

(2018) 12 DEL CK 0262

In the Delhi High Court

Case No : Arbitration Petition No. (COMM.) 57 Of 2018

Union Of India

APPELLANT

Vs

Reliance Industries Ltd. & Ors

RESPONDENT

Date of Decision : 18-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 11 Rule 21
Arbitration and Conciliation Act, 1996 — Section 9(1)(ii)(c), 11, 14, 16, 17, 17(1),
17(1)(ii)(c), 18, 19, 19(1), 19(2), 19(3), 19(4), 20, 21, 22, 23, 24, 25, 26, 27, 36,
37(2)(b)
Evidence Act, 1872 — Section 123

Citation : (2018) 12 DEL CK 0262

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : A.K. Ganguli, Shailendra Swarup, Bindu Saxena, Aparajita Swarup, Arunabh Ganguli, Harish N Salve, Sameer Parekh, Lalit Chauhan, Sonali Basu Parekh, S. Lakshmi Iyer, Aweshat Padhi, Sarthak Gaur, Raghav Shankar, Himanshu Suman, Rajiv Nayyar, Mahesh Agarwal, Madhur, Rishi Agrawala, Niyati Kohli, Karan Luthra

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J

1 This is an appeal preferred by the Union of India (hereafter referred to as "UOI") under Section 37 (2) (b) of Arbitration and Conciliation Act, 1996 (in short "1996 Act") against the procedural order dated 31.08.2018 passed by the majority members of the Arbitral Tribunal.

It may be relevant to note, at the very outset, that the Arbitral Tribunal includes three persons, two of whom are nominees of the parties while the Presiding Arbitrator has been appointed by the Supreme Court in a proceeding carried out under Section 11 of the 1996 Act.

The other aspect, which requires to be noticed at the very beginning, is that

though the impugned procedural order had been signed by all three persons, there is a partial dissent on two aspects by one of the members. The dissent, it appears, is issue specific and is recorded in paragraph 18 and 60 of the impugned order.

2 The impugned order, as it would appear, which, is also the case of the UOI before me, though dated 31.08.2018, was signed on 05.09.2018.

3 In sum, the impugned order directs, inter alia, disclosure of documents by the UOI and respondents i.e. the original claimants. Being aggrieved, UOI has instituted the instant appeal.

Backdrop

4 Before I proceed further, it may be helpful to note the background in which the Arbitral Tribunal came to be constituted. The important point to be kept in mind is that upon its constitution, the Arbitral Tribunal has passed five procedural orders. UOI is, in fact, aggrieved by the fifth procedural order, i.e. order dated 31.08.2018.

5 In and about 12.04.2000, the UOI entered into a Production Sharing Contract (in short "PSC") with the Reliance Industries Limited i.e. respondent No.1 (hereafter referred to as "RIL") and NIKO (NECO) Resources Limited i.e. respondent No.2 (hereafter referred to as "NIKO").

6 PSC, inter alia, placed obligations on RIL and NIKO with regard to exploration, extraction, evacuation and sale of natural gas from D1-D3 gas fields situate in the KG Basin.

The UOI along with RIL and NIKO had forged the PSC with the intent to share "profit petroleum". Steps, in that behalf, were taken in consonance with the declaration made by the UOI under the New Exploration Licensing Policy (NELP).

Under the PSC, RIL was designated as the operator qua D1-D3 gas fields.

7 It appears that RIL in its capacity as the operator, upon discovering the source of natural gas, presented its report to the Managing Committee, as defined under the PSC. This report, it appears, was submitted by RIL, based on inputs received from Hydrocarbon experts appointed by it.

The Managing Committee, apparently, comprised two nominees of the UOI and one nominee each of RIL and NIKO. Apart from other aspects, according to UOI, it was Managing Committee's mandate to declare the discovery made in D1-D3 gas fields as having attained "Commercial" status.

It is in this background that RIL and NIKO submitted an Initial Development Plan (in short "IDP") to the Managing Committee for its approval based on inputs received from experts appointed by them.

The Managing Committee, it appears, approved the IDP submitted by RIL and NIKO on 05.11.2004.

8 Evidently, RIL and NIKO had got conducted further studies in D1- D3 gas fields via renowned international experts, who, as it appears, came to the conclusion that it may be possible to extract a higher quantity of gas than that which was taken into consideration while formulating the IDP.

This circumstance led RIL and NIKO to submit an Amended IDP (in short "AIDP").

In and about 12.12.2006, the AIDP was approved unanimously, albeit, with some modifications by the Managing Committee.

9 According to UOI, based on the AIDP, RIL and NIKO submitted its Work Programmes and budgets for carrying out the development work and Production Operations in D1-D3 gas fields.

Apparently, the Work Programmes and budgets were approved by the Managing Committee as presented by RIL and NIKO.

The UOI claims that though the Work Programmes and budgets were approved by it for production of 80 mmscmd of gas which had to be extracted from 50 development wells, RIL and NIKO as against this had drilled only 18 development wells. Furthermore, even though RIL and NIKO had drilled lesser number of development wells they sought to recover and appropriate costs for all 50 development wells.

The recovery and appropriation of costs, it appears, was being made by RIL and NIKO from the revenues obtained on sale of gas.

It is this, purported, excess recovery and/or appropriation of enhanced costs from the revenues obtained on sale of gas which disrupted the relationship between parties and resulted in triggering of the arbitration mechanism by RIL.

10 For the purpose of completion of the sequence of events, it would be relevant to note that in and about 21.02.2011, RIL sold part of its interest via an agreement of even date to B.P. Exploration (Alpha) Limited i.e. respondent No.3 (hereafter referred to as "BP"). Resultantly, BP became a party to the PSC and, accordingly, arrayed itself as a claimant along with RIL and NIKO.

Therefore, wherever necessary RIL, NIKO and BP will collectively be referred to hereafter as "respondents/Contractors" unless reference is required to be made to them separately.

11 Continuing with the narrative, it is because UOI disallowed recovery of costs, that the respondents/Contractors were pushed into serving a notice to arbitrate upon UOI. The notice of arbitration, which is, dated 23.11.2011 adverted, inter alia, to the respondents/Contractors nominee Arbitrator.

The UOI, on the other hand, appointed its nominee Arbitrator on 05.07.2012 after a Section 11 petition was instituted by the respondents/Contractors in the Supreme Court. This petition was, subsequently, disposed of by the Supreme Court on 07.08.2012. Pertinently, the Supreme Court did not disturb the

appointment made by UOI.

As it transpires, the two nominee Arbitrators could not agree on the Presiding Arbitrator, which propelled the respondents/Contractors to approach the Supreme Court. The Supreme Court vide order dated 29.04.2014 appointed a Presiding Arbitrator. However, on account of objections raised by the UOI, the then Presiding Arbitrator, resigned on 07.07.2014. This led to the Supreme Court interceding in the matter, once again, which led to the appointment of the incumbent Presiding Arbitrator, on 23.09.2014.

12 Evidently, the matter concerning the constitution of the Arbitral Tribunal did not rest with this. The UOI, it appears, filed a petition under Section 14 of the 1996 Act seeking removal of the respondents/Contractors" nominee Arbitrator. Pertinently, the very day (i.e. 05.12.2014) the petition was moved, the respondents"/Contractors" nominee Arbitrator chose to tender his resignation.

13 Consequent thereto, on 09.12.2014, the respondents/Contractors appointed a new nominee Arbitrator. Resultantly, the Arbitral Tribunal, as presently constituted, could commence its proceedings, only around, December, 2015.

14 As noticed above, five procedural orders have been passed by the Arbitral Tribunal. The first one being the order dated 23.12.2015.

In this order, the Arbitral Tribunal, inter alia, provided that the arbitration proceedings would be governed by the Indian Constitution and the Statutes enacted by India. Besides this, a time table for conducting arbitration proceedings was also set forth by the Arbitral Tribunal.

