
(2010) 11 DEL CK 0198

In the Delhi High Court

Case No : O.M.P. No. 528 of 2010 and I.A. No's. 11839 and 11861 of 2010

Union of India (UOI)

APPELLANT

Vs

Selan Exploration Technology Ltd.

RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2011) 1 AD 76

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : A.S. Chandhiok, ASG, R. Sasiprabhu and Ritesh Kumar, for the Appellant; Neeraj Kishan Kaul S. Rewari and Prashant Kalra, for the Respondent

Final Decision : Allowed

Judgement

Vipin Sanghi, J.—The petitioner, Union of India, has filed this petition u/s 34 of the Arbitration and Conciliation Act, 1996 (the Act) to seek the setting aside of the arbitral award dated 03.05.2010 passed by the arbitral tribunal consisting of Dr. Justice A.S. Anand, Former Chief Justice of India, Mr. Justice S.S. Sodhi, Former Chief Justice of Allahabad High Court and Mr. Justice J.K. Mehra, Former Judge of Delhi High Court.

2. The award is a unanimous award rendered by the arbitral tribunal, whereby the arbitral tribunal has interpreted Article 14 of the Production Sharing Contract (PSC) between the parties. The tribunal has accepted the interpretation advanced by the respondent, and rejected the interpretation advanced by the petitioner.

3. First, the back ground facts. In or around 1992, the Government of India decided to attract private investment in the sector of exploration and production of petroleum. It issued a notice inviting tender and invited bids in respect of certain oil fields from the private sector.

4. The respondent, in response to the NIT, submitted its bid. The bid also

contained the respondents proposal for profit sharing of the petroleum. The respondent projected an investment of Rs. 2.70 crores in the Lohar Block for carrying out petroleum operations in two phases, i.e. to carry out the detailed 3-D Seismic Survey to be followed by one or two extension wells and to carry out work from the existing well for production of petroleum.

5. After extensive negotiations, the parties entered into the PSC dated 13.03.1995. The production of petroleum in the Lohar Oilfield was started by the respondent in 1995-96. The formal mining lease was granted by the Govt. of State of Gujarat in favour of the respondent on 10.10.2003 with effect from 13.03.1995 in the area admeasuring 5.00 sq. kms in Lohar Block of Mehsana District for 25 years.

6. The recitals in the PSC read as follows:

(1) The Oil Fields (Regulation and Development) Act, 1948 (53 of 1948) (hereinafter referred to as "the Act") and the Petroleum and Natural Gas Rules, 1969, made thereunder (hereinafter referred to as "the Rules") make provision inter alia for the regulation of Petroleum Operations and the grant of licences and leases for exploration and development of Petroleum in India;

(2) The rules provide for the grant of mining leases in respect of land vested in a State Government by the State Government with the previous approval of the Central Government.

(3) Exploration carried out by the Oil and Natural Gas Corporation Ltd. prior to the Effective Date has led to a Discovery in the Contract Area, hereinafter referred to as the Discovery.

(4) The Government desires that the Petroleum resources which have been discovered and may exist in the Contract Area be exploited with the utmost expedition in the overall interest of India in accordance with good petroleum industry practices.

(5) Government had invited bids from persons interested in the development of petroleum resources in the Contract Area.

(6) The Companies have represented that they have the necessary financial and technical resources and the technical and industrial competence and experience necessary for proper discharge and/or performance of all obligations required to be performed under this Contract in accordance with good petroleum industry practices.

(7) The Government and the Company have agreed to enter into this Contract with respect to the area referred to in Appendices A & B of this contract on the terms and conditions herein set forth.

7. A few definitions contained in the contract may also be referred to at this stage.

1.20 "Cost Petroleum" means the portion of the total volume of Petroleum produced and saved from the Contract Area which the Contractor is entitled to take in a particular period for the recovery of Contract Costs as provided in Article 13".

1.38 "Investment Multiple" means, in relation to the Contract Area, the ratio of accumulated Net Cash Income from the Contract Area to accumulated Investment in the Contract Area, earned by the Companies, as determined in accordance with paragraphs 3-7 of Appendix D".

1.41 "Net Cash Income" shall have the meaning assigned in paragraph 2 of Appendix D.

"The "Net Cash Income" of the Companies from the Contract Area in any particular year is the aggregate value for the year of the following:

(i) Cost Petroleum entitlement of the Companies as provided in Article 13;

Plus

(ii) Profit Petroleum entitlement of the Companies as provided in Article 14;

Plus

(iii) All incidental income (or the type specified in Section 3.4 of the Accounting Procedure) arising from Petroleum Operations;

less

(iv) royalty and cess less

(v) All Production Costs incurred on or in the Contract Area;

less

(vi) the notional income tax, determined in accordance with paragraph 7 of this Appendix, payable by the Companies on profits and gains from the Contract Area".

"1.53 "Profit Petroleum" means all Petroleum produced and saved from the Contract Area in a particular period as reduced by Cost Petroleum and calculated as provided in Article 14".

8. Article 2 defines duration of the contract to be a period of 25 years from the effective date, unless the contract is terminated earlier in accordance with its terms. It is extendable by the Government for a further period not exceeding 5 years, provided that it may be extended for a further period, but not exceeding 35 years from the effective date.

9. Article 13 provides for recovery of contract costs by the contractor for extraction of oil and gas. Insofar as it is relevant, it reads as follows:

ARTICLE 13

RECOVERY OF COSTS FOR OIL AND GAS

13.1. The Contractor shall be entitled to recover Contract Costs out of the total volumes of Petroleum produced and saved from the Contract Area in accordance with the provisions of this Article, after deduction of applicable levies.

13.2. Development Costs incurred by the Contractor in the Contract Area up to the date of Commercial Production shall be aggregated, and the Contractor shall be entitled to recover out of the Cost Petroleum the aggregate of such Development Costs at the rate of one hundred percent (100%) per annum of such Development Costs beginning from the date of such Commercial Production from the Contract Area.

13.3. The Contractor shall be entitled to recover out of the Cost Petroleum the Development Costs which it has incurred after the date of Commercial Production from the Contract Area at the rate of one hundred percent (100%) per annum of such Development Costs beginning from the date such Development Costs are incurred.

13.4. The Contractor shall be entitled to recover in full during any Year the Production Costs incurred in the Contract Area in the Year out of the Cost Petroleum. If during any Year the Cost Petroleum is not sufficient to enable the Contractor to recover in full the Contract Costs due for recovery in that Year in accordance with the provisions of Articles 13.2 to 13.4 then:

- (a). recovery shall first be made of the Production Costs; and
- (b). recovery shall then be made of the Development Costs.

