 laying a 36" pipeline for transmission of gas. This was to be done in pursuance to a resolution dated 8th January, 1999 of the operating committee. It will be relevant to reproduce the extracts of the said minutes dealing with this subject:

"36" Trunk Line:

Mr. Sanjay Gupta briefed the forum on the background of the 15 km-long 36" Trunk Line project and brought out the progress achieved in obtaining the ROU as well as in completion of design engineering. The consortium agreed to finalize the suppliers for the various long-lived items like pipes, pipe-bends, launches and receivers, fittings valves, meter runs etc. as well as the agency for laying the pipeline to enable the commissioning of the pipeline prior to the onset of the 1999 monsoons.

It was decided that GSPL should take immediate action in procurement of the pipes (including pipe bends) and MIKE should proceed with the procurement of all valves, fittings, flanges including meter runs.

It was decided that NIKO, being the Operator, would be responsible for the overall supervision and coordination of the various activities involved in the execution of the project. It was also agreed that once the pipeline was laid for operation and the maintenance of the pipeline would continue to be the responsibility of Niko as the Operator during the life of its Operatorship.

GSPL also pointed out that it had earlier written to Directorate General of Hydrocarbon (DGH) stating that this project be given a "Cost Recovery Status" under relevant Clauses of the Production Sharing Contract (PSC). Despite repeated reminders, DGH is yet to clarify its stand on this issue. Therefore, in the absence of a firm directive from DGH, the consortium agreed to undertake the pipeline project as a Joint Venture project and be funded by the consortium. The consortium agreed to put up this issue at the forthcoming GCM with DGH and it hopes that DG would grant the project the Cost Recovery Status. However, it was also agreed by the consortium that since DG did not accord this project a "Cost

Recovery Status" as per the PSC norms, then Niko would take legal opinion and proceed for arbitration."

5. It would thus be seen there was some dispute about the Director General of Hydro-carbon (DGH in short) according his approval to this project of laying the 36 pipeline cost recovery status. Thereafter in the correspondence exchanged inter se the parties and specifically in the letter dated 18.1.1999 by respondent No.2 to the appellant, it was reiterated that the appellant would be responsible for the operation and maintenance of the proposed 14 Kilometer pipeline from Hazira Gas Plant to Mora Village, Surat for transportation of natural gas produced from Hazira field after the execution of the project. A meeting of the Managing Committee as defined under the PSC was held on 20th April, 1999 where the view of the respondent No.1 to the effect that the PSC does not permit cost recovery status to lay a pipeline for transportation of gas beyond the delivery point was recorded.

6. The delivery point is defined in Article 1.20 of the PSC to mean groups gathering station of Oil and Natural Gas Corporation Limited or as may otherwise be agreed between the contractor and ONGC Limited. There were subsequent discussions and exchange of correspondence for fixation of a delivery point. It was the contention of the DGH that since the delivery point being proposed by the consortium of the appellant and respondent No.2 fell outside the purview of the PSC the matter has to be referred to the Ministry of Petroleum and Natural Gas while the contention of the consortium was that the PSC does not prohibit the consortium members from creating a delivery point even if it is outside the field boundaries. Finally the DGH in its letter dated 6.8.1999 took a firm stand that the fixation of delivery point is a policy issue and required government approval and came to the conclusion that there was no justification for laying of the 36", 14 kilometres pipeline from Hazira Plant to Mora Village under the Hazira Development Project. The consequence of this was that respondent No.2 vide letter dated 9.8.99 informed the appellant that in view of this stand of the DGH the project for 36" pipeline would no longer remain a joint venture project of the appellant and respondent No.2. Simultaneously respondent no.2 also informed the DGH vide its letter dated 11/18.8.1999 that they were surprised to note the reasons cited for the non-grant of approval and were of the view that the DGH had failed in properly evaluating consortium proposals and the consortium's abilities to perform its duties under the PSC had been badly effected. The appellants in response to the letter dated 9.8.99 of the respondent No.2 vide their letter dated 13.8.1999 noted that they were surprised at the unilateral decision made by Respondent No. 2 that the project would no longer remain a joint venture project and reiterated their decision that the pipeline would remain in joint venture project and that there was no question of the appellant withdrawing from the same. Respondent No.2 in their subsequent communication dated 31.8.1999 to the appellant recorded that the reason for the letter of the respondent No.2 not to treat the pipeline project as a joint venture was the decision of DGH in not agreeing to the proposal allowing it as a cost sharing item

