* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: October 06, 2023***

Pronounced on: April 24, 2024

\+ FAO(OS) (COMM) 48/2018

UNION OF INDIA ..... Appellant

Through: Mr. Vivek Kohli, Senior Advocate with Ms. Neetika Bajaj, Ms. Astha Garg, Ms. Kopal Mittal & Ms. Bhavya Bhatia, Advocates

Versus

HINDUSTAN OIL EXPLORATION COMPANY LTD. .....Respondent

Through: Mr. Tejas Karia, Ms. Ila Kapoor, Ms. Ananya Aggarwal & Ms. Shivika Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The present appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellant Division of the High Court Act, 2015 read with Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, has been preferred by the appellant against the order dated 20.12.2017 whereby the learned Singly Judge has refused to partially set aside the impugned Arbitral Award dated 21.08.2017.

2. The appellant-Union of India has averred that in order to promote the exploration of oil & natural gas, the Government of India announced the New Exploration Licensing Policy, 1999 ("NELP") to provide an even playing platform to both the public and private sector undertaking in the exploration and production of hydrocarbons. Bids were invited to the aforesaid exploration wherein the interested parties were required to submit Minimum Work Program ("MWP") Commitment; percentage of annual production which would be allocated to recovery of cost incurred to actualize the production; and share in profits offered to the appellant.

3. Upon entering into Award, the parties were required to enter into Production Sharing Contract ("PSC") to agree and accept that if the bidder fails to perform the MWP, it would pay to appellant the amount equivalent to the cost of unfinished MWP.

4. According to appellant, the MWP Commitment is based upon assumption of the actual reserve available for extraction of natural resource oil and gas from the womb of mother earth and identification of those points from which such resources may be extracted. Such identification of points is possible only after a thorough and detailed exploration of the acreage.

5. The appellant averred that the respondent company, being engaged in the business of oil and gas exploration and production, along with Mosbacher India, L.L.C. ("MIL") and Energy Equity India Petroleum Private Limited ("EEIPL") entered into a PSC dated 08.01.2001 with the appellant for exploration of hydrocarbons (crude and natural gas). Parties also entered into a Joint Operating Agreement on 08.01.2001. For the reasons EEIPL turned into default, its initial participating interest was

transferred to MIL and so, an addendum dated 20.10.2004 to the Joint Operating Agreement dated 08.01.2001, was entered between the appellant and the respondent as well as MIL.

6. Thereafter, the MIL also assigned 50% of its participating interest to the respondent herein thus, making the principal interest of MIL and the respondent in the ratio of 20:80. In this regard, a Deed of Assignment and Assumption dated 01.09.2004, was entered as an amendment 1 and 2 to the Product Sharing Contract dated 08.01.2001.

7. The appellant further averred that according to the Product Sharing Contract ("PSC") dated 08.01.2001, the exploration was to be completed over a period of seven years, beginning from 16.03.2001; subject to any extension pursuant to Article 3.6 thereof. The exploration work was divided into three phases, Phase-I was to be completed within a period of three years; and Phase-II and Phase-III were to be completed within two years each from the date when work under the previous phase was complete.

8. The appellant further contended that Phase-I was thus to be completed by 15.03.2004 and Phase-II was to start from 16.03.2004, which was to end on 15.03.2006. As per article 3.3 of Product Sharing Contract, the consortium was to carry out drilling of one exploration well in the second phase to at least one of the following depth:

i. 1300 meters;
ii. To basement;
iii. That point below which further drilling would become impractical due to geological conditions encountered.

9. The consortium was, however, not able to comply with the terms of the PSC and requested for grant of extension of time under Phase-II which

was to be considered by the Management Committee and accordingly, in its 6th meeting held on 07.12.2005, the Phase-2 work was extended for a period of six months, i.e. from 16.03.2006 to 15.09.2006, however, no condition for grant of first extension was imposed.

10. The appellant averred that as per PSC, only one extension was permitted and if the Contractor failed to perform its commitment, it would be settled with the liability envisaged and agreed in PSC.