The unrecovered portions of Contract Costs shall be carried forward to the following Year and the Contractor shall be entitled to recover such Costs in such Year or the subsequent Years as if such Costs were due for recovery in that Year, or the succeeding Years, until the unrecovered Costs have been fully recovered out of Cost Petroleum from the Contract Area.

13.5. The maximum percentage of Cost Petroleum to which the Contractor shall be entitled, in accordance with the provisions of this Article, shall be on hundred percent (100%) for initial Five (5) years and fifty (50%) thereafter.

10. Article 14 is most relevant, and insofar as it is relevant, reads as follows:

ARTICLE 14

PRODUCTION SHARING OF PETROLEUM BETWEEN CONTRACTOR AND GOVERNMENT

14.1. The Contractor and the Government shall share in the Profit Petroleum from the Contract Area in accordance with the provisions of this Article.

The share of Profit Petroleum, in any year, shall be calculated for the Contract Area on the basis of the Investment Multiple actually achieved by the Companies

at the end of the preceding Year for the Contract Area as provided in Appendix D.

14.2. Profit Sharing

14.2.1. When the Investment Multiple of the Companies at the end of any Year is between zero (0) and three and a half (3.5), including three and a half (3.5), the Government shall be entitled to take and receive zero per cent (0%) and the Contractor shall be entitled to take and receive one hundred per cent (100%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Year.

14.2.2. When the Investment Multiple of the Companies at the end of any Year in respect of the Contract Area is more than three and a half (3.5) the Government shall be entitled to take and receive fifty per cent (50%) and the Contractor shall be entitled to take and receive fifty per cent (50%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Year.

14.3. For the avoidance of doubt, it is hereby stated that once the Company's Investment Multiple has increased so as to trigger, in any Year, a higher percentage of Profit Petroleum sharing for the Government (and a lower percentage for the Contractor) than that existing before the date of such increase, the Parties shall be entitled to share in the total volume of Profit Petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability.

14.4. The value of the Company's Investment Multiple at the end of any Year in respect of the Contract Area shall be calculated in the manner provided for, and on the basis of the net cash flows specified, in Appendix D to this Contract. However, the volume of Profit Petroleum to be shared between the Government and the Contractor shall be determined for each Quarter on an accumulative basis. Pending finalization of accounts, delivery of Profit Petroleum shall be taken by the Government and the Contractor on the basis of provisional estimated figures of contract costs, production, prices receipts, income and any other income or allowable deductions and on the basis of the value of the Investment Multiple achieved at the end of the preceding Year. All such provisional estimates shall be approved by the Management Committee when it is necessary to convert monetary units into physical units of production equivalents or vice versa, the price or prices determined pursuant to Articles 18 and 20 for Crude Oil, Condensate and Natural Gas respectively shall be used. Within sixty (60) days of the end of each Year, a final calculation of Profit Petroleum based on actual costs, quantities, prices and income for the entire Year shall be undertaken and any necessary adjustments to the sharing of Petroleum shall be agreed upon between the Government and the Contractor and made as soon as is practicable thereafter.

11. For the financial year 2005-06, upon calculation, it was found that the value of the Investment Multiple (IM) had increased to 5.16. The petitioner, therefore, invoked Article 14.2.2, as above extracted, and demanded 50% of the Profit

Petroleum, from the year 2006-07 onwards. It appears, there is no dispute between the parties so far as the share of the petitioner in the profit petroleum for the financial year 2006-07 is concerned. However, for the subsequent years, i.e. 2007-08 onwards, the respondent disputed the claim of the petitioner founded upon the IM of 5% achieved at the end of the financial year 2005-06.

12. The stand of the respondent in its letter dated 29.01.2007 was that since the IM did not exceed 3.5 in any quarter of the financial year 2006-07, therefore, sharing of Profit Petroleum would not become applicable in the financial year 2007-08 as per the provisions of Article 14.2 to Article 14.4 of the PSC.

13. The petitioner reiterated its stand vide email dated 08.02.2007, wherein it was contended that as per Article 14.2, 14.3 and 14.4 of the PSC, the contractor will have to pay 50% of the Profit Petroleum, if any, to the Government of India, with effect from the financial year 2006-07 irrespective of whatever the IM be, since the IM had exceeded 3.5 in the financial year 2005-06.

14. Consequently, disputes arose between the parties in relation to the interpretation of Article 14. According to the respondent it is only when the IM of the company exceeds 3.5 in a particular year, that the share of the petitioner in Profit Petroleum in the succeeding year would be 50%, but later on if the IM falls below the value of 3.5, in any year, the share of the petitioner in the profit petroleum would be 0% in the succeeding year.

15. On the other hand, the case of the petitioner before the arbitral tribunal was that once the value of IM exceeds 3.5 in any year, the share of the petitioner, in all subsequent years would be 50%, and the share of the respondent in profit petroleum shall, for the remaining period of the contract, get restricted to 50% of the profit petroleum.

16. The arbitral tribunal framed issues on 08.05.2009 after the pleadings were completed. On 17.08.2009, the arbitral tribunal deleted issue Nos. 3 to 6. The first 2 issues framed by the arbitral tribunal are relevant for the present purpose, and read as follows:

1. Is the Claimant entitled to retain entire Profit Petroleum for the financial year 2007-08, since the Investment Multiple did not trigger value higher than 3.5 in any quarter of the preceding financial year?

2. Is the Respondent entitled to receive 50% of the Profit Petroleum available for the year 2007-08 and for subsequent years, irrespective of the position that in the preceding financial year the Investment Multiple fell below 3.5 because in the financial year 2005-06 the Investment Multiple had triggered a value higher than 3.5?

17. The arbitral tribunal in paragraph 74 of the impugned award held and declared as follows:

that Article 14.1, 14.2 and 14.3 when read together, mandate that the

Investment Multiple actually achieved has to be calculated every year to determine the share of Profit Petroleum in the preceding year, to be shared in the succeeding year in accordance with the scheme of Article 14.2.1 and 14.2.2. Thus, if, the IM exceeds the value of 3.5 in a particular preceding year, then for the succeeding year, the share of Profit Petroleum would be calculated as per Article 14.2.2 but, thereafter, if, in the immediately succeeding year or any subsequent year, the IM value falls below 3.5 in the concerned preceding year, the share of the Government in Profit Petroleum in the succeeding year, would be determined as envisaged by Article 14.2.1

18. The submission of learned Additional Solicitor General, Mr. A.S. Chandhiok is that the interpretation advanced by the respondent and adopted by the arbitral tribunal goes contrary to the express terms of the contract. He submits that the present is not merely a case of interpretation of the contract by the arbitral tribunal, which would normally not be interfered with, in proceedings u/s 34 of the Act. He submits that the impugned order is patently illegal.