under the PSC. This was followed by subsequent communication of Respondent No.2 dated 12.10.1999 suggesting a meeting to be held of the Operating Committee to taken not of the project and approve the expenditure incurred in laying the pipeline of 36" and it was proposed to discuss the other matters of the joint venture. Though there is subsequent communication on record, no formal separate agreement was executed between the appellant and respondent No.2 in respect of this 36" 14 calumniators pipeline.

7. The appellant has filed petitions in the Supreme Court of India u/s 11 of the Arbitration and Conciliation Act, 1996 seeking arbitration in respect of this dispute relating to the laying and operation of this pipeline. The same are being contested by the respondents as it is the contention of the respondents that laying of the pipeline did not form a part of the PSC. In the absence of any agreement for this pipeline, there was no arbitration agreement inter-se the parties in respect of this subject matter.

8. The learned Single Judge had in the impugned order examined these contentions in detail regarding the submissions of both the parties. This aspect was examined by the learned Single Judge in view of the preliminary objections taken by the respondent to the maintainability to the petition on the ground that there was no arbitration agreement between the parties and consequently the petition u/s 9 of the Act was not maintainable. The other contention of the respondent was that in view of the delay and laches in approaching the Court by the appellant for an act which took place only in August, 2000 and further in view of third party rights having been created, the appellant was not entitled to any relief in the petition. After recording the submission of learned counsel for the parties in this behalf, learned Single Judge remarked in the impugned order that for purpose of deciding the application before him, he would presume that there exists an arbitration agreement between the parties. The contention on behalf of appellants forcefully advanced by Sh. Kapil Sibal, Mr. P. Chidambaram, and Mr. T. Andharajina, Sr Advocates, is that having clearly stated in the impugned order that the learned Single Judge could consider the application filed by the appellant on this assumption, the learned Single Judge ought not to have gone into the merits of this controversy. The learned Single Judge in the impugned order has come to the conclusion that the laying and operating of the pipeline had to be with the approval of the Government and with the approval of the management committee under the PSC. The learned Single Judge disagreed with the submissions advanced on behalf of the appellant that laying of the pipeline beyond the downstream flange to the delivery point within or outside the contract area will also come within the meaning of delivery point. The learned Single Judge thus concluded that laying of the pipeline beyond the downstream flange of the gas/oil separation facility was clearly outside the scope of the PSC and the JOA. The learned Single Judge further observed:

"I am, at this stage not going into the question whether the dispute between the parties were covered under the arbitration agreement as contained in the

production sharing contract and the joint operating agreement but since the work is beyond the scope of the production sharing contract, in my prima-facie view, the dispute will not be covered by the contract."

9. We are in agreement with the submission of the learned counsel for the appellant that the learned Single Judge ought not to have gone into this aspect and analyses the contract from the point of view of arriving at a conclusion whether or not this question of laying the pipeline fell within the PSC and the arbitration clauses contained therein.

10. There is no dispute about the execution of the PSC and the JOA both containing arbitration clauses. In view of the admission of the execution of the agreement the existence of the arbitration clause stood admitted and in our view, the matter in controversy ought to be left to be adjudicated upon by the Arbitrator. The scheme of the Act is different from the Indian Arbitration Act, 1940. u/s 16 of the Act, the Arbitral Tribunal may rule on its own jurisdiction including the objections with respect to the existence or validity of the arbitration agreement. The Arbitral Tribunal in terms of sub-section (5) of Section 16 of the Act is required to decide the plea in respect of the jurisdiction of the Arbitral Tribunal and a party aggrieved by such an arbitral award is entitled to make an application for setting aside an arbitral award in accordance with the Section 34 of the Act. The learned Single Judge in fact has first recorded that he would not like to go into this controversy and presume the existence of the arbitration agreement to decide the present application. This, in our view, would be the correct approach to take specially as there is an arbitration clause in the PSC and Therefore while deciding an application u/s 9 of the Act, there would be no requirement to go into a more detailed examination on this aspect of the factum of the subject matter of the dispute being covered or not under the arbitration clause.