11. During the aforesaid extended period, the Government of India vide New Exploration Police ("NEP"), 2006 dated 18.04.2006 considered proposal for grant of additional extension beyond the period of six months and thereby, offered option to the Contractor to safeguard its investments till the expiry of phase and seek extension to chase possibility of striking discovery and relieving of its liability to pay the amount equivalent to the unfinished MWP. However, the said extension was subject to the fulfilment of the certain conditions, including:

> i. furnishing 100% Bank Guarantee of the unfinished MWP; and
> ii. deposit 10% cash payment of the unfinished MWP; as agreed pre-estimated Liquidated Damages

12. The appellant has alleged that despite first extension in Phase-II, the respondent failed to carry out any drilling activity until 09.09.2006 in terms of MWP very well knowing that its commitment to explore well to the depth of 1300 meters was non-existent and will not be able to complete the MWP till 15.09.2006. The respondent vide letter dated 10.09.2006 requested the Director General of Hydrocarbons ("DGH") for grant of extension of time

for Phase-II by one month from 16.09.2006 till 15.10.2006 beyond the extension of six months already granted under the PSC, stating that the contract depth would be reached by 27.09.2006. In response thereto, the appellant vide letter dated 12.09.2006 granted extension making it clear that extension of six months was already given in conformity with the PSC and so, no further extension would be granted except the one granted under NEP, 2006, i.e. except the present one.

13. According to Article 5.10 of the PSC, the Contractor was under obligation to submit work program and budgets in relation to the petroleum operations to be carried out during the relevant year, within 90 days before the commencement of each year. The Contractor submitted R.E. 2006-2007 the cost of one exploration well, being USD 14,245,000 which was approved by the Management Committee and, therefore, the appellant calculated the liquidated damages on the said amount, being 10% of the total cost of unfinished MWP.

14. The respondent vide letter dated 13.09.2006, recognising the NEP, 2006 requested the waiver of liquidated damages claiming that the consortium would take only seven additional days to complete the unfinished work, against whereof expenditure USD 1.194 million was to be incurred.

15. The appellant has alleged that the consortium was well aware that the drilling program would not be completed but spud the well on 08.09.2006 even though second phase was expiring on 15.09.2006. The consortium approached the DGH for the first time on 10.09.2006 in complete ignorance of NEP 2006.

16. The DGH vide letter dated 14.09.2006 informed the respondent that there cannot be any waiver of liquidated damages and conditions of the NEP, 2006 must be accepted to avail the benefit of further extension, which was otherwise not available as per PSC. Further, the DGH informed the respondent that the cost of unfinished work program was being accepted subject to the submission of respondent regarding its ability to drill 825 meters by 15.09.2006, failing which pre-estimated liquidated damages would be imposed.

17. The respondent vide letter dated 15.09.2006 submitted the draft dated 14.09.2006 in the sum of Rs.55,10,357/- being equivalent to USD 119,401 towards liquidated damages.

18. The DGH vide letter dated 12.10.2006 informed the respondent about grant of extension from 16.09.2006 to 15.10.2006 for completion of unfinished work under Phase-I in terms of NEP, 2006. However, it was made clear that if the respondent did not fulfil MWP Commitment till 15.09.2006, it will have to pay the 100% cost of unfinished work program in accordance with Article 5.7 of PSC.

19. According to appellant, if the extension was not granted under NEP, 2006, the respondent would have been held liable to pay 100% cost for not completing the program before expiry of second phase. However, upon payment of 10% of the unfinished MWP, the Consortium exercised the option of completing the MWP and saving itself from the consequences. Thus, the act of the consortium to seek second extension to complete the MWP was a thoughtful commercial decision taken by the consortium at that point of time.

20. The appellant alleged that by 15.09.2006, the respondent was required to reach 8.25 meters of drilling, however, it could reach only 631 meters of depth drilling and even though it asserted that it would require seven days to complete the drilling; the second phase could be completed only by 22.10.2006, i.e. 37 days from the date of grant of extension, which is apparent from the End of Well Report submitted by the respondent.