19. Mr. A.S. Chandhiok submits that the arbitral tribunal has completely ignored Article 14.3 of the PSC which in unequivocal terms provides that once the respondents IM increased so as to trigger, in any year, a higher percentage of profit petroleum sharing for the Government (and a lower percentage for the respondent), than that existing before the date of such increase, the Parties shall be entitled to share in the total volume of profit petroleum in the proportion specified in the relevant Articles", namely Articles 14.2.1 and 14.2.2 "in respect of the higher levels of IM and shall not be entitled to receive any profit petroleum shares in respect of the lower levels of profitability.

(emphasis supplied)

20. Mr. Chandhiok submits that Article 14.3 is capable of one and only one interpretation, i.e. that if and when the respondent contractor achieves a level of profitability measured in terms of the IM more than 3.5 even once, then for the remaining term of the contract (which as per Article 2 is defined as 25 years from the effective date), the petitioner would be entitled to a "share in the total volume of profit petroleum" in the ratio fixed under Article 14.2 (which deals with profit sharing) "in respect of higher levels of Investment Multiple" and not in the proportion in respect of the lower levels of profitability.

21. Mr. Chandhiok submits that the PSC is structured such that the contractor is entitled to recover contract costs i.e. Development Costs and Production Costs from out of "the total volumes of petroleum produced and saved from the Contract Area". Article 13.2 entitles the contractor to recover the aggregate of Development Costs incurred upto the date of Commercial Production out of the cost petroleum @ 100% per annum. Development Costs incurred after start of commercial production are recoverable from the cost petroleum @ 100% per annum. The contractor is entitled to recover its production costs in any year from the cost petroleum in that year. Cost petroleum could be 100% of the production

in the first five years, and 50% of the production thereafter. He refers to Article 13 of the PSC in this respect.

22. I may note that the understanding of the petitioner, as aforesaid, also appears to have been the understanding of the respondent as is evident from paragraph 35 of the impugned award. However, the claim of the respondent that the initial five years should be taken to commence from 10.10.2003 (the date of grant of the mining lease) and not from September 1995, (when the Government of the State of Gujarat had agreed in principle for grant of mining lease for, inter alia, the area in question) was rejected by the arbitral tribunal. Reference in this regard may be made to paragraphs 45, 46 and 52 of the impugned award.

23. In paragraph 47 of the award, the arbitral tribunal held as follows:

The basic aim of Article 13.5 is, thus, to allow the contractor to recover its Development Cost from the revenue of Petroleum produced in the initial five years at the rate of 100% of the Contract Costs without the Government getting any share in those five years. Thereafter, share of the Claimant in the Contract Cost would be at the rate of 50% of the Cost Petroleum and the balance 50% shall be received and taken by the Government. Article 13.5, thus, allows the Contractor to recover Development Costs at the rate of 100% for the "initial five" years out of the Cost Petroleum and thereafter to share it in the ratio of 50:50% with the Government

24. Mr. Chandhiok submits that the determination of the IM under Article 14.1 was relevant for the purpose of determining the share of the parties in the profit petroleum under the PSC. The share of the petitioner in the profit petroleum, in any year, was to be determined by reference to the IM actually achieved by the respondent at the end of the preceding year as provided in Appendix D. He submits that since, in the initial five years of commercial production, the entire production could be allocated as cost petroleum to recover Development Costs and Production Costs, and thereafter the cost petroleum could be upto 50% of the production in any year, the IM was required to be calculated year after year so that the profit petroleum (i.e. all the petroleum produced minus the cost petroleum) could be shared in the proportion set out in Articles 14.2.1 and 14.2.2. However, Article 14.3 clarified the matter beyond any doubt that "once" the respondents IM had increased "so as to trigger" in any year, a higher percentage of profit petroleum sharing for the Government and, consequently a lower percentage for the respondent than that existing before the date of such increase, then thereafter the parties were entitled to share the "total volume of profit petroleum" in the proportion specified in the relevant Articles of Article 14 in respect of the higher levels of IM, and the Government was not to receive any profit petroleum in accordance with the lower levels of profitability. He submits that the use of the expressions "once", "trigger" and "total volume of profit petroleum" clearly show that the once the milestone of IM greater than 3.5 had been achieved, (as provided in Article 14.2.2, which entitles the Government to take and receive 50% of the profit petroleum and which reduced the respondent/

contractors share to 50% of profit petroleum for the succeeding year), the share of the Government for the remaining period of the contract in the total profit petroleum would have to be determined by reference to the share prescribed in respect of the higher levels of IM and shall not be reduced in respect of the lower levels of profitability, i.e. for IM lower than or equal to 3.5.

25. Mr. Chandhiok submits that the purpose of the contract was to provide for the mechanism of profit sharing between the parties, of the profit petroleum mined by the respondent/contractor. The determination of the IM on an annual basis was merely a statistical and academic exercise, since the profit sharing was linked to the IM achieved in a given year so as to determine the shares in the profit petroleum in the subsequent year. It did not mean that even after the milestone of IM more than 3.5 had been achieved, the exercise of determining the IM was required to be undertaken for the purpose of fixing profit sharing ratio for the remaining term of the contract.

26. Mr. Chandhiok submits that the interpretation advanced by the respondent, and adopted by the arbitral tribunal, was in the teeth of Article 14.3. He submits that the perusal of the impugned award shows that the arbitral tribunal has not once considered the effect of the words "... .. and shall not be entitled to receive any profit petroleum shares in respect of the lower levels of profitability". He submits that the arbitral tribunal has skirted the issue that arose before it, by completely ignoring the clear mandate of Article 14.3 of the contract.