15 In and about 22.09.2017, albeit, upon completion of pleadings, which included the Statement of Claim (in short "SOC"), Statement of Defence (in short "SOD"), reply and Defence to the SOD, Counter Claims, rejoinder to reply and Defence to the Counter Claims, parties herein exchanged their respective Redfern Schedules.

It appears, while the respondents/Contractors made their first tranche of voluntary disclosure on 25.11.2017, UOI made no such disclosure.

16 The second procedural hearing was held on 28-29/07.2017. In this proceeding, the Arbitral Tribunal indicated the procedure for disclosure and furnishing of interrogatories.

17 Evidently, on 13.01.2018, the Arbitral Tribunal held its third procedural hearing. At this hearing, parties were asked, inter alia, to submit their revised Redfern Schedules.

The respondents/Contractors submitted their revised Redfern Schedule on 22.01.2018. Likewise, the UOI, submitted its revised Redfern Schedule on 12.02.2018.

18 On 11.05.2018, the UOI made their second tranche of voluntary disclosure.

19 The record shows that the Arbitral Tribunal held its fourth procedural hearing on 11-12.03.2018.

20 On 01.08.2018, the UOI made disclosure of four documents, these being: (i) e-mail instructions given to Dr. Gopalakrishnan on 30.03.2011;

(ii) Mr. P.V. Ramana's report of October, 2004; (iii) Mr. N.C. Nanda's report of August, 2004; and (iv) Engineers India Limited report on IDP of September, 2004.

21 The fifth procedural hearing was held on 3rd and 4th August, 2018, when each individual request for disclosure submitted by parties was examined by the Arbitral Tribunal. As a result of the exercise carried out at the fifth procedural hearing, the impugned order came to be passed on 31.08.2018.

22 A close perusal of the impugned order would show that the Arbitral Tribunal has zeroed down the objections of UOI against the request for disclosure made by the respondents/Contractors under the following broad heads:

(i) The requests lack relevance and/or materiality.

(ii) The requests are mere "fishing and roving" exercise.

(iii) The requests made lack specificity.

(iv) The requests made are directed towards internal documents

(v) The documents of which disclosure is sought are privileged as they refer to the affairs of the State.

(vi) That the documents of which disclosure is sought are privileged inasmuch as they refer to intra-Governmental discussions.

(vii) The requests are irrelevant as the documents sought are notings of lower functionaries, who are lesser in rank than those who have taken the ultimate decisions on behalf of the UOI.

23 A perusal of the impugned order would also show that the Arbitral Tribunal has dealt with each of the objections raised by UOI, based on its appreciation of law, as applicable to requests made for discovery in Indian Courts. In this behalf, more particularly, the Arbitral Tribunal has relied upon the following judgments: (i) M L Sethi v. R P Kapur, (1972) 2 SCC 427 (ii) The Municipal Board of Agra v. Asharfi Lal, ILR (1922) 44 All 202 and (iii) Basanagouda v. S B Amarkhed, (1992) 2 SCC 612.

The Arbitral Tribunal based, primarily, on these three decisions, set forth for itself the following guiding principles; which, according to it, were applicable while sifting through requests for disclosure made by the parties.

(i) First, that the request for discovery of documents could not be refused only because it did not specify the documents, which are sought to be discovered. The

rationale being, unless the party seeking discovery is aware of what documents are in possession of the opposite party, it cannot possibly seek discovery of specific documents.

(ii) Second, a party has a right to approach the Court or concerned Adjudicatory Authority and to insist on production of all documents, which are in existence or which had been in existence, which "throw light" on the matter in issue and these documents being those which are in power and possession of the opposite party.

(iii) Third, the Court or the Adjudicatory Authority concerned, which has to rule upon the request, while ordering production of documents, in power and possession of the opposite party, shall examine whether the documents, whose production is sought, are necessary to decide the matter in issue. In other words, while exercising its discretion, the Court or the Authority concerned will delve into aspects pertain to expediency, justness and relevance of the documents keeping in mind the matter in issue.

24 Based on the aforesaid broad principles, the Arbitral Tribunal also dealt with the objections raised on behalf of the UOI regarding claim of privilege and that which related to seeking disclosure of notes made in government files by lower functionaries. The latter objection was based on the argument that internal notes made by lower functionaries were irrelevant as they were not the final decision makers in the pyramidal governance structure which subsisted in the Executive of the day.

Insofar as the objection as regards privilege available to UOI under Section 123 of the Indian Evidence Act, 1872 (in short "Evidence Act") is concerned, the Arbitral Tribunal rejected the same on the ground that in the present times, the archaic doctrine of crown privilege was no longer available, especially, where it related to commercial dealings that the Government may have had with the private entity. The Arbitral Tribunal, in this behalf, observed that justice was better served, rather than undermined when there was openness, transparency and accountability. The exceptions carved out by the Arbitral Tribunal to these observations were where documents, whose disclosure was sought, related to State security, diplomacy and such like aspects. In coming to this conclusion, the Arbitral Tribunal relied upon the dicta and down in the following judgments: *Conway Vs. Rimmer*, [1968] A.C. 910 (HL); *S.P. Gupta Vs. Union of India*, (1981) Supp. SCC 87; *State of U.P. Vs. Raj Narain*, (1975) 3 SCC 333; *Burmah Oil Company Limited Vs. Bank of England*, [1979] 3 All ER 700; and lastly, *People's Union for Civil Liberties v. Union of India* (2004) 2 SCC 476.

Insofar as the aspect concerning the file notings was concerned, the Arbitral Tribunal observed that it could not, simply, in one-stroke dismiss the request for disclosure of file notings and internal documents only because they did not constitute the Government's final decision. Accordingly, the Arbitral Tribunal, while holding that the proportionality of each such request would have to be

examined observed that it could not, based on a general objection raised against disclosure of file notings, not deny such a request. According to the Arbitral Tribunal, the UOI's submission in this behalf was erroneous as it had also sought a whole range of documents from the respondents/Contractors which may not have resulted in enabling them to reach a final decision in the given matter. In sum, the Arbitral Tribunal in respect of this aspect, in a sense, applied the adage what's sauce for the goose is sauce for the gander.

25 The bulwark of the majority reasoning was that given the provisions of Sections 18 and 19 of the 1996 Act while it is required to follow the principles of natural justice, it is not bound by the provisions of the Code of Civil Procedure, 1908 (hereafter referred to as "CPC") and/or the Evidence Act.

However, even while saying so, the Arbitral Tribunal discussed the relevant case law, placed before it, whereupon it proceeded to individually examine the requests for disclosure made by the respondents/Contractors and the UOI. There were 19 such requests made by the respondents/Contractors whereas the UOI made 41 requests.

26 As to how these requests were dealt by the Arbitral Tribunal is, briefly, adverted to in the table given hereafter:

UOI/ Appellant's Requests

UOI/ Appellant's Requests

S. No.

Nature of request

Decision of the Arbitral Tribunal (A.T.)

Brief reasons

Request No.1

Copy of the Board Resolution of RIL Board of Directors together with copies of Board Agenda Notes and documents showing the Technical and Financial basis and proposal for RIL Board to make Investment Decision to bid for Block KG-DWN-98/3 ("Block KG-D6") for petroleum operations and copy of the RIL Board minutes of the relevant Board meetings.

No Order

Claimants agreed to provide an affidavit.

Request No.2(a) and (b)

Request No.3

2 (a) -Copies of minutes of the meetings of the Board of Directors of the Reliance Industries Ltd. (including copies of Resolutions) together with copies of

Board Agenda. and the supporting Board Notes and Supporting documents referred to and/or placed before the RIL Board for the consideration of proposal and approval of sale by Reliance Industries Ltd. of part of its participating Interest under the PSC in Block KG-06 to BP Exploration (Alpha) Ltd including approval of the RIL-BP Sale and Purchase Agreement dated 21.02.2011.