11. Mr. P. Chidambaram, learned senior Advocate in support of his submissions that there was no need for the learned Single Judge to go into the aforesaid question or even to make any prima facie observations in this behalf referred to the judgment of the Supreme Court in *Nimet Resources Inc. and Another Vs. Essar Steels Ltd.*, . He submitted that even if there has been some transaction, but the correspondence, documents or exchange between the parties is not clear as to the existence or non-existence of an arbitration agreement, the appropriate course is to leave the question for the Arbitration to decide the same u/s 16 of the Act rather than by the Chief Justice or his nominees u/s 11. This judgment was delivered by Sh. Rajendra Babu, J. sitting as Single Bench of the Supreme Court. It was further submitted that even in the case of *Wellington Associates Ltd. Vs. Mr. Kirit Mehta, M.J. Rao, J.* of the Supreme Court was of the view that existence of the arbitration agreement may be decided u/s 16 of the Act by the Tribunal but the jurisdiction of the Chief Justice or his designate to decide the question at the stage of Section 11 application is not excluded. Subsequently in *Malaysian Airlines Systems BHD (II) vs. M/s Stic Travels (P)Ltd.* 2000 1x AD

(S.C.) 158, the same learned Judge referred the matter to be decided by the Arbitrator.

12. Mr. Chidambram further supported his contention with reference to the judgment of the Supreme Court in the Renusagar Power Co. Ltd. Vs. General Electric Company and Another, where the Supreme Court expressed the view that the expression such as "arising out of", or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to its existence, validity and effect (scope) of the arbitration agreement. This judgment was further referred to in the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, by the Supreme Court.

13. Mr. Chidambram also contended that if the scope and ambit of the arbitration clause is perused along with other relevant clauses of PSC, it would be clear that the Government and the Management Committee have no role to play if cost recovery is not in issue.

14. Mr. Mukul Rohtagi, the learned Additional Solicitor General, referred to various clauses of the contract to contend that the scheme of the contract envisage that respondent No.1 had a major role to play in respect of all policy decisions and, Therefore, in the absence of approval by respondent No.1 there could be no joint venture in respect of the pipeline. This contention is also supported by Mr. Sen, learned Senior Advocate for respondent No.1.

15. We are not dealing in detail with any of the aforesaid contentions and are also not referring to the clauses of the contract in detail since in our view the same is not relevant for purposes of decision of the application u/s 9 of the Act. As discussed above one of the questions on the execution of the agreement containing arbitration clause is admitted the question whether a particular task fell within the scope of the contract or not, the issue about the existence or validity of the arbitration agreement qua that matter had to be determined either by the Arbitral Tribunal or by the Court seized of the application u/s 11 of the Act.

16. In the present case the petition u/s 11 of the Act.

11 of the Act. of the Act is pending before the Supreme Court. The question we have to consider is as to whether the appellants are entitled to any interim reliefs and if so of what nature pending adjudication by the Supreme Court of Section 11 of the Act. petition or in case Supreme Court directs the matter to be considered by the Arbitral Tribunal till such time as the Arbitral Tribunal considers the matter. The fact that the contract contains an arbitration clause is sufficient for consideration of a Section 9 petition at the present stage. 17. The next question which we have to consider is the nature of interim relief prayed for by the appellant in the application filed u/s 9 of the Act.