27. Mr. Chandhiok further submits that the arbitral tribunal while rendering its award has not only ignored the mandate of Article 14.3, but has also proceeded to determine the inter se rights of the parties on its assumed notion of equity. In this regard, he refers to the observations of the arbitral tribunal in paragraph 73 of the impugned award, where the arbitral tribunal observed "it could, therefore, be wholly inequitable to assume, as suggested by learned Counsel for the respondent, that once in any year, the Investment Multiple has triggered a percentage of Profit Petroleum, exceeding 3.5, than that existing before the date of such increase, the parties shall be entitled to share in the total volume of Profit Petroleum, for all subsequent years as per Article 14.2.2, irrespective of the IM actually achieved for the remaining term of the Contract".

28. Mr. Chandhiok further submits that a clause like Article 14.3 is prescribed in other similar contracts executed by the Government with other exploration firms. As an instance, he places reliance on Clause 16.3 contained in the Production Sharing Contract between the Govt. of India, ONGC Ltd., Videocon Petroleum Ltd., Command Petroleum (India) Pty. Ltd. and Ravva Oil (Singapore) Pte Ltd. for the Raava Oil and Gas Field, which reads as follows:

16.3. PTRR Level Not to Revert to Lower Level For the avoidance of doubt, it is hereby stated that once the Company's Post Tax Rate of Return has increased so as to trigger, in any Year, a higher percentage of Profit Petroleum sharing for the Government (and a lower percentage for the Contractor) than that existing

before the date of such increase, the Parties shall be entitled to share in the total volume of Profit Petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Post Tax Rate of Return and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability

29. He submits that the other contractors who are similarly placed as the respondent herein have correctly understood the purport of the agreement and are sharing the profit petroleum with the Government in the same manner as claimed by the petitioner.

30. Mr. Chandhiok further submits that the interpretation adopted by the tribunal would lead to absurd results inasmuch, as, the petitioner despite being the owner of the mine, which is a national resource, would be deprived of a share in the profits generated by the respondent. He submits that for the first time ever since 1995, the petitioner received a share in the profit petroleum in the year 2006-07. That is the only year in which the respondent shared the profit petroleum. For the period thereafter, i.e. from 2007-08, as, according to the respondent, the IM has again decreased below 3.5, the petitioner is being denied any share in the profit petroleum. It is submitted that the respondent having recovered all its initial development costs. Its subsequent development costs and ongoing production costs are also being taken care of by permitting the respondent to take 50% of the production towards cost petroleum. There can be no justification to deny the share of the petitioner in the profit petroleum, as the plant set up by the respondent has achieved a higher profitability reflected by IM more than 3.5. He submits that it is for this reason that Article 14.3 clearly provides that once a higher IM has been achieved in any year, which would entitle the petitioner to a higher share in profit petroleum, thereafter the share in the profit petroleum of the petitioner would not be decreased.

31. Mr. Chandhiok submits that the impugned award is patently illegal and the arbitral tribunal has disregarded its authority and misconducted itself in ignoring the clear language used by the parties in Article 14.3 of the contract. The arbitral tribunal has acted without jurisdiction while making its award by acting in manifest disregard of the contractual term contained in Article 14.3. Mr. Chandhiok submits that the award is arbitrary and capricious. Mr. Chandhiok has placed strong reliance on the judgment of the Supreme Court in Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, in support of his submissions.

32. On the other hand, Mr. Neeraj Kishan Kaul, Senior Advocate, who appears for the respondent on advance notice, submits that the arbitral tribunal has merely interpreted the contractual terms contained in, inter alia, Article 14 of the PSC. He submits that the interpretation adopted by the arbitral tribunal is a plausible interpretation. Mr. Kaul submits that the arbitral tribunal has harmonized Articles 14.1 to 14.4 read with Appendix D. He submits that the profit sharing ratio is to be determined by reference to the IM, which has to be calculated for each year.

That, according to him, the clear mandate of Article 14.1 read with Appendix D. Mr. Kaul further submits that Article 14.3 is merely clarificatory. It cannot subsume Article 14.1 read with Appendix D.

33. Mr. Kaul submits that the arbitral tribunal has taken note of the understanding of the parties as reflected in their correspondence. The respondent had sent a communication dated 26.10.1995, wherein the respondent had sought a suitable clarification from the petitioner, inter alia, in respect of Article 14.3 by stating:

Article 14.3 - Investment multiple even if triggered to a higher level during any year, would revert to the investment multiples as calculated for subsequent years.

34. The petitioner had replied to the said letter vide letter dated 20.11.1995 and had clarified as follows:

Article 14.3: The value of investment multiple in any particular year would be based on the cumulative net cash inflow upto the end of the preceding year divided by the cumulative investment upto the end of the preceding year. As such, this value could go in either an upward or downward direction depending on the respective cumulative values of the net cash inflow and the investment.

35. Mr. Kaul submits that reliance placed by the petitioner on the contractual clause contained in the contract for profit sharing with another party is of no avail as the arbitral tribunal was concerned with the interpretation of the contractual clause as contained in the contract in question. Two different contracts, having different phraseology cannot have a bearing on the meaning to be ascribed to the contractual terms in each other. Mr. Kaul, therefore, submits that there is no justification for this Court to interfere with the arbitral award as no ground for such interference is made out in the facts of the case.

36. Before I proceed further, I consider it appropriate to take stock of the scope of the jurisdiction of the Court to interfere with the arbitral award where it is assailed on the ground that the tribunal has adopted an interpretation contrary to the express terms of the contract while rendering its award. In *Associated Engineering Co. Vs. Government of Andhra Pradesh and another*, the Supreme Court held that a conscious disregard of the law or the provisions of the contract from which the arbitrator derives his authority vitiates the award. In paragraph 34, the Supreme Court held: -

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see *Mustill and Boyd's Commercial Arbitration*, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see *Halsbury's Laws of England*, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide

action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

(emphasis supplied)

37. In *New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation*, , the Supreme Court held:

9. ...It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. We, therefore, affirm the decision of the Division Bench on this score (claim 6).

(emphasis supplied)

38. In *Steel Authority of India Limited Vs. J.C. Budharaja*, Government and Mining Contractor, , the Supreme Court, inter alia, held:

...that it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action... .

... It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error....

(emphasis supplied)

It was further observed:

... Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement....

39. In *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, , the Supreme Court held that where the fundamental

terms between the parties are ignored by the arbitrator, such arbitrator is said to exceed his jurisdiction even where the arbitration clause is widely worded. The Supreme Court held as follows:

22. Further, in the present case, there is no question of interpretation of clauses 17 and 18 as the said clauses are so clear and unambiguous that they do not require any interpretation. It is both, in positive and negative terms by providing that the contractor shall be paid rates as fixed and that he shall not be entitled to extra payment or further payment for any ground whatsoever except as mentioned therein. The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration Clause 74 is very widely worded, therefore, the dispute was required to be referred to the arbitrator. Hence, the award passed by the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the contractor.