2(b) - Copies of the minutes of the meetings of the Board of Directors of BP (including copies of resolutions) together with copies of Board Agenda and supporting Board Notes and supporting documents referred to and/or placed before the BP Board for consideration of proposal to purchase and approval of the purchase by BP of pat RIL's participating interest under the PSC in Block KG-06 including approval of the RIL-BP Sale Agreement.

3 - Complete Sale Purchase Agreement

dated 21 .02.2011 between RIL and BP.

No order

2(a) - The Claimants (respondents herein) offered to file an affidavit to explain both their searches and the absence of further material in response.

2(b) & 3 - (i) Given the strong insistence by the Claimants in their requests on transparency and disclosure by the UOI, it follows that the burden lies on the Claimants to justify redactions on the ground of commercial confidentiality.

(ii) Section 23(2) does not assist to any conclusion, for it merely says that the parties "may" submit documents which they consider relevant with their statements of case. There is no obligation one way or the other. In any event, the Claimants submitted only the title page of the sale document with their Statement of Claim, and nothing more, because the only reason they referred to the document in question was to demonstrate BP's title to claim as owner of a participating interest, and that title is not now in issue.

(iii) CPR 11, rule 15 does not assist to any conclusion, because (a) the A.T. is not bound by its terms (section 19 of the Act), and in any event its only sanction is to prevent use of a document in question in evidence by the party who referred to it, and in any event non-production is permitted if there is a sufficient cause or excuse, and in the present case the alleged cause or excuse is the combination of the irrelevance of the redacted portions together with their commercial confidentiality.

(iv) The A.T. is brought back to the question on merits: are the redacted portions irrelevant and commercially confidential? The A.T. concluded that it should await the Claimants' affidavit, and the UOI's reaction to it. In the final analysis the A.T. can, if necessary, make up its mind about the documents after seeing them for itself in unredacted form.

Request No. 4

Copy of the Technical Presentation referred to in Exhibit C-8 made by G&G Group.

No order

Responsive documents found.

Request no. 5(a),(b) & (c)

5(a)- Copy of the Technical Presentation made by RIL referred to in Paragraph-1 of Exhibit C-9.

5(b) - Copies of the several "High Amplitude Reflection Packages" referred to in Exhibit C-9.

5(c) - Copy of the geobodies Maps presented by RIL to arrive at geological model and clay types referred to in Exhibit C-9.

No Order

- Claimants do not resist disclosure
- Offered to search again and provide an affidavit concerning any non-disclosure.

Request No. 6

Copy of the Technical Presentation made by "Dr. R.B.", covering exploration activities and results of exploratory drilling carried out by the Operator and referred to in Exhibit C-10 filed by the Claimants.

No Order

Responsive documents have been produced.

Request No. 7

Copy of the Technical Presentation made by "Dr. R.B.", covering exploration activities carried out by the Operator and referred to in Exhibit C-14 filed by the Claimants.

No Order

Responsive documents have been produced.

Request No. 8

Copy of the (i) complete D&M report, (ii) complete Consultant Report of Petroleum Geoservices of the SOC. These ("PGS") & Petrotel documents referred to at Page in the Initial Development Plan Paragraph 123 of SOC. Copies of letters addressed to D&M requesting them to prepare a report.

No Order

- D&M and PGS report have been produced.

- Claimants agreed to supply the rest of the documents.

Request No. 9

Copy of the complete RIL- in House study Contractors own in-house estimate referred to on page 32 in IDP and in paragraph 123 (at Page 50) of SOC.

No Order

- Disclosure is not resisted.
- Partial disclosure has already been made.

Request No. 10

Copy of the study and data considered by the

Contractor for delineating the development area based on the extent of reservoir and referred to in paragraphs 125 and 223 of the SOC

No Order

- The A.T. is unable to identify any study or data or other document (other than the IDP) referred to in paras 125 and 223.
- The Claimants have already produced the simulation model prepared in connection with preparation of the IDP.
- At the third disclosure hearing in August 2018, the Claimants stated that they do not resist disclosure or deny relevance, but submit that there are no separate studies. They have consented to produce an affidavit concerning the position following a further reasonable search.

Request No. 11

Documents setting forth each of the parameters based on which calculation of gas volume set forth in IDP has been arrived at and details of calculation of gas volumes and reports.

No Order

- At the third hearing, the Claimants clarified that they no longer resisted disclosure of any documents which could be found. They consented to provide an affidavit regarding the requested material.

Request No. 12

12 (1) - Geo-cellular Model (GCM) prepared by D&M and RIL Exhibit in House of D1- D3 Fields used for preparing dynamic model for generating production profile in the proposed IDP (softcopy)

12(2)- Upscaled Model and Simulation Model & Reports with 34 wells (profile and coordinates Material Balance Simulator (MBAL) Model at the time of AIDP

submission along with all well locations on Map{50 Wells} well locations with latitude and longitude.

No Order

- No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no.13

Documents which indicate co-ordinates of all 34 well locations considered in IDP along with dates of spudding, completion of drilling and completion for production and well design.

No Order

- Claimants clarified at the third hearing that they do not resist disclosure and agreed to explain their response to the request by affidavit.

- No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no.14

Geo-cellular Model prepared by GCA for projecting AIDP 2P in place gas volumes.

No Order

- The Claimants have offered to provide an expert and/or expertise to the UOI to assist it to access all parts of the documents. The same offer is made as to Requests 20(a) and (b), 22, 23, 25, 27, 28,

29, 30, 33, 34 and 35 below.

- No Order required, other than a direction to the Claimants to provide the expert and/or appropriate expertise to the UOI to assist it to access all parts of the documents in question.

Request no. 15

Paragraph 137 of the SOC, inter alia, states that "Based on its own studies and upon the validation by GCA of the integrity of its model. Contractor decided to revise the field

No Order

- No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

development project on the basis of the 2P reserves considered to be present in the reservoir at the time: (emphasis supplied) Copy of the RIL studies then carried out and the model (soft copy) referred to in that paragraph (137) of SoC for the 2P serves considered by e Contractor and copy the GCA model integrity

validation report.

Request no. 16

Basis and calculations for translating i.e. tapping of in place gas volume and reserves through 50 wells along with well coordinates (latitude and longitude) referred to in the proposed AIDP submitted by the Claimant RIL to the MC, a copy of which is at Exhibit 'C-30' filed by the Claimants.

No Order

No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no. 17

Documents containing Well- wise and year- wise production profile considered along with well co-ordinates, Gas Rate, Water Rate, Flowing Bottom Hole Pressure (FBHP), Static Bottom Hole Pressure (SBHP), Cumulative gas production for all 50 well locations as proposed in AIDP and cumulative gas production year-wise from the wells drilled. (Well-wise profile for all the wells and total profile for the field year- wise).

No Order

No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no. 18

Gaffney Cline & Associates has in its report dated January 2006 (Exhibit C-26) at page 9 stated that "GCA's estimate includes 4.9 TCF of gas in place in the unappraised interchannel area outside the main channel belts identified by the approved development plan. It is anticipated that some of this gas will be recovered by RIL'S current FOP. But the area requires appraisal In order to prepare an effective Development plan".

Copies of the studies or appraisal undertaken by RIL in-house or otherwise pursuant to the recommendation made by the GCA for appraisal of gas in place in the interchannel area.

No Order

No Order required, save for a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no. 19

Copies of (i) gas sale purchase agreements with all gas purchasers, and

(ii) gas sale invoices for every month pursuant to the said gas sale purchase agreements, from the commencement of gas sales till date, issued by RIL/Niko/

BP to their respective gas purchasers.

(iii) RIL in its letter dated 01.04.2014 to Rastriya Chemical & Feteriliser Limited, has stated, inter alia, that marketing margin shall be \$0. 135 I MMBTU Claimants to provide '

similar letter to other purchasers.

(iv) Documents /Invoices raised to the purchasers, wherein marketing margin has been separately charged.

No Order

No Order currently required.