18. Mr. Mukul Rohtagi, learned Additional Solicitor General, strenuously argued that the appellant in any case is disentitled to any relief on grounds of delay and

laches. There is a time gap of almost one year between the date the appellant admittedly acquired knowledge of the fact that respondent No.2 is not willing to consider the laying of the pipeline either under the PSC or under any new joint venture agreement and the date the petition u/s 9 of the Act was filed. The time gap has further resulted in third party rights being created even to the knowledge of the appellant. The issue of delay and laches had also been considered by the learned Single Judge. The learned Single Judge has considered the fact that respondent No.2 has as far back as August, 1999 informed the appellants about the refusal of respondent No.1 to approve the 36" pipeline and that the same may no longer remain a joint venture project. Further in January, 2000, the respondent No.2 has informed the appellants that the pipeline was being taken over by Gujarat State Petronet Ltd. (GSPL in short) and the amount invested by the appellant was being returned. The appellant took no action. The respondent entered into a Memorandum of Understanding with GSPL on 29th January, 2000 and the said transaction was concluded on 27th March, 2000. Thus third party right having been created the learned Single Judge was of the view that the Court cannot set the clock back so as to resound third party rights and direct the respondents to hand over the pipeling to the appellant. The said GSPL was not a party to any of the proceedings and the learned Single Judge was of the view that the said company has to be heard before any order adverse to it can be passed by the Court. The learned Single Judge was further of the view that despite the objection of third party rights having been created by the respondents, the appellant had not made GSPL a party to the petition and thus they cannot be permitted to operate the pipeline.

19. The learned senior counsel for the appellant fairly conceded that much water has flown even after the institution of the petition and at this stage in view of the transaction between respondent No.2 and GSPL, no relief can really be claimed to operate the pipeline. It was further contended on behalf of appellant that the power of the Court u/s 9 of the act is wide enough and it is not necessarily analogous to the power exercisable under the provisions of Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908. Reference was made to the language of Section 9 to argue that the word used in this section are "interim measure of protection" and thus the relief can be appropriately moulded.

20. The learned senior counsel for the appellants, on being asked about the nature of protection the appellant is claiming now put forth broadly the following interim measure of protection:

1. No third party rights be created in the property i.e. the pipeline to the extent of 1/3rd as the appellant had invested to the extent of the said share in the pipeline.
2. Preservation of the revenue stream from the use of the pipeline to the extent of 1/3rd of the revenue by creation of an escrow account in a bank, of the choice of Respondents, who is to be appointed as an escrow agent to guarantee that in the event of the appellant succeeding, the said amount to the extent of 1/3

becomes realizable forthwith by the appellant from the escrow agent.

3. In view of the transactions between respondent No.2 and GSPL a directions to ensure that the share holding patters of Gujarat State Petronet Limited is not altered.

4. Direction to respondent No.2 to pass appropriate resolutions for compliance of the directions by GSPL in view of the GSPL being a 100% subsidiary of the respondent at the time of the transaction.

21. We have heard the learned counsel for the parties on the aforesaid suggested interim measures of protection.

22. Learned counsel for the appellant have inter alias referred to the wider power of the Court u/s 9 of the Act. On the other hand Mr. Mukul Rohtage, Additional Solicitor General, argued that principles analogous to Order 39 Rules 1&2 of the Code of Civil Procedure, 1908 would apply as noted by the learned Single Judge. We are of the view that it cannot be dispute that the three basic legal principles of existence of prima facie case, balance of convenience and irreparable loss and injury have always to be taken into account before any interim order is passed either under Order 39 Rule 1 & 2 or u/s 9 of the Act. While the aforesaid principles cannot be given a go-bye the power to grant interim measures of protection u/s 9 of the Act is wider in view of the phraseology used in Section 9 of the Act.

23. We have to also consider the issue arising out of the relief being Claimed against GSPL as the said entity is not a party before us. In view of the same the learned Additional Solicitor General placed before us the share capital structure of GSPL as one the date of the transaction and at present. This information has been submitted by respondent No.2 in the form of a surrender affidavit. Since there is no practice of any such surrender affidavit being filed in appeal we have perused the affidavit and the chart only to a limited extent as it supplies information about the share holding pattern of GSPL. We may at this stage observe that we had clearly informed learned counsel for the parties that we would confine only to the material as was placed before the learned Single Judge at the time prior to the decision of the application u/s 9 of the Act.