(emphasis supplied)

40. In *Bharat Coking Coal Ltd. Vs. Annapurna Construction*, , the Supreme Court held:

22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.

41. The Supreme Court referred to the decisions in *Bharat Coking Coal Ltd. (supra)* and *Continental Construction Co. Ltd. v. State of M.P.* (1988) 3 SCR 103 in the decision reported as *State of Rajasthan Vs. Nav Bharat Construction Company*, and observed:

27. ...An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However, where the term of the contract is clear and unambiguous the arbitrator cannot ignore it.

(emphasis supplied)

42. The same legal position was reiterated in Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., wherein the Supreme Court observed:

17. We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that courts shall not ordinarily substitute their interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the courts to set things right.

(emphasis supplied)

43. Similarly, in DDA v. R.S. Sharma and Co. (2008) 13 SCC 80, the Supreme Court held that except in cases of jurisdictional errors, it is not open to the Court to interfere with an award. This proposition is unexceptionable. It was further held:

3. ...However, from a reading of the decisions of this Court referred to earlier it is clear that when an award is made plainly contrary to the terms of the contract not by misinterpretation but which is plainly contrary to the terms of the contract it would certainly lead to an inference that there is an error apparent on the face of the award which results in jurisdictional error in the award. In such a case the courts can certainly interfere with the award made by the arbitrator.

44. The Supreme Court reiterated the statement of the law as contained in J.C. Budharaja (supra) in the recent decision in Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Others, In this case, the Court had found that the arbitrator had ignored a particular clause of the contract and made a departure from the contract while awarding certain claims of the contractor. The Supreme Court, consequently, held that the award could not be sustained.

45. An instance of a case, where the Court interfered with the award founded upon an interpretation given by the arbitral tribunal to a contractual term is contained in case of Polymat India P. Ltd. and Another Vs. National Insurance Co. Ltd. and Others, . The expression "factory-cum-godown-cum-office" contained in

the insurance policy were interpreted by the arbitral tribunal and it was held that even those goods which was lying outside the factory and godown were covered by the insurance policy. The Supreme Court held that the expression "factor-cum-godown" has to be read in the context in which they appear in the insurance policy documents. The Supreme Court by reference to the insurance form filled by the petitioner held that what was sought to be insured was the plant and machinery. The Supreme Court further held that it was clear that goods lying outside the plant were not insured. The interpretation of the arbitrator to the contrary was rejected by the Court.

46. Treating the aforesaid decisions of the Supreme Court as the guiding lights, I proceed to examine whether the award of the arbitral tribunal calls for interference by this Court.

47. The discussion of the arbitral tribunal with regard to the interpretation of Article 14 of the PSC is found in paragraphs 65 to 74 of the award. The same are relevant and are reproduced herein below:

65. Sharing of Profit Petroleum, which is defined in Article 1.53, is essentially one of the main purposes which is intended to be served by the Profit Sharing Contract executed between the parties. Profit Petroleum under the PSC is required to be calculated as per the provisions of Article 14 read with Appendix D and the Accounting Principles.

Under Article 14.1, the share of Profit Petroleum in any year requires to be calculated on the basis of the Investment Multiple actually achieved by the contractor at the end of the preceding year from the contract area as provided in Appendix D.

Clause 1 of Appendix D reads thus:

In accordance with the provisions of Article 14, the share of the Government and the Contractor respectively of profit Petroleum from any field in any year shall be determined by the investment multiple earned by the companies from the Contract area at the end of the preceding year. These measures of profitability shall be calculated on the basis of the appropriate net cash flows as specified in the Appendix D.

It also lays down:

Profit Petroleum from the Contract Area in any year shall be shared between the Government and the contractor in accordance with the value of the Investment Multiple earned by the Companies as at the end of the previous year pursuant to Article 14.2-14.6.

66. Articles 14.2, 14.3 and 14.4 deal with the scheme of Sharing of Profit Petroleum treating the IM, calculated as per Article 14.1, as the measure for determining profitability. The range of Investment Multiple under Article 14.2.1 is rather wide i.e. 0 to 3.5. So long as the IM actually achieved by the Contractor,

at the end of any year, is within the range of 0 to 3.4 including 3.5, the Government shall be entitled to receive 0% of the share in Profit Petroleum and the Contractor shall be entitled to retain 100% of the revenue from Profit Petroleum from the contract area. Under Clause 14.2.2, when the IM at the end of any year in respect of the contract area exceeds 3.5, the Government becomes entitled to take and receive 50% (Fifty Percent) of the share and the Contractor also would be entitled to take and receive 50% (Fifty Percent) of the share and the Contractor also would be entitled to take and receive 50% of the total profit Petroleum from the Contract Area with effect from the start of the succeeding year. Thus, reading the provision of Article 14.2.1 and 14.2.2 with the provisions of Article 14.1, it becomes obvious that the calculation of the IM is an exercise which is required to be undertaken every year, as the sharing of Profit Petroleum, in any year depends upon the value of IM actually achieved at the end of the preceding year.

The main area of conflict between the Claimant and the Respondent centers around the interpretation of Article 14.3. At the cost of repetition we would like to reproduce Article 14.3 here:

For the avoidance of doubt, it is hereby stated that once the Company's Investment Multiple has increased so as to trigger, in any Year, a higher percentage of Profit Petroleum sharing for the Government (and a lower percentage for the Contractor) than that existing before the date of such increase, the Parties shall be entitled to share in the total volume of Profit Petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability.

(Emphasis ours)

67. While learned Counsel for the Respondent maintains that Article 14.3 mandates that once I.M in any year has triggered the value of more than 3.5, the sharing of profit Petroleum in all the succeeding years during term of the contract will be determined on the basis of the higher level of IM and profit sharing once achieved and will not be calculated on the basis of lower levels of profitability and, therefore, the Contractor is not required to calculate the value of IM for the purpose of determining the share of the parties in Profit Petroleum, year after year. In other words according to Mr. Sasi Prabhu, not only the IM but also Article 14.1 is of no use after the clause of IM has triggered to the value of more than 3.5 in any year for the rest of the term of the contract.