Request no. 20

20(a) - Paragraph 202.2 of SoC states that certain laminated sand units are connected. Claimants to provide copies of reports/log- correlation studies identifying and containing particulars including locations and other details of those laminated sand units which are stated to be connected as also of sand units which are not connected. 20(b) - Claimants to disclose and provide copies of including locations and other details of laminated sand units that are connected to each other and of those which are connected to main sand.

No order

No Order required, other than a direction to the Claimants to provide the expert and/or appropriate expertise to the UOI to assist it to access all parts of the documents in question.

Request no. 21

RFDP at Exhibit C-101 at Page 1523 in paragraph 2 thereof states, inter alia, that the geological understanding at the time of AIDP as validated by global experts was that these shaly sands (both inside and outside the main channels) are porous and apparently connected to the clean channel sands and will contribute to production through the wells drilled in the main channel sands. Copies of the Reports and studies or other documents including reports and studies of "global experts" which purportedly show that these shaly sands as referred to above in Exhibit C-101 are porous and connected to main channel sands.

No order

NO ORDER required, other than a direction to the Claimants to file the affidavit(s) they have agreed to supply.

Request no. 22

Copies of the reports and/or studies and other documents on the basis of which the Claimants has allegedly come to the conclusion in the RFDP that the Shaly

sands are not connected to main channel sands.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) they have in general agreed to supply, and/or to provide the expert and/or expertise to the UOI to assist it to access all parts of the documents in question.

Request no. 23

Copies of the sand co-relation studies referred to in paragraph 158.2 of SOC which purport to show high degree of connectivity and communication between thick sands in the main channel area together with copies of the communications by which such sand co-relation studies were shared between Niko and RIL together with copies of correspondence with respect to such sand correlation studies between RIL and NIKO.

No order

No Order required, other than a direction to the Claimants to provide the expert and/or appropriate expertise to the UOI to assist it to access all parts of the documents in question.

Request no. 24

Copies of sand co-relation studies/ studies based on which degree of connectivity of various reservoirs of gas were purportedly ascertained at the time of submission of the

AIDP by the Claimants.

No order

No Order required, other than a direction to the Claimants to file the affidavit (s) which they have agreed to provide.

Request no. 25

The Claimants have mentioned in RFDP (Exhibit C-101 at page 1524 paragraph 3.3) that based on 4 wells drilled, 9 sand units were sampled. Claimants to provide copies of reports/studies of such sampling together with documents containing particulars of number of channel system, and sand/sand units in the D1-D3 fields and OGIP of each such sand unit.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) they have in general agreed to supply, and/or to provide the expert and/or expertise to the UOI to assist it to access all parts of the documents in question.

Request no. 26

Claimants to provide OGIP as on November, 2011 and on August 2012 for main

channel sand and laminated sand and interchannel area in the format mentioned in the MCR dated 12.12.2006 together with cumulative gas produced from main channel sand, laminated sand and interchannel area as on November, 2011 and as on August 2012 when RFDP was submitted.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) which they have agreed to provide.

Request no. 27

Copies of the technical studies and the basis of such studies through which OGIP of 2.4 TCF referred to in paragraph 146.5.1 of Claimants Reply and Defence to Counter Claim had been arrived at.

No order

NO ORDER required, other than a direction to the Claimants to provide the expert and/or expertise to the UOI to assist it to secure practical access all parts of the documents in question.

Request no. 28

Technical studies/reports and the technical parameters/basis together with copies of log- correlation data of wells connectivity with laminated sands for OGIP of 1.2 TCF in laminated sand claimed by the Contractor.

No order

The A.T. repeats its answer under Request 27.

Request no. 29

Copies of studies referred to in paragraph

146.5.2 of the Claimants Reply to SOD and Counter Claim to claim 760 SCF of gas volume sparsely distributed in disconnected laminated sand in the interchannel area and main channel area.

No order

The A.T. repeats its answer under Request 27.

Request no. 30

The Claimants Reply and Defence to Counter Claim paragraph 146.5 states that RFDP is based on studies. Copies of such studies based on which RFDP was prepared and category of estimated gas volume mentioned therein have, however, not been disclosed.

No order

The A.T. repeats its answer under Request 27.

Request no. 31

Copies of the study/report on the basis of which the Contractor purportedly determined plateau of rate 80 mmcmd for 22 wells, tubing head pressure of these 22 wells and that additional wells are to be drilled to have 80 mmcmd plateau production upon decline of pressure in these 22 wells.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) which they have agreed to provide.

Request no. 32

Copies of studies based on which RFDP was prepared and submitted.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) which they have agreed to provide.

Request no. 33

Copy of Geological Model which led to alleged lowering of estimate and reserves by the Claimants in the RFDP and the recalibrated model.

No order

No Order required, other than a direction to the Claimants to provide the expert and/or appropriate expertise to the UOI to assist it to access in practice all parts of the documents in question.

Request no. 34

Copies of the studies referred to in paragraph 146.5 of Claimants Reply and Defence of Counter Claim.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) they have in general consented to supply, and/or to provide the expert.

Request no. 35

Electronic copies of the (then) models referred to in paragraph 146.4 of the Claimants Reply and Defence of Counter Claim.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) they have in general agreed to supply, and/or to provide the expert and/or appropriate expertise to the UOI to assist it to access in practice all parts of the documents in question.

Request no. 36

Copies of(i) the reports/studies on the basis of which the Claimants, as stated, understood that: "A large number of areas with laminated sands in and outside the channel areas which had earlier been considered to be potentially gas bearing are now understood to be devoid of commercial hydrocarbons as stated in paragraph 146.5.3 of the Claimants Reply and Defence of Counter Claim, and (ii) communications of RIL to NIKO and BP in respect thereof and correspondence between them with regard to the above referred statement in Paragraph

146.5.3 of the Claimants Reply and Defence of Counter Claim:

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) they have in general consented to supply, and/or to provide the expert and/or appropriate expertise to the UOI to assist it to access in practice all parts of the documents in question.

Request no. 37

Copies of the following Documents: a) Joint Operating Agreement between RIL and Niko. (b) Joint Operating Agreement among RIL, Niko and BP.

No order

Request withdrawn

Request no. 38

Claimants considered AIDP an extension of IDP and have referred to the details of the initial expectations from the D1-D3 field in paragraph II D of SOC.

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) which they have agreed to provide.

Request no. 39

In-house or otherwise Studies and documents/ techno-commercial reports based on which all wells were drilled in D1- D3 Fields by the Contractor along with production data of each of the well drilled. [Paragraph E at page 13 of SOC.]

No order

No Order required, other than a direction to the Claimants to file the affidavit(s) which they have agreed to provide.

Request no. 40

Copy of the Appraisal Report as of 31.3.2003 on Block KG-DWN-98/3 located

Offshore India for Niko (NECO) Ltd. (prepared by DeGolyer and MacNaughton) in accordance with Canadian Policy No.2-B of Canadian Securities Administration) and

all subsequent Appraisal Reports prepared for Niko (NECO) Ltd. prepared in accordance with said Canadian Policy No. 2- B of Canadian Securities Administrators till the submission of RFDP i.e. till the year 2012.

No order

The Claimants now state that the responsive document will be produced (having already been produced to the UOI in another forum).

Request no. 41

Chairman's Statement in RIL's in AGMs and RIL's Directors Report together with complete audited annual financial statements of RIL for the financial years - 2003 - 2004 to 2009- 2010.

No order

Annual financial statements of Reliance are public documents and the UOI can obtain them for themselves. If for convenience, the Claimants wish to volunteer to produce them they may do so. No Order required.

Respondents' /Contractors' Requests

S. No.

Nature of request

Decision of the A.T.

Brief reasons

Request No. 1

Disclosure of MoPNG's July 2011 response to an enquiry from the government auditor.

Granted

Confidentiality as between Government/CAG and the public is not in dispute: and in the AT's opinion the general confidentiality relied on does not justify non-disclosure of a document commenting on the AIDP and arguably directly relevant to a central issue in this arbitration.