24. The position which emerges from the information submitted before us by respondent No.2 is that GSPL was decided to be established as a subsidiary of respondent No.2 and the equity structure to be determined by the Gujarat Infrastructure Development Board. GSPL was incorporated on 23rd December, 1998 with a total paid up capital of Rs. 700/- being subscribed by respondent No.2. As on 31st March, 2000 total paid up capital of GSPL was subscribed by respondent No.2. It is further stated that Ultimately respondent No.2 is to hold only 18% shares capital in GSPL though as on 31st March, 2001 and as on date respondent No.2 has an equity participation of 73.5% in GSPL.

25. In view of the aforesaid facts learned counsel for the appellant contended

that GSPL being an 100% subsidiary of respondent no.2 on the date of transaction in respect of the pipeline an even today hold 73.5% shares GSPL there is no need to implead GSPL as a party specially keeping in mind that GSPL has no privity of contract and no arbitration clause exists between the said two parties. It was argued that the appellant is entitled to seek relief against the respondents and anybody claiming under the respondent. It was further contended that respondent No.2 can always be directed to pass appropriate resolutions to ensure compliance by GSPL specifically keeping its present equity structure in mind and Therefore it is necessary to further ensure that equity structure of GSPS is not altered.

26. Mr. P. Chidambram, learned senior counsel for the appellant relied on the decision of the Supreme Court in *Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. and Others*, to contend that it is a fit case where the corporate veil should be lifted to ascertain the true nature of transactions, the identities of the parties involved and whether the transaction was genuine and bonafide in view of the shares holding pattern. He submitted that there was difference between respondent No.2 and GSPL. He further placed reliance on another decision of the Supreme Court in *State of U.P. and Others Vs. Renusagar Power Co. and Others*, where the concept of subsidiary and holding company is discussed. The Supreme Court held that concept of lifting the corporate veil is a changing concept and in the expanding horizon of modern jurisprudence lifting of corporate veil is permissible. The Supreme Court was further of the view that the frontiers for lifting the corporate veils are unlimited but the same depends upon the realities of the constitution. It has to be considered in the facts and circumstances of the case depending upon the relationship of the holding company and the subsidiary company. If the two companies are inextricably linked with each other, and the subsidiary in reality has no separate existence, then the corporate veil has to be lifted and the two identities were liable to be treated as one concern.

27. On the other hand Mr. Mukul Rohtagi, learned Additional Solicitor General, contended that the question of lifting the corporate veils would only arise if there was a fraud or an attempt to create any liability by the company. The transaction, it is contended, is a clear transaction and the parties had knowledge of the same. He relied on the treatise of Palmer on Company Laws 24th Edition at page 216 to contend that unless the incorporation is used for some illegal or improper purpose, the Court would not treat the subsidiary as one body. The observation in Palmer's Company Law is as follows:-

"The courts have further shown themselves willing to 'lift the veil' where the device of incorporation is used for some illegal or improper purpose. So, where a transport company sought to obtain licenses for its vehicles, which it was unlikely to obtain if it made application on its own behalf, by causing the application to be made by a subsidiary company to which the vehicles were to be transferred, the court refused to treat parent and subsidiary as independent bodies and decide

the application on the basis that they were one commercial unit."

28. We have considered the aforesaid contentions and are of the view that merely because GSPL is a subsidiary of respondent No. 2, it is not necessary to lift the corporate veil for every transaction between the holding company and subsidiary company. The relationship of the holding company and the subsidiary company in the present case has to be analysed in view of the readmitted position that GSPL was a 100% subsidiary of respondent No.2 on the date of the transaction in respect of the pipeline and the appellant had invested the capital cost to the extent of approximately 8.55 crores in the pipeline Along with respondent No.2 before the same was transferred to the GSPL. Therefore, if it becomes necessary to protect the interests of any party and any interim measures of protection are required appropriate direction can always be issued to respondent No.2 to ensure the protection for the benefit of the appellant even though the measures may have an implication on GSPL.

29. Mr. Mukul Rohtagi, learned Additional Solicitor General, Urged forcefully us that the claim of the appellant can be quantified in terms of money and no interim measures of protection are necessary. Mr. Rohtagi stated before us that respondent No.2 had offered to pay to the appellant its share capital cost of approximately 8.55 Crores and in fact had even sent a cheque for the same to the appellant in January, 2000, which the appellant refused to accept. He further stated before us that this amount has been kept by respondent No.2 in a separate account and the same is earning interest and would always be available for the benefit of the appellant.