68. Mr. Mukhopadhyaya, on the other hand submitted that the wording of Article 14.3 of PSC "that once the Company's Investment Multiple has increased so as to trigger" higher value, has reference to the concerned particular year and does not apply to "all" years after the value of IM has triggered to more than 3.5". Learned Counsel submitted that the IM of the company is required to be calculated at the end of each year in respect of the Contract Area and that this

exercise has to be performed every year during the entire term of the Contract so as to determine the value of IM achieved during the particular year and that calculation of IM does not become irrelevant nor Article 14.1 rendered otiose after once the IM value in any year has exceeded the value of 3.5.

69. The Tribunal has observed in an earlier part of this Award, that sharing of Profit Petroleum is the main purpose which is intended to be served by the Profit Sharing Contract.

The mandate of Article 14.1 is to calculate the IM actually achieved every year. The share of the parties in Profit Petroleum in any year as per Article

14.1 depends upon the value of IM actually achieved at the end of the preceding year. In our view, therefore, calculation of IM annually is an important exercise aimed for working out the manner of sharing of Profit Petroleum between the parties.

The definition of IM in Article 1.38 shows that it is a measure to determine the ratio of accumulated net cash income from the contract area to the accumulated investment in the Contract area and under Article 14.1 the share in the Profit Petroleum of the parties, is required to be calculated on the basis of the value of IM actually achieved by the Contractor at the end of the preceding year.

70. In our opinion, Article 14.1 is mandatory in nature. It provides that the Contractor and the Government shall share in the Profit Petroleum from the Contract Area in accordance with the provisions of this Article and that the share of Profit Petroleum in any year shall be calculated for the Contract Area on the basis of the Investment Multiple actually achieved by the Contractor at the end of the preceding year. The expression "actually achieved" in Article 14.1 unmistakably suggests that the exercise for calculation of IM has to be done every year as calculation of Investment Multiple actually achieved in a given year is the only measure envisaged by the PSC to determine profitability and has a direct bearing on the sharing of Profit Petroleum between the parties in the manner prescribed by Article 14.2.1 and 14.2.2.

The expression used in Article 14.3:

it is hereby stated that once the Company's Investment Multiple has increased so as to trigger, in any Year, a higher percentage of Profit Petroleum sharing for the Government (and a lower percentage for the Contractor) than that existing before the date of such increase, the Parties shall be entitled to share in the total volume of Profit Petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability.

Thus, Article 14.3 when read with Article 14.1 makes it abundantly clear that IM actually achieved by the Contractor requires to be calculated every year and that the share of the parties in Profit Petroleum depends upon the IM value actually

achieved at the end of the preceding year. Article 14.3 clearly states that the proportion of the shares of the parties would be as "specified in the relevant Article above". Article 14.3, thus, incorporates the preceding clauses of Article 14 in it. We are unable to persuade ourselves to agree with learned Counsel for the Respondent that Article 14.1 would become redundant or rendered otiose and calculation of IM would also become irrelevant after the IM in any year exceeds the value of 3.5, for all the succeeding years till the entire term of the contract. By no stretch of reasoning can the IM become "static for all times" just because in one year it has exceeded the value of 3.5 and it cannot be presumed that the IM actually achieved would for all the subsequent years be the same without actual calculation of IM.

71 . Indeed, Article 14.3 does not appear to be happily worded but when read in the context of the Contract and the provisions of Article 14.1, 14.2.1, 14.2.2, it clarifies the position that the parties shall be entitled to share in the total volume of the Profit Petroleum, in the proportion specified in those Articles. The mandate of Article 14.1 viz. to determine investment Multiple actually achieved cannot be ignored at any stage during the subsistence of the contract. Neither the words "irrespective of IM" nor the words "in all succeeding years", as suggested by Mr. Sasi Prabhu, find any place in Article 14.3. If, Mr. Sasi Prabhu is right in his interpretation of Article 14.3, then the parties to the contract as well have just added, as the opening word "once" in Article 14.2 and the words "till the term of the Contract" at the end of Article 14.3. Those expressions neither can be added to Article 14.2 nor even impliedly accepted to be part of Article 14.2.

72. It is also apparent from the letter of the Mr. Ramani, one of the signatories of the PSC dated 19th November 1995, (supra) that the value of Investment Multiple in any particular year would be based on the cumulative net cash inflow upto the end of the preceding year divided by the cumulative investment upto the end of the preceding year and that such value of IM could go either upwards and downwards direction depending upon the net cash inflow and the investments. This clarification which reflects the intention of Article 14.3 read with 14.1 has great relevance and importance. It supports the submission made on behalf of the Claimant. As observed by the Supreme Court *Godhra Electricity Co. Ltd. v. State of Gujarat* (supra) "great assistance can be available from the interpreting statements made by the parties themselves and that this process of practical interpretation and application, is not regarded as remaking of the contract. It is a further expression by the parties of the meaning they give to various terms used in the contract. This clarification by Mr. Ramani, does provide great assistance to appreciate the rival arguments raised before us. In the opinion of the Tribunal Article 14.3 does not render any of the sub-clauses of Article 14 redundant or otiose.

Apart from what has been observed above, there is one other aspect which supports the view taken by us.

73. The PSC inter-alia provides for share of Profit Petroleum between the parties.

With a view to work out the profit sharing between the parties, the calculation of Investment Multiple every year is essential as the share in Profit Petroleum has to be calculated on the basis of Investment Multiple "actually achieved" at the end of the preceding year from the Contract Area. If the calculation of IM actually achieved exceeds 3.5 in the preceding year, the Government would get its share as envisaged by Article 14.2.2 but if the IM actually achieved falls below 3.5 in the preceding year, the share of the parties would be calculated as required by Article

14.2.1. It does not admit of any doubt that the Investment Multiple actually achieved by the company at the end of the preceding year can vary from year to year depending upon the ratio of accumulated net cash income from Contract Area to the accumulated Investment in the Contract Area in the concerned year. It would, therefore, be wholly inequitable to assume, as suggested by learned Counsel for the Respondent, that once in any year, the Investment Multiple has triggered a percentage of Profit Petroleum, exceeding 3.5, than that existing before the date of such increase, the parties shall be entitled to share in the total volume of Profit Petroleum, for all subsequent years as per Article 14.2.2, irrespective of the IM actually achieved for the remaining term of the Contract. A harmonious construction of Article 14.3 would be to read it along with the provision of Article 14.1 and 14.2. As already noticed, on its plain language, Article 14.3 does not say that Articles 14.1 and 14.2 would be rendered redundant once the IM exceeds 3.5 in any year for the remaining tenure of the PSC or that IM would not be required to be calculated annually as it would become irrelevant.