21. The respondent had represented the cost of exploration as USD 1.194 million whereas in R.E. 2006-07, the cost of USD 14.245 million was given. Even though as per audited accounts of the respondent, the cost incurred was USD 12.447 million.

22. On 15.03.2008, the respondent relinquished the contract area after completing the third exploration phase. The DGH vide letter dated 09.06.2008 called upon the respondent to submit cost of completed wells by 20.06.2008 for the purpose of calculating the liquidated damages. Similar request was made vide letter dated 19.08.2008 and 28.03.2008 to the respondent to submit original and copies of acquired available data and information w.e.f. 15.03.2008 as per article 4.3 of PSC.

23. The respondent vide letter dated 27.08.2008 submitted the data with detailed calculation of liquidated damages already paid and balance payable damages based upon their audited accounts.

24. The appellant vide letter dated 29.07.2011 *post-facto* set off the decision of the DGH granting second extension of one month in Phase-II from 16.09.2006 till 15.10.2006, on the conditions previously imposed.

25. The DGH pursuant to the audited accounts came to know that the cost of unfinished MWP was USD 1,194,011, which was submitted by the

respondent at the time of seeking second extension in terms of NEP, 2006, was far less than the actual expenditure incurred by the respondent which was quoted as USD 12,474,652.

26. The appellant averred that as per provisions of NEP, 2006, the liquidated damages payable by the respondent were as under:-

Total No. of Drilling Days	43
Total Cost Incurred for Drilling in Second Phase	USD 12,447,792
No. of days excluded, as being a within the period of Second Phase	8 (08.09.2006 to 15.09.2006)
No. of days for which Liquidated Damages were payable in terms of NEP, 2006	35 (43-8)
Per day Cost Incurred for the Second Phase	USD 289,484
Total Cost Incurred for 35 drilling days	USD 10,131,924
Total Liquidated Damages (10% of total cost incurred for 35 drilling days)	USD 1,013,192

27. According to the appellant, after much deliberations with the appellant and DGH, the valuation of liquidated damages were calculated and vide letters dated 22.06.2012 and 18.07.2012, the DGH informed the Ministry of Petroleum and Natural Gas the basis of such calculation, which was finally approved by the appellant vide letter dated 04.09.2012. The

appellant further directed the DGH to recover the balance amount of liquidated damages to the tune of USD 893,791. Accordingly, the DGH vide letter dated 10.09.2012 asked the respondent to pay the balance amount of USD 893,791.

28. The DGH vide letter dated 10.09.2012 communicated that the appellant had approved the liquidated damages to the tune of USD 1,013,192, out of which out of which USD 119,401 was already paid by the respondent and the balance of USD 893,791 was payable by the respondent. The aforesaid demand was resisted by the respondent vide letter dated 11.10.2012.

29. Vide further communication dated 18.12.2012, the DGH informed the respondent that the information provided by the latter for calculation of liquidated damages and the number of days for completing the unfinished work under Phase-III was incorrect and misleading and also the liquidate damages demanded initially were only provisional in nature. The respondent vide letter dated 15.02.2013 paid the appellant a sum of Rs.4,76,30,122/- towards liquidated damages in lieu of grant of second extension under NEP, 2006.

30. The DGH vide letter dated 27.02.2013 advised the respondent to pay the differential amount of Rs.6,25,654/- along with interest, however, the respondent rejected the demand and instead invoked arbitration proceedings by sending arbitration Notice dated 06.06.2013.

31. The respondent in its statement of claims filed before the learned Arbitral Tribunal and prayed as under:

> ***i.*** *The respondent in its statement of claims filed before the learned Arbitral Tribunal sought a declaration that*

the demand of liquidated damages to the tune of Rs.119,401/- by the DGH vide letter dated 14.09.2006 was illegal and invalid and thereby sought to refund the aforesaid amount with interest @ 18 % per annum from 15.09.2006 till the date of award.