30. It was the submission of Mr. Rohtagi that the aspect of interim measures has been considered by the learned Single Judge and the Appellate Court ought not to interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored the settled principle of law for refusal of interlocutory injunction and relied on the observations made by the Supreme Court in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, . Mr. Rohtagi also submitted that GSPL is not a party before us and as such is not bound by any agreement between the appellant and respondent No.2. He referred to the judgment of the Division Bench of this Court in *Patanjal and Another Vs. Rawalpindi Theatres (P) Ltd.*, . He further submitted that accounts are maintained in usual course both by respondent No.2 and GSPL being Government undertaking and there is no question of the appellant not being able to realise any amount, if ultimately found due, in favor of the appellant by any competent forum since the two companies have the backing of the state Government.

31. Learned counsel for the appellant, however, urged that there was no guarantee that the amount would be realised incase the appellant succeeds. Not only this the learned counsel for the appellant claimed that periodic statement be also got submitted from Respondent No.2 and GSPL of the accounts to be

maintained separately. It was submitted that the pipeline can be used not only for the gas from Hazira but also to transmit gas of other parties and would thus earn revenue to which the appellant is entitled to the extent of 1/3rd share. Learned senior counsel appearing on behalf the appellant referred to the treatise of Williams and Mayares vs. Oil and Gas Laws 1996 5 389 under the Heading "853. Implied covenant to market the product: introduction". In the said treatise breach of covenant to market oil and gas have been considered and it is rebreed that most cases are concerned with failure to market gas. This is so as gas, unless it is liquified, must be stored below ground and to be moved to the market only through pipeline. Thus disagreements between land owners and operators have naturally arisen over the diligence exercised by the lessee in circuiting gas under these circumstance. Mr. Chidambaram specifically referred to the observations in the treatise to the effect "upon discovery of mineral on a lease hold; the lessee is ordinarily under an implied duty to use due diligence" to market the product." It was the contention of Mr. Chidambaram that it was the right and duty of the appellant market the gas and thus the action fo the respondent No.2 to the contrary is not in accordance with "good petroleum practice" .He further referred to article 3.1 of the JOA Where the nature of relationship between the parties, i.e. appellant and respondent No.1, has been defined to be that their titled and rights to the property acquire in connection with the joint operations shall be that of co-proprietors or tenants in common. Thus it was contended that there is a right in the pipeline in which the appellant had contributed as also in marketing the gas. Since rights have been created by transfer in favor of GSPL separate accounts for the same were necessary.

32. Mr. Mukul Rohtagi, learned Additional Solicitor General, has further submitted that though the initial cost for laying the pipeline was shared in the ratio of 2/3: 1/3 between the respondent No.2 and the appellant, respondent No.2 has spent further additional amounts before the transfer to GSPL and the GSPL has also spend considerable amount to make the pipeline functional.

33. We have given our thoughtful consideration to all aspects in order to balance the equities and to protect the rights of the parties, pending application u/s 11 of the Act before the Supreme Court. We are not inclined at this stage to direct the creation of an escrow account or appoint a escrow Manager as is sought to be urged on behalf of the appellant more particularly in view of the statement of the learned Additional Solicitor General that the amount of Rs. 8.55 crores towards the investment made by the appellant has been kept in a separate account earning interest for the benefit of the appellant. We may clarify that the learned counsel for the appellant however categorically stated before us that they were not interested in this amount as they had a right of revenue share in the earnings from the transmission of the gas through the pipeline. in view of the statement of Mr. Rohtagi there is no doubt that this amount of security to the extent of at least Rs. 8.55 crores is lying with Respondent No.2 for the benefit of the appellant. However, we are of the view that it would be but appropriate that the account be kept in such a manner that the transaction in respect of the

pipeline and its use are clearly available for the benefit of the forum which ultimately will adjudicate upon the disputes between the parties.