74. As a result of the above discussion, the Tribunal Holds and Declares that Article 14.1, 14.2 and 14.3 when read together, mandate that the Investment Multiple actually achieved has to be calculated every year to determine the share of Profit Petroleum in the preceding, to be shared in the succeeding year in accordance with the scheme of Article 14.2.1 and 14.2.2. Thus, if, the IM exceeds the value of 3.5 in a particular preceding year, then for the succeeding year, the share Profit Petroleum would be calculated as per Article 14.2.2 but, thereafter, if, in the immediately succeeding year or any subsequent year, the IM value falls below 3.5 in the concerned preceding year, the share of the Government in Profit Petroleum in the succeeding year, would be determined as envisaged by Article 14.2.1.

48. With due respect to the arbitral tribunal, a perusal of the above extract from the arbitral award shows that the arbitral tribunal while interpreting Article 14 of the PSC, and, in particular Article 14.3, has not dealt with the clear language used by the parties in the said sub-article, and in particular, the words "....the Parties shall be entitled to share in the total volume of Profit Petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability.

(emphasis supplied)

49. The arbitral tribunal, in paragraph 66 of the award, observes that the range of IM under Article 14.2.1 is rather wide, i.e. 0 to 3.5. In Article 14.2, there are only two sub-articles, i.e. 14.2.1 and 14.2.2. If the IM is between 0 to 3.5, the share of the petitioner in the profit petroleum is 0%, i.e. the petitioner gets no share at all. Whereas, if the IM increases beyond 3.5%, the share of the petitioner in the profit petroleum jumps from 0% to 50%.

50. To understand the purport of Article 14.3, I may take a hypothetical case. Supposing Article 14.2 provided for a more graded structure for profit sharing such that:

(i). If the IM was above 0 and upto 0.5, the share of the petitioner in the profit petroleum was 0%;

(ii). If the IM was above 0.5 and upto 1.0, the share of the petitioner in the profit petroleum was 10%;

(iii). If the IM was above 1.0 and upto 1.5, the share of the petitioner in the profit petroleum was 20%;

(iv). If the IM was above 1.5 and upto 2, the share of the petitioner in the profit petroleum was 30%;

(v). If the IM was above 2.0 and upto 2.5, the share of the petitioner in the profit petroleum was 40%;

(vi). If the IM was above 2.5 and upto 3.0, the share of the petitioner in the profit petroleum was 45%;

(vii). If the IM was above 3.0 and upto 3.5, the share of the petitioner in the profit petroleum was 47%;

(viii). If the IM was above 3.5, the share of the pt in the profit petroleum was 50%.

51. The calculation of the IM in such a situation would have to be undertaken from year to year even after the IM achieves a figure of more than 0.5, as the share of the petitioner in the profit petroleum could rise with a higher IM in succeeding years. On a plain reading of Article 14.3, until and unless the IM exceeds 3.5, which triggers the highest possible share for the petitioner in the profit petroleum, i.e. 50%, the IM would have to be calculated year after year. Article 14.3 clearly states that if the IM increases to, let say, 2.3 in a particular year, but the same is not sustained in the following year, the share of the petitioner in the profit petroleum in the subsequent year(s) would be determined by reference to the IM of 2.3, and not by reference to the lower IM achieved in the subsequent years. However, the IM would still have to be calculated year after year, as there would still be scope for the IM to rise to a level beyond 3.5, which would give the highest possible percentage of profit petroleum to the

petitioner.

52. The observations of the arbitral tribunal that the IM cannot become static for all times, just because for one year it has exceeded the value of 3.5 demonstrates, with due respect, a misdirected approach. The IM would obviously not become static for all times merely because it has exceeded the value of 3.5 in a given year, just that its relevance for purposes of calculating the share of the petitioner in the profit petroleum would become redundant because of the clear language used in Article 14.3.

53. The finding of the arbitral tribunal that Article 14.1 is mandatory in nature does not militate against the clear and express language of Article 14.3. It is well settled that while interpreting a contract, no clause of the contract can be given a go-bye and an interpretation which goes contrary to an express term of the contract can certainly not be adopted. When Article 14.1 states that the Contractor and the Government shall share the profit petroleum in accordance with the provisions of "this Article", it also includes Article 14.3. Article 14.3 uses the expression "... the parties shall be entitled to share in the total volume of profit petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple and shall not be entitled to receive any Profit Petroleum shares in respect of the lower levels of profitability." The "relevant Articles above" are those Articles which deal with "profit sharing". The parties consciously used the expression "relevant" so as to exclude the irrelevant. Article 14.1 merely states that the share in the profit petroleum of the parties would be linked to IM actually achieved at the end of the preceding year for the contract area as provided in Appendix "D". It is Article 14.2 with the heading "profit sharing", which specifies the proportions in which the profit petroleum would be shared. Therefore, reference to "relevant Articles" obviously is a reference to Article 14.2 and not Article 14.1 as concluded by the arbitral tribunal.

54. No doubt, Article 14.3 does not use words like "till the term of the contract" (as observed by the arbitral tribunal in paragraph 71 of the award), but it certainly uses the expression "once" and "trigger", and apart from stating that "the parties shall be entitled to share in the total volume of profit petroleum in the proportions specified in the relevant Articles above in respect of the higher levels of Investment Multiple", it goes on to state the same thing in the negative by stating "and shall not be entitled to receive any profit petroleum shares in respect of the lower levels of profitability". This, to my mind, connotes the same meaning as would have been connoted by the use of the words "till the term of the contract" at the end of Article 14.2. Unfortunately, as I have already noticed above, the arbitral tribunal has not even ventured to examine the last three lines of Article 14.3.

55. I may note that, even according to the respondent, the words of Article 14.1, 14.2, 14.2.1 and 14.2.2 could give rise to one and only one doubt. Mr. Kaul, during the course of his arguments, placed before me the written submissions

filed by the respondent before the arbitral tribunal. Paragraph 5.5 of the written submissions, which deals with the aspect of interpretation of Article 14 of the PSC, reads as follows:

The words of Articles 14.1, 14.2, 14.2.1 and 14.2.2 are quite clear. However, one and only one doubt in its construction could arise. What if, in a given year, the Investment Multiple exceeds 3.5 and therefore in the subsequent year Profit Petroleum is payable to the Respondent, Government of India but in the said subsequent year, the Investment Multiple falls in any given quarter including possibly from the first quarter to less than 3.5, does the obligation of the Contractor to pay Profit Petroleum in this concerned subsequent year stop immediately as a result of the fall in the IM i.e. Investment Multiple to less than 3.5 or does it continue notwithstanding the same but only for the said subsequent year.