Request No. 2

(Amended request) Disclosure of earlier versions of, or equivalent formal documentation dealing with, the subject-matter of the DGH's published October 2017 "Standard Operating Procedure for Declaration of Commerciality" etc. (Standard Operating Procedure). (Documentation dating from May 2004 to

October 2013).

(List of custodians provided)

Granted

- UOI consented to disclosing the

October 2017 procedure.

In deciding whether such consent would extend to earlier versions of the document, the AT held:

- Confidentiality cannot be a ground for non-disclosure, especially when the claimants (Respondents herein) successfully proved the following:

i. Request is sufficiently specific.

ii. Documentation relevant.

- Therefore, fair disclosure must do justice to the contentions of both sides to the argument.

Request No. 3

(Amended request) - Disclosure of formal MoPNG or DGH guidelines or procedures concerning methodology or criteria for estimation and approval of OGIP/reserve estimates in proposed development plans or their revisions

(Documentation dating from May 2004 to October 2013). (List of custodians provided)

Granted

- Relevant and admissible material should be produced.

- If formally published guidelines are relevant, as they obviously are, the same response obtains for earlier such material, even if not published.

- Hence, UOI's other contentions rendered unpersuasive.

Request No. 4

Disclosure of formal guidelines or procedures of the MoPNG or DGH in effect from January 2011 to May 2014 governing decisions to approve, deny or revise proposed development well locations. (List of custodians provided)

Granted

Reasons for granting are same as in Request no.3 as the UOI's stand is same as in Request no.3.

Request No. 5

(Amended request) - Disclosure of the UOI's documents dated between

28.8.2012 and 1.10.2013 concerning (especially disputing, challenging or discussing) the decision of the UOI's representatives on the MC (Management Committee) not to approve the RFDP at the meeting of 1.10.2013.

Granted

- Internal documents not immune from disclosure just because they are internal.
- Disclosure is primarily aimed at the internal documents of the opposing party which have NOT been shared or disclosed. - Internal documents cannot be free of the obligation to disclose because they are documents which the discloser would prefer to treat as confidential.
- UOI not entitled at the stage of disclosure to base its objections to disclosure on the assumption that its case is correct.

As for the claim to privilege, the

A.T. in general rejects it for the reasons and in the terms set out in the Introduction to this Disclosure Order.

Request No. 6

Documents, falling within the period of two years before the MC meeting of 1.10.2013, which were sent, received or created by the listed custodians and which went to the UOI representatives on the MC for the purpose of the meeting of 1.10.2013. (List of custodians provided)

Granted

Reasons for granting are same as in Request no.5 as the UOI's stand is same as in Request no.5.

Request No. 7

The UOI's internal documents, sent, received or created in the period from 1.10.2011 to October 2013 by custodians whose names have been listed to aid a search, discussing the position taken by the UOI's representatives at the MC meetings held on 2.11.2011 and 7.8.2012, that additional drilling of development wells was required.

Granted

- At the stage of disclosure, it is not for the Parties to assume, or for the A.T. to rule on, the Parties' individual pleaded contentions: that awaits their final award.
- The role of disclosure is to allow fair access to each other's documents to permit the several pleaded cases to be fairly heard and adjudicated.

Request No. 8

Seeks disclosure of documents sent, received or created by named custodians (whose documents are to be searched) in the period 1.1.2011 to 22.5.2014, and which were sent to the UOI representatives on the MC for the purposes of the MC meetings held on 17.3.2011, 2.5.2011, 2.11.2011,

7.8.2012, 1.10.2013 and 22.5.2014,

and on the basis of which those representatives demanded the drilling of additional wells. (Search items provided)

Granted (subject to such a confirmation of full disclosure by affidavit.

- Since, UOI stated, "Wherever documents are there, the same have been provided by GOI."

- Not clear whether UOI is by that statement accepting, despite its manifold objections, that it is willing to disclose the requested documents, and has done so, to the extent that such documents are available. If so, UOI is entitled to confirm by affidavit that it has in due course made a reasonable search of the requested custodians and has disclosed all available documents.

Request No. 9

Disclosure of instructions given to Dr.Gopalakrishnan, an expert retained by the UOI, in connection with his April 2011 report, and any other documents provided to, or relied on by, him in preparing his report.

No Order

The UOI will promptly produce the document(s) in question.

Request No. 10

Disclosure of documents sent, received or created by the named custodians in the period 29.12.2010 to 7.8.2012 concerning the decision of the UOI's representatives on the MC to deny approval of the Claimants' (respondents herein) proposed Work Programmes and Budgets for FY 2011-12 and FY 2012-2013.

Granted

- Request is limited and focussed in nature, by reference to specific proposed Work Programmes and Budgets and named custodians.

- Disclosure is sought of documents relevant to the Parties' pleaded dispute.

Request No. 11

Disclosure of documents provided to the UOI's representatives on the MC for the purposes of the MC meetings held on 17.3.2011, 2.2.2011 and 2.11.2011. List of custodians and search terms provided.

Granted

- The request is sufficiently focussed and relevant.

Request No. 12

Disclosure of formal guidelines or procedures of the MoPNG and DGH in effect between 1.1.2013 and 10.9.2013 relating to the inclusion of marketing margins in the value of petroleum for purposes of cost recovery and profit sharing under NRLP PSCs. (List of custodians and search terms provided.)

Granted

-Not clear from the UOI's statement that all guidelines and procedures "are in the public domain", whether the Claimants' (respondents herein) request for earlier unpublished guidelines and procedures has been the subject of a proper and reasonable search as requested. If such documents do exist, then the fact that such guidelines are now published demonstrates that such documents are neither confidential

nor privileged.

- The requested documents, if they exist, are the subject matter of a limited and focussed request, are relevant.

Request No. 13

Disclosure of documents from the period of one year before 1.7.2014 on the basis of which the UOI demanded that the Contractor include its marketing margins when calculating the value of petroleum produced and saved under the PSC. (List of custodians and search terms provided.)

Granted

- The A.T.'s concern that whether the UOI has made a proper and reasonable search for such documents as requested, which is the applicable procedural requirement.

- The requested documents, if they exist, are the subject matter of a limited and focussed request and hence, should be disclosed.

Request No. 14

Disclosure of earlier formal but unpublished guidelines in effect between 1997 to October 2007 concerning the classification and/or recovery of general and administrative costs incurred by contractors under NELP PSCs, having regard to the guidelines published in October 2017 entitled Standard Operating Procedure.

Granted

The requested documents, if they exist, are the subject matter of a limited and focussed request. They are relevant, and should be disclosed.

Request No. 15

Disclosure of documents sent, received or created by the listed custodians in the period of one year prior to 1 June 2008 setting out the reasons for the UOI's decision disallowing the recovery of general and administrative costs that the Contractor incurred during the period of the PSC into FY 2007-2008.

Granted (subject to any subsequent claim to privilege for specific documents searched for, logged and identified, for which privilege might be claimed for a reason outside the submissions deal with and rejected herein).

- The request is focussed and limited, and the documents requested are relevant. The request relates to the UOI's alleged October 2007 reversal of its attitude to such costs, as pleaded for instance in the Statement of Claim at paras 248ff.

Request No. 16

Disclosure of the report or other written evaluation of the IDP prepared by PV Ramana dated 13.10.2004.

No Order

In its latest submissions dated 31.7.2018, the UOI states that it will produce the documents requested.

Request No. 17

Disclosure of the report or other written evaluation of the IDP prepared by N C Nanda for DGH dated 27.8.2004.

No Order

In its latest submissions dated 31.7.2018, the UOI states that it will produce the documents requested.

Request No. 18

Disclosure of the report, study or other written evaluation of the AIDP prepared by J.M. Baruah for DGH dated 10.11.2006.

Granted

- A.T. deciphered the stand of UOI as willingness to produce documents on the basis of its response to requests no. 16, 17 and 19.