34. We thus direct that respondent No.2 will ensure that a separate account in respect of the amount expended towards further capital cost in making pipeline functional and of the revenue generated from the same is maintained. We are of the considered view that since GSPL was a 100% subsidiary of respondent No.2 hold 73.5% shares in GSPL appropriate resolutions, as may be deemed fit and proper be passed by respondent No.2 to ensure that separate accounts are kept even by the GSPL in respect of capital cost incurred by them for making the pipeline functional as also the revenue generated from the use of the pipeline for transmission of the gas either from Hazira or through any third source. We have also taken into consideration the submission of Mr. Rohtagi, learned Additional Solicitor General, that both GSPL and respondent No.2 are fully supported by the State Government and the appellant cannot have any apprehension about the financial capacity of any of the respondents of GSPL. Mr. Rohtagi urged that in fact he was representing the State Government. This being the submission it is not open for respondent No.2 to contend that such directions cannot be passed against GSPL. Our direction does not even adversely affect any of the rights of GSPL as it is entitled to continue to run the business in respect of the pipeline without any let or hindrance except to the extent of accounts being maintained as aforesaid.

35. We are also not inclined to pass any direction restricting the operation of the share holding pattern of GSPL. The affidavit in the form of surrender filed by respondent No.2 has indicated that the share holding pattern of GSPL is to ultimately change, the share holding being divested in favor of State Consumer Company, Oil and Gas Sector Company under the Government of India, L&G suppliers using financial institutes, the Gujarat Industrial Development Corporation and Gujarat Maritime Board. The share-holding pattern of GSPL thus cannot be restricted to its present position. In view of the aforesaid we have to consider the prayer of the appellant that no third party interest be created in the property of the pipeline to the extent of 1/3rd share as they had admittedly invested about 8.55 Crores for the same. The learned counsel for the appellant had thus contended that all the reliefs including the relief of specific performance of the understanding between the appellant and respondent NO.2 whereby the appellant had to operate the pipeline can be sought before the learned Arbitrators. We need not go into this issue as to whether the appellant are or are not entitled to such relief as the same is liable to be considered by the appropriate forum. We, however, feel that protection is necessary only in respect of the property of the pipeline to the extent that further third party interest be not created in the pipeline specifically as the prayer of the appellant is not in terms of money alone but the right to operate the pipeline. We are conscious of the fact that only respondent NO.2 is a party before us but in view of the fact that GSPL was a 100% subsidiary at the stage of relevant transaction and respondent No.2 still holds 73.5% shares in GSPL and the submission of the

learned Additional Solicitor General Mr. Mukul Rohtagi was that in effect State and Public Bodies are before us, to remove any apprehension of non-payment in the mind of the appellant, direction still can be issued to respondent No.2 to take appropriate steps and pass appropriate resolution if any to ensure that neither respondent No. 2 nor GSPL create any third party interest in the property of the pipeline to the extent of 1/3rd share. We, Therefore, restrain the creation of any further third party interest to the extent of 1/3rd share in the ownership of pipeline.

36. The appeals are allowed in the aforesaid terms. The observations of the learned Single Judge in respect of the arbitrability of the disputes are set aside, the said question is left open to be decided either in the proceedings on application u/s 11 of the Act or as per any other direction of the Supreme Court as may deemed appropriate. Respondent No. 2 and GSL will comply with the following directions.

1. Regular accounts to be maintained in respect of the capital expenses for the 36" - 14 kilometers pipelines from Hazira to Mora.
2. Regular and separate accounts to be maintained of the revenue generated from the use of the pipeline for transmission of gas generated at Hazira or otherwise by any third party.
3. No third party interest be created in the property of the pipeline to the extent of the 1/3rd share.

37. The aforesaid orders shall ensure for the benefit of the appellant till the decision by the Supreme Court on the application u/s 11 of the Act, in case the application is rejected or till the conclusion of arbitration, if referred to Arbitrator by the Supreme Court. Needless to say that in case of reference to Arbitrator, the Arbitral Tribunal will be free to modify these directions as may deemed appropriate by the Tribunal.

38. The appeal is disposed of accordingly in the aforesaid terms making it clear that the observations made by us are tentative only for the purposes of deciding the appeals and will not prejudice or affect the merits of the rights of the parties. Parties are left to bear their own costs.