ii. *Further claimed that the demand of DGH vide letter dated 10.09.2018 seeking damages to the tune of USD 893,791 was illegal and invalid as the same was not made in accordance with Clause A.1(b) of NEP and thus, refund of the aforesaid amount was sought.*

iii. *The respondent claimed that the amount of liquidated damages were to be calculated on the basis of estimated cost for completion of the unfinished MWP for exploration of Phase-II as per Clause A.1(b) which was USD 51,172 as against the USD 893,791 and since the respondent have already deposited the amount of Rs.4,76,30,122/- on 15.02.2013, the balance was liable to be refunded to the respondent with interest @ 18% per annum from 15.02.2013 till the date of award.*

32. The learned Arbitral Tribunal vide impugned award dated 21.08.2017 held as under:-

i. *The claims of the Respondent for refund of Rs.55,10,357 (USD 119,401) deposited by Respondent towards pre-estimated Liquidated Damages pursuant to the Letter of demand of the DGH, dated 14.09.2006 as well as interest thereon, are barred by limitation;*

ii*. The contention of the Respondent pertaining to the existence of Force Majeure conditions and it entitlement to second extension on said ground was disallowed by the Arbitral Tribunal;*

iii. *The contention of the Respondent that there was no justification for recovery of Liquidated Damages as the Government of India / Appellant did not suffer any loss or damage, was rejected;*

iv. *It was accepted by the Arbitral Tribunal that in accordance with Article 3.6 of the PSC, only 1 (one) extension of maximum 6 (six) months was allowable by the Management Committee and any further extension could be granted only in accordance with NEP, 2006, subject to fulfilment of pre-requisite conditions as mentioned therein, inter alia, 100% Bank Guarantee and 10% cash payment as the agreed pre-estimated Liquidated Damages for the unfinished MWP;*

V. *It was held by the Arbitral Tribunal that Liquidated Damages required to be deposited by the Respondent under Category A.l (b) of the NEP, 2006 do not have the same connotation as Liquidated Damages governed by Section 74 of the Indian Contract Act, 1872. Liquidated Damages under Section 74 are recoverable only at the end of the contract, however, Liquidated Damages under the NEP, 2006 are levied during the course of the performance of the contract when the MWP for a particular phase has not been completed and extension has been sought to complete the unfinished MWP for the phase;*

vi. *The Tribunal held that it was open to the DGH to make a supplementary demand for the Liquidated Damages basis DGH's Letter dated 14.09.2006.*

33. The challenge to the aforesaid award by the appellant-Union of India is on the ground that even though the learned Arbitral Tribunal has held that the appellant is entitled to receive liquidated damages but the learned Tribunal has erred in computing the quantum of liquidated damages. The calculation adopted by the learned Tribunal is flawed, arbitrary and contrary to substantive law.

34. Learned Arbitral Tribunal vide impugned award dated 21.08.2017 by its majority award held that the claim of respondent of appellant DGH

seeking liquidated damages to the tune of USD 119,401 vide letter dated 14.09.2006 is barred by limitation and therefore, was disallowed. Further, held that the determination of liquidated damages by the DGH vide its letter dated 10.09.2012 amounting to USD 893,791 was not in terms of Clause A.1(b) of the NEP and so, recovery of USD 893,791 by DGH from respondent cannot be sustained. As per Clause A.1(b), the estimated amount of liquidated damages payable by respondent on the basis of estimated cost of completion of unfinished MWP for exploring Phase-II was determined as USD 51,172 against the demand of USD 893,791 and since the respondent had already deposited the amount of Rs.4,76,30,122/- on 15.02.2013 after adjusting the amount of USD 51,172, the balance was to be refunded by the DGH to the respondent.

35. Also held that the RBI Reference Rate for conversion of Rupee into Dollar on 15.02.2013 was Rs.53.9885, rounded off to Rs.53.99 for USD. The Indian Rupee equivalent to USD 51,172 at the RBI rate of Rs.53.99 prevailing on 15.02.2013 comes to Rs.27,62,776=28. After deducting this amount of Rs.27,62,776=28 from the sum of Rs.4,76,30,122=00 deposited by HOEC on February 15, 2013, the balance amount of Rs.4,48,67,345=72, which was paid in excess towards Liquidated Damages by HOEC to DGH, is refundable by DGH to HOEC.