Request No. 19

Disclosure of an Evaluation Report prepared by Engineers India Limited for DGH dated 30.9.2004.

No Order

In its latest submissions dated 31.7.2018, the UOI states that it will produce the documents requested.

Submission of Counsel

27 Given this background, arguments have been advanced on behalf of the UOI by Mr. A.K. Ganguli, Sr. Advocate, instructed by Mr. Shailendra Swarup, Advocate while arguments on behalf of RIL were advanced by Mr. Harish N Salve, Sr. Advocate, instructed by Mr. Sameer Parekh, Advocate. Insofar as BP was concerned, it was represented by Mr. Rajiv Nayyar, Sr. Advocate, along with Messrs Mahesh Agarwal and Rishi Agrawala.

28 At the very outset on behalf of the respondents/Contractors a preliminary objection was taken that the appeal under Section 37(2) (b) was not maintainable as the impugned order, contrary to what was contended on behalf of the UOI, had not been passed under Section 17 (1)(ii) (c) of the 1996 Act. The contention, pithily put, was that Section 17 of the 1996 Act dealt with the interim measures and that an order for production of documents was not an interim measure of the kind contemplated under the said provision. Therefore, in sum, the argument was that the reliance placed on behalf of the UOI on Section 17 (1) (ii) (c) of the 1996 Act was clearly misconceived. In support of his submissions, Mr. Salve relied upon the following judgments: (i) Arun Kapur Vs. Vikram Kapur and Others, (2002) 96 DLT 757 (paras 12 to 16); (ii) Silor Associates SA Vs. Bharat Heavy Electrical Ltd., 213 (2014) DLT 312; and (iii) Judgment dated 01.05.2018 in the matter of Rhiti Sports Management Pvt. Ltd. Vs. Power Play Sports & Events Ltd, passed in OMP (Comm.) 394/2017 (Para 20).

29 Mr. Nayyar, who appeared for BP, while supporting the contention advanced on behalf of the RIL that the appeal was not maintainable, submitted that, in fact, the unamended provisions of Section 17 would apply as the notice of arbitration was issued prior to the amendment brought about on 23.10.2015 in the 1996 Act. In this behalf, it was brought to my attention that notice of arbitration, whereby arbitration proceedings were commenced, is dated 23.11.2011. Furthermore, the contention raised was that the unamended Section 17 was modeled on Article 17 of the UNCITRAL Model law, 1985 (in short "1985 Model Law") which conferred on the Arbitral Tribunal the power to put in place "interim measures of protection" in respect of those aspects which constituted subject matter of arbitration.

In other words, the power conferred on the Arbitral Tribunal was limited in nature, which was exercisable to protect the subject matter of arbitration during the conduct of the proceedings. The submission was that the unamended Section 17 said nothing about the power of the Arbitral Tribunal to order discovery or, in respect of any other procedural matter, which are aspects now dealt with under Chapter V Part I of the 1996 Act.

In furtherance of this submission, it was pointed out that Section 19 which is incorporated in Chapter V Part I of the 1996 Act was modeled on Article 19 of the 1985 Model Law. The contention being that the two provisions were similar in scope, ambit and width.

Based on this premise, it was sought to be argued that the power to order discovery was available in Section 191 of the 1996 Act, which, inter

1 19. Determination of rules of procedure.- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence. alia, provided that the provisions of the CPC and the Evidence Act would not bind the Arbitral Tribunal for good reason. According to the counsel, the legislature wanted to free the Arbitral Tribunals from procedural laws, even while allowing parties to agree on procedures for conducting arbitration or, upon failure of the parties to arrive at any agreement as to the procedure, to allow Arbitral Tribunals to establish their own procedure.

In this regard, my attention was drawn to sub-section (1), (2) and (3) of Section 19 of the 1996 Act. Emphasis was laid on the fact that sub- section (4) of Section 19 of the 1996 Act which conferred the power on the Arbitral Tribunal to determine admissibility, relevance, materiality and weight of any evidence, provided a clue that the power of discovery was located in Section 19 of the 1996 Act. In support of the contention that the power to order disclosure would be located in Section 19 of the 1996 which, according to the counsel, was *pari materia* with Article 19 of the 1985 Model Law, reliance was placed on the extract of the book authored by Gary Born titled: International Commercial Arbitration (2nd ed, 2014) at pages 2325 to 23262.

2 The UNCITRAL Model Law does not deal specifically with the subjects of disclosure or discovery, in either the original 1985 text or the 2006 revision of the Model Law. As a result, Article 19(1)"s general recognition of the parties" procedural autonomy applies to the subject of disclosure between the parties,

30 In rebuttal, Mr. Ganguli made the following submissions:

(i) First, except for Section 17, there is no other provision in the 1996 Act, which confers power on the Arbitral Tribunal to order discovery and/or inspection or even production of documents.

(ii) Second, the expression "property" and "thing", which obtains in Section 17 (1) (ii) (c) of the 1996 Act, brought within its fold the matters and things other than real property. Therefore, the power conferred on the Arbitral Tribunal to put in place interim measures under Section 17 (1) (ii)

(c) of the 1996 Act brought within its ambit power to order discovery and/or inspection. In this behalf, a co-relation was sought to be made between the expression "inspection", "property" and "thing" with the expression "full information" or "evidence" obtaining in the very same provision.

just as it applies to other procedural aspects of the arbitration. Similarly, where the parties have incorporated institutional arbitration rules which include provisions regarding disclosure, Article 19(1) requires giving effect to such provisions. As a consequence, where the parties have made an agreement, express or implied, regarding the arbitrators' disclosure authority, that agreement will generally define the tribunal's powers.

In the absence of agreement by the parties, several provisions of the Model Law imply that arbitrators possess authority to order parties to an arbitration to produce evidentiary materials. Article 19(2) of the Model Law grants arbitral tribunals broad authority with respect to evaluating evidence, although it makes no specific reference to order for "disclosure" or "discovery" of such materials. More directly, Article 27 grants arbitrators the power to seek judicial assistance in "taking evidence", which strongly implies the existence of authority on the part of the arbitrators to order either party (and, arguably, third parties) to produce evidence in the arbitral proceedings.

(ii)(a) The argument was that the "property" or "thing" being expressions not confined to real property, interim measures could be ordered as may be found necessary or expedient by the Arbitral Tribunal to obtain full information or evidence with regard to such property or thing which forms part of the subject matter of the dispute obtaining between the parties. (ii)(b) Thus, what was sought to be portrayed was that one of the modes of obtaining information or evidence vis-à-vis property or for thing was to direct discovery and production of documents. It was, thus, contended that if Section 17 (1) (ii) (c) was interpreted and construed in this manner, the appeal filed under Section 37 (2) (b) of the 1996 Act would be competent.

(iii) Third, the Chapter Headings would show that the Legislature drew a distinction between the provisions, which articulated the jurisdiction of the Arbitral Tribunal, as against those which pertained to the conduct of arbitral proceedings. In this behalf, reference was made to Chapter IV, which bears the heading "Jurisdiction of Arbitral Tribunal" and contains Sections 16 & 17 and Chapter V, which bears the header "conduct of arbitral proceedings" and contains Sections 18 to 27. Based on the heading provided for in Chapters IV & V, it was sought to be emphasized that Section 17 dealt with the power of the Arbitral Tribunal, while the provisions falling in Chapter V related to the conduct of arbitral proceedings.

(iii)(a) Reliance with regard to the submissions made hereinabove was placed on the judgment rendered by a Division Bench of this Court in Thyssen Krupp Werkstoffe GMBH Vs. Steel Authority of India, [FAO (OS) 258/2010, dated

07.04.2011].