56. Therefore, it is not open for the respondent to now contend that on a reading of Articles 14.1 and 14.2 along with its sub-articles, there was no scope for any doubt in anyone's mind that the share of the petitioner in the profit petroleum had to be calculated each year irrespective of the fact whether the share of the petitioner in any given year had been fixed at 50% of the profit petroleum on the basis of the IM more than 3.5 in the preceding year.

57. It is clear that the parties inserted Article 14.3 with a view to clarify the position emerging from reading Articles 14.1 and 14.2 with its sub-articles. Had Articles 14.1 and 14.2 with its sub-articles been as clear as contended by the respondent, there was no need for the parties to have inserted Article 14.3. The purpose of inserting Article 14.3 was precisely to put matters beyond any doubt. It has been put beyond any doubt, on a plain reading of Article 14.3, that once the IM has increased so as to trigger (which connotes the sense of irreversibility), a higher percentage of profit petroleum sharing for the petitioner and lower percentage for the respondent, than that existing before the date of such increase (which means that for the first time the IM has crossed the figure of 3.5), the parties shall be entitled to share in the total volume of profit petroleum in proportion specified in Article 14.2 in respect of higher levels of IM "and shall not be entitled to receive any profit petroleum shares in respect of the lower levels of profitability". Pertinently, Article 14.3 does not restrict the right of the petitioner to receive the higher percentage of profit petroleum as a share only for the year following the year in which the IM increases beyond 3.5. If the intention of the parties was to restrict the right of the petitioner to receive a share of the profit petroleum at 50% only for the year following the year in which the IM increases above 3.5. Article 14.3 would have certainly used words such "for the subsequent year".

58. I may also take note of the definition of the term "Investment Multiple" at this stage. Investment Multiple means in relation to the contract area, the ratio of accumulated net cash income from the contract area to the accumulated investment in the contract area earned by the companies as determined in

accordance with paragraphs 3 to 7 of Appendix D. "Net Cash Income" as defined in Appendix D read as follows:

The "Net Cash Income" of the Companies from the Contract Area in any particular year is the aggregate value for the year of the following:

(i) Cost Petroleum entitlement of the Companies as provided in Article 13;

Plus

(ii) Profit Petroleum entitlement of the Companies as provided in Article 14;

Plus

(iii) All incidental income (or the type specified in Section 3.4 of the Accounting Procedure) arising from Petroleum Operations;

less

(iv) royalty and cess less

(v) All Production Costs incurred on or in the Contract Area;

less

(vi) the notional income tax, determined in accordance with paragraph 7 of this Appendix, payable by the Companies on profits and gains from the Contract Area.

59. Appendix D also sets out the manner in which the IM ratio is to be calculated as at the end of any year in the following words:

The Investment Multiple ratio earned by the Companies as at the end of any year from the Contract Area shall be calculated by dividing the aggregate value of the addition of each of the annual Net Cash Income (accumulated, without interest, up to and including that year starting from the year in which Production Costs were first incurred or Production first arose on or in the Contract Area) by the aggregate value of the addition of each of the annual Investments (accumulated, without interest, up to and including that year starting from the year in which Development Costs were first incurred

60. It, therefore, follows that the IM of 3.5 indicates an overall/accumulated return on investment of 350%. Only after the accumulated return on accumulated investment of 350% is achieved for the first time by the respondent, its obligation to share the profit petroleum with the petitioner arises. Pertinently, Appendix D itself provides that "Profit Petroleum from the Contract Area in any year shall be shared between the Government and the Contractor in accordance with the value of the Investment Multiple earned by the Companies as at the end of the previous year pursuant to Articles 14.2-14.6". Article 14.3 has, therefore, to be applied while calculating the profit petroleum from the contract area in any year. Once the share of the petitioner in the profit petroleum has hit the upper circuit, by virtue of Article 14.3 the share of the petitioner in

the profit petroleum shall not fall below thereafter. Therefore, it cannot be said that the share of the petitioner in the profit petroleum for subsequent years would be dependent on the IM calculated for such subsequent years.

61. A perusal of the communication dated 26.10.1995, whereby the respondent sought a clarification with regard to Article 14.3 and the response of the petitioner thereto, shows that the petitioner merely clarified that the value of the IM could go in either direction, i.e. upward or downward. This communication does not say that the share of the petitioner in the profit petroleum could go down in the subsequent years, once it has been fixed at a higher percentage because of the IM increasing to above 3.5.

62. Mr. Kaul vehemently argued that the interpretation advanced by the petitioner would have the effect of taking away the incentive of the respondent to make further investments in the oil field to extract even larger quantities of petroleum. This submission of Mr. Kaul appears to be misplaced on a reading of Article 13 of the PSC. Any development costs incurred by the respondent even after the start of commercial production from the contract area are fully recoverable as a part of the cost petroleum. The only distinction is that development costs incurred during the period after the initial period of 5 years are recoverable as part of cost petroleum with the condition that the cost petroleum cannot be more than 50%. Pertinently, the unrecovered portion of cost petroleum is carried forward to the following year and the contractor is entitled to recover such costs in such year or the subsequent years as if such costs were due for recovery in that year, or the succeeding years, until the unrecovered costs have been fully recovered out of cost petroleum from the contract area.

63. In the light of the above discussion, I am of the view that the impugned award is patently contrary to the express term of the Production Sharing Contract between the parties, and in particular to Article 14.3 thereof. The tribunal has acted in manifest disregard of Article 14.3 of the PSC and, therefore, has acted without jurisdiction. The present is a case, where there was no question of interpretation of Article 14.3 of the PSC, but of simply reading the same as it is. The mandate of Article 14.3 is clear and unambiguous as explained above. The arbitral tribunal has ignored the plain grammatical meaning of Article 14.3 and laid undue and unwarranted emphasis on Article 14.1 of the PSC. The impugned award is arbitrary and capricious and cannot be sustained. It is, accordingly, set aside. The petition is allowed. The petitioner shall be entitled to costs quantified at Rs. 1 Lac.