36. The learned Tribunal also awarded interest on the amount of Rs.4,48,67,345=72 which is refundable by DGH to HOEC @ 12% per annum from February 15, 2013 till the date of the award and future interest @ 12% per annum on the said amount of Rs.4,44,35,425=72 from the date of the award till payment.

37. Further held that the demand by DGH for Rs.6,25,654/- towards difference in exchange rates is null and void. The said demand relates to payment of USD 893,791 which has been found as not sustainable and amount deposited by HOEC against the said demand has been found to be refundable to the extent of Rs.4,44,35,425=72 and in respect of USD 51,172 found payable as Liquidated Damages, Indian Rupee equivalent has been calculated at RBI referred rate of Rs.53.99. In the circumstances, the demand of Rs.6,25,654=00 made by DGH does not survive.

38. The appellant being aggrieved against the Arbitral Award, filed objections under Section 34(2)(b)(ii) of the Act before the learned Single Judge by filing O.M.P.(COMM) 457/2017, seeking partial setting aside of the Arbitral Award to the effect that the computation accepted by the Arbitral Tribunal is contrary to the Rule of Law and concepts of transparency and fairness. The appellant pleaded before the learned Single Judge that *vide* impugned Arbitral Award, the DGH was directed to refund the liquidated damages amounting to INR 4,48,67,345.72 and to pay interest @ of 12% per annum on the aforesaid amount *w.e.f* 15.02.2013 till the date of the Arbitral Award and future interest @ 12% per annum on the aforesaid amount from the date of the Arbitral Award till the payment, thereby dismissing the appellant's counter-claim.

39. The appellant also pleaded that the Tribunal had failed to appreciate that the respondent was granted extension of one month as stipulated under Category A.1, subject to the condition as stipulated in NEP, 2006.

> *"(i) The Contractor will provide 100% of the unfinished MWP as bank guarantee;*
>
> *(ii) 10% cash payment for the unfinished MWP as*

agreed pre-estimated Liquidated Damages."

40. The appellant further claimed that *vide* Letter dated 12.09.2006, the respondent had estimated expense of USD 14,245,333 and the DGH had asked the respondent to deposit its 10% towards liquidated damages for granting further extension. However, the learned Tribunal failed to appreciate that the DGH had only provisionally accepted the liquidated damages mentioned in Letter dated 14.09.2006 on the basis of actual cost allegedly incurred by the respondent on 10.09.2006.

41. The Tribunal also failed to consider that the respondent had failed to achieve its target undertaken *vide* Letter dated 13.09.2006 *i.e.* to drill depth of 825 meters upto 15.09.2006 and as such during the second extension, only 475 meters of drill depth was left to be undertaken. Thereby, the respondent had failed to meet its commitments enumerated in Letter dated 13.09.2006 and even after grant of further time of seven extra days to complete the drilling exercise, the work could be completed only after completion of 35 extra days and the respondent claimed cost of USD 289484 per day, which was more excessive than the number of days and cost assumed by the respondent.

42. The appellant also pleaded before the learned Single Judge that the Tribunal had ignored Letter dated 27.08.2008, whereby the respondent had admitted that balance liquidated damages are payable. However, the calculation of liquidated damages was changed from incurred costs (as specified in respondent Letter dated 13.09.2006) to the costs mentioned in the audited accounts. The actual per day cost incurred by the respondent for the year 2006-2007 was USD 289484 as has also been calculated by the DGH *vide* Letter dated 18.07.2012 (para k). However, the respondent while

seeking second extension under NEP, 2006 had highly under-estimated the drilling cost per day of USD 170753.

43. Also, the learned Arbitral Tribunal failed to consider that the liquidated damages calculated by the respondent was on the basis of vague assumptions by not considering that the respondent took 35 days extra instead of seven days to complete the work in second phase.

44. The learned Single Judge *vide* impugned order dated 20.12.2017 held that the interpretation given by the learned Arbitral Tribunal to the terms of NEP, 2006 cannot be said to be perverse. Further held that the High Court in exercise of its powers under Section 34 of the Act, cannot interfere with an award and substitute its view in place of interpretation accepted by