(iv) Fourth, albeit, on merits, it was contended, that the request made on behalf of the respondents/Contractors was vague and in the nature of a roving and fishing inquiry. In support of this contention, reliance was placed, once again, on the judgment of the Division Bench in the matter of Thyssen Krupp. It was submitted that this was a case where the Division Bench sustained the objections taken with regard to request for discovery and inspection on the ground that it was vague and in the nature of a roving and fishing inquiry. It was stated that the application, though, in this case, was made under Section 9 (1) (ii)(c), the said provision, was *pari materia* with the provisions of Section 17(i)(ii)(c) of the 1996 Act. Parallels were drawn with the language obtaining in the two provisions. In support of this submission, reliance was, in addition, placed on the following judgments:

(i) *Basanagouda Vs. Dr. S.B. Amarkhed and Others*, (1992) 2 SCC 612 (at 619);
(ii) *Lajpat Rai Vs. Tej Bhan and Others*, AIR 1957 P&H 14, (paragraphs 3 & 7);
(iii) *Raj Sarogi Vs. American Express India Pvt. Ltd.*, 94 (2001) DLT 127 (paragraph 7); and (iv) *Ram Sewak Yadav Vs. Hussain Kamil Kidwai*, AIR 1964 SC 1249 (paragraph 7).

(iv)(a) To buttress this submission, by way of examples, my attention was drawn to requests No. 5, 6 & 14.

(v) Fifth, the impugned order was erroneous inasmuch as the Arbitral Tribunal failed to appreciate that while Section 19 of the 1996 Act provided that the Arbitral Tribunal was not bound by the provisions of the CPC or the Evidence Act, the principles analogous thereto, would apply to arbitration proceedings. In support of this submission, reliance was placed on the following judgments: (i) *Oil and Natural Gas Corporation Ltd. Vs. Interocean Shipping (India) Pvt. Ltd.*, 2017 (5) Arb. LR 402 at 452 and (ii) *Sahyadri Earthmovers Vs. L & T Finance Limited*, (2011 Suppl.)Arb.LR 400 (Bombay) [at 406 (para xviii)].

(vi) Sixth, the Arbitral Tribunal while passing the impugned order, had acted contrary not only to the provisions of Article 33.93 of the PSC but its 3 Article 33.9 - The arbitration agreement contained in this Article 33 shall be governed by the Arbitration and Conciliation Act, 1996 (Arbitration Act). Arbitration proceedings shall be conducted in accordance with the rules for arbitration provided in Arbitration Act and the United Nations Commission on own procedural order i.e. order dated 23.12.2015. Based on the provisions of the Article 33.9 and what was indicated in the procedural order dated 23.12.2015, it was argued that it was mandatory on the part of the Arbitral Tribunal to apply the provisions of the Indian Constitution and the relevant Statutes, which included the provisions for arbitration provided in the 1996 Act and those incorporated in the United Nations Commission on International Trade Law (UNCITRAL) Rules, to the extent, the corresponding provisions were not found in the 1996 Act.

(vii) Seventh, the Arbitral Tribunal was bound to act in consonance with the decision of the Supreme Court in *Oil and Natural Gas Corporation Ltd v. Western Geco International Ltd*, (2014) 9 SCC 263 [at pages 278 to 280 (paras 35 and 38 to 40)]. The contention was that the Supreme Court in this case had, inter alia, enunciated the principle that in conduct of the arbitral proceedings, the Arbitral Tribunal was bound to adopt a judicial approach in determination of any matter in issue before it.

International Trade Law (UNCITRAL) rules may apply to the extent where corresponding rules are not provided in the Act.

4 12. GENERAL ORDERS

The arbitration shall be governed by the Act, and the arbitration shall be conducted in accordance with the rules for arbitration provided in the Act. The United Nations Commission on International Trade law (UNCITRAL) Rules (1976) may apply to the extent that corresponding rules are not provided for in the Act.

The Tribunal is not bound by any strict rules of evidence. It may receive and rely upon any evidence it considers relevant and helpful and will determine the relevance, materiality and weight of the evidence before it.

(viii) Eighth, the Arbitral Tribunal had ignored the law on the subject concerning internal file notings. The Supreme Court in various cases, had ruled that internal file notings were wholly irrelevant as they neither confer nor take away any right vested in a party and, hence, could not be relied upon by an Arbitral Tribunal or a Court while granting relief. In support of this submission, reliance was placed on the following judgments: (i) *Shanti Sports Club & Another Vs. Union of India & Others*, (2009) 15 SCC 705 (paras 43 & 52); (ii) *Union of India and Another Vs. Ashok Kumar Agarwal*, (2013) 16 SCC 147 (paras 34 to 38); (iii) *Delhi Union of Journalists Cooperative House Building Society Ltd Vs. Union of India and Others*, (2013) 15 SCC 614 (para 17); and (iv) *Sethi Auto Service Station and Ors. Vs. Delhi Development Authority and Ors*, (2009) 1 SCC 180 (para 14).

(ix) Lastly, the Arbitral Tribunal, in ordering discovery, had completely ignored the fundamental policy of Indian law, which is, that while examining the request for discovery, it is required to keep in mind not only the relevancy of the document in the context of subject matter of dispute obtaining between the parties but also as to whether it was admissible and necessary for the purpose of adjudication. The respondents/Contractors, in their request for discovery, have made bald averments to the effect that UOI had acted "not in good faith" and/or had acted in "bad faith"; assertions which were not supported by any fact or material particulars. To buttress this submission, reference was made to paragraphs 204, 228.2 and 228.3 of the SOC. The emphasis was that such a request was not a valid plea in law. In support of this contention, reliance was placed upon the judgment of the Supreme Court in *Arun Kumar Agrawal Vs. Union of India*, (2014) 2 SCC 609 (paras 73 and 90).

Reasons:

31 Having heard counsel for parties and perused the record, the first and foremost aspect, which I am required to consider is: as to whether the instant appeal is maintainable. Quite obviously if I were to hold that the appeal was not maintainable other issues would fall by the way side because then they would be outside my remit.

31.1 However, before I do so, I must note that the Arbitral Tribunal has after examining the requests for discovery directed, wherever necessary, discovery of documents, both by UOI as well as the respondents/Contractors. In issuing such a direction, the Arbitral Tribunal has taken a view that it is not bound by the provisions of the CPC and the Evidence Act. The Arbitral Tribunal, instead, has indicated that it would be bound by the principles of natural justice. This position, which the Arbitral Tribunal has taken is, inter alia, based on the provisions of Section 18 and 19 of the 1996 Act. Thus, in a nutshell, while the Arbitral Tribunal has taken the position that it is not bound by the provisions of the CPC and Evidence Act, it has, in consonance with the provisions of Article 33.9 of the contract obtaining between the parties and its first procedural order dated 23.12.2015 made an endeavour to apply the law as expounded by the Supreme Court and various High Courts.

32 Now coming back to the issue of maintainability of the appeal, UOI has contended, apart from the merits of the matter, that the power of an Arbitral Tribunal to order discovery is rooted in Section 17(1)(ii)(c) of the 1996 Act. The reason that the UOI takes this stance is that once the power of the Arbitral Tribunal is sourced in this provision, then, the instant appeal would automatically be competent.

33 In order to appreciate the contentions advanced on behalf of the UOI in this regard, the relevant part of Section 17 of the 1996 Act needs to be extracted hereafter:

"Section 17. Interim measures ordered by arbitral tribunal. -

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-

(i) xxx xxx xxx

(ii) for an interim measures of protection in respect of any of the following matters, namely:-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, as to which any question may arise

therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence....."

A close perusal of the extracted provision would show that the Arbitral Tribunal has the power to issue directions for putting in place interim measures on behalf of the party before it, both during the course of the Arbitration proceedings and after the pronouncement of the arbitral award, but before it is enforced in accordance with Section 36 of the 1996 Act.

Furthermore, while issuing directions to put in place interim measures for protection of a party who seeks such relief, it can issue directions for detention, preservation or inspections of any property or thing, which is the subject matter of the dispute in the arbitration proceedings. Clearly, the expression "property or thing" is not confined to tangible property, it can extend, in my view, to intangible property as well.

This far, to my mind, the provision presents no problem in holding as to what falls within the ambit of Section 17(1)(ii)(c) of the 1996 Act. It is the latter part of the very same provision qua which the differences in perception have arisen between the parties.

It is Mr. Ganguli's submission that the power conferred on the Arbitral Tribunal to order inspection qua a property or thing necessarily confers a concomitant power to seek information or evidence by ordering discovery of documents.

34 To my mind, the submission of Mr. Ganguli is not quite correct in view of the fact that the latter part of Sub-Clause (c) of Clause (ii) of Sub-Section(1) of Section 17 of the 1996 Act is only indicative of the fact that while putting in place interim measures in order to protect by way of detention, preservation or inspection of any property or thing which is subject matter of the dispute in the arbitration proceedings, if any, question were to arise while carrying out these directions, then, the Arbitral Tribunal would have the power to authorize any person to enter upon any land or building in possession of any party where, perhaps, the property or thing may lie or, where necessary, authorize taking of samples or making of observations or experiment to be carried out - which may be required or be considered expedient for the purpose of obtaining full information or evidence.

In other words, where the direction issued by the Arbitral Tribunal is to detain, preserve or inspect any property or thing and, while giving effect to such interim measures an issue arises, the Arbitral Tribunal after assessing the situation, would be well within its power to authorize a person to enter the land or building, which may be in possession of any party or authorize taking of samples or making observation or having an experiment carried out, which may be considered necessary to obtain full information or evidence. The power under

Section 17(1)(ii)(c) is not to order discovery of documents, which may be connected or related to a property or thing, which is the subject matter of dispute in the arbitration proceedings. Inspection of any property or thing, which is the subject matter of the dispute in an arbitration, in my opinion, would be different from ordering discovery or inspection of documents, which are related to a property or thing whether tangible or intangible, which is the subject matter of the dispute.

35 Therefore, in my view, as has been rightly contended on behalf of the respondents/Contractors that the source of power to order discovery is not rooted in Section 17(1)(ii)(c). Thus, if this be the position, then clearly, the instant appeal which has been filed under Section 37(2) of the 1996 Act would not be competent.

36 The Tribunal, to my mind, has correctly kept in mind the provisions of Section 18 and 19 of the 1996 Act and its own procedural order. Section 18 requires the Arbitral Tribunal to treat the parties equally and give to each party a full opportunity to present its case.

Likewise, Section 19 while providing that the Arbitral Tribunal is not bound by the provisions of the CPC or Evidence Act goes on to say that the parties are free to agree upon a procedure to be followed by the Arbitral Tribunal in the conduct of proceedings and that failing any agreement (subject to Part I of the 1996 Act), it could conduct proceedings in the manner it considers appropriate.

What I have paraphrased hereinabove is that which is provided in Sub-Section (1), (2) and (3) of Section 19 of the 1996 Act. Sub-Section (4) of Section 19 interestingly provides that the power of the Arbitral Tribunal under Sub-Section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Therefore, what is important to note is that while it empowers the Arbitral Tribunal to conduct proceedings in a manner it thinks appropriate, that power includes the power to sift the evidence placed before it by the parties by keeping in mind the aspects that I have referred to hereinabove.

37 The Arbitral Tribunal in this case, bearing in mind the fact that no procedure had been agreed to by the parties with regard to the aspects such as inspection and discovery, decided to go about in a manner it thought appropriate, which is by applying the principles enunciated by the Courts in India, which included the Supreme Court. Therefore, the argument advanced on behalf of UOI that the source of power to order discovery was contained in Section 17(1)(ii)(c) of Chapter IV, in my opinion, is misconceived. To my mind, if at all one were to locate the source of power conferred on the Arbitral Tribunal to order discovery of documents it can only be found in the provisions of Sections 19 of the 1996 Act. Section 19, inter alia, provides that where no procedure is agreed upon by the parties, the Arbitral Tribunal can devise an appropriate procedure in consonance with known principles of law.

The argument, thus, advanced based on the heading of Chapter IV, which

encapsulates Section 17 of 1996 Act is untenable. The Chapter headings, in my opinion, cannot control the scope and ambit of the provisions found in the Chapter. Thus, the fact that Chapter V, which contains Sections 18 and 19, bears the heading "Conduct of Arbitral Proceedings" cannot control the power conferred on an Arbitral Tribunal under these provisions. Likewise, the heading of Chapter IV which reads as "Jurisdiction of Arbitral Tribunals" which contains Section 17 cannot confer jurisdiction where none is conferred.

A perusal of Sections 19 (4) and 27 of the 1996 Act shows that the Arbitral Tribunal has the implicit power to order disclosure and discovery of documents. Apart from the fact that upon failure of parties to agree to a procedure with regard to conduct of arbitration under Sub-Section (3) of Section 19, the Arbitral Tribunal can adopt an appropriate procedure, Section 19 (4) grants the power to the Arbitral Tribunal to ascertain the admissibility, relevance, materiality and weight of any evidence. Clearly, this provision provides a clue that the Arbitral Tribunal would also have the attendant power to order disclosure of documents, which may have evidentiary value.

Likewise, under Section 27, either the Arbitral Tribunal on its own or a party, if so interested, with the approval of the Arbitral Tribunal can apply to the Court for assistance to take evidence from the opposite party or even a non-party. Both Sections, thus, inhere in the Arbitral Tribunal, inter alia, the power to gather evidence.

The legislative policy appears to be that a remedy of appeal ought not to be provided against an order passed by the Arbitral Tribunal directing discovery of documents. The legislative policy seems to be to not impede the smooth conduct of arbitration proceedings by interdicting procedural orders passed by the Arbitral Tribunal in furtherance of the adjudicatory process.

If parallels have to be drawn, then, one can look to the provisions of Order XI of the CPC, which vests power in the Civil Courts to order discovery and inspection. Except for an order passed under Rule 21 of Order XI of the CPC, there is no appeal provided in the CPC against an order directing discovery or inspection. Order XLIII of the CPC, which provides for appeal against an order passed under Order XI Rule 21 makes an exception in this regard, perhaps, in view of the coercive nature of the order passed under this provision.

Under Order XI Rule 21 where a party fails to answer interrogatories or discover documents or grant inspection, the Court upon being approached via a suitable application is empowered in the case of the plaintiff to dismiss the suit for want of prosecution and in case of the defendant have his defence struck out.

Therefore, in my view, if the argument advanced on behalf of UOI is accepted, it will stymie the arbitration proceedings; a situation which will enure to the benefit of a recalcitrant party which does not desire a quick resolution of the dispute.

38 Therefore, I see no difficulty in coming to the conclusion that the concomitant

power of disclosure vests in the Arbitral Tribunal by virtue of Section 19 and not Section 17(1)(ii)(c) as the legislative policy seems to be to prevent institution of appeals against such orders as they have a debilitating effect on the conduct of arbitration proceedings.

39 The only case which the Union of India has cited in support of its submission that the appeal would be maintainable is the judgment delivered by the Division Bench in Thyssen Krupp Werkstoffe GMBH case. A careful examination of the Division Bench judgment passed by this Court would show that the issue with regard to competency of an appeal under Section 37(2)(b) of the 1996 Act did not come up for consideration in that case. The Division Bench was only concerned with the issue as to whether in the facts and circumstances of the case, the request for discovery and inspection was in the nature of roving and fishing enquiry.

40 Therefore, in my view, the Division Bench judgment is not a precedent for the issue which has been raised before me by the parties. Furthermore, given the fact that I have held that the appeal is not competent for the reasons given above, I do not wish to embark upon the process of deciding on the validity of the impugned order on merits. Suffice it to say, in the narration of events, I have noted the process followed by the Arbitral Tribunal in ordering discovery of documents based on request placed before it by the parties.

41 Thus, for the foregoing reasons, the appeal is dismissed. However, there would be no order as to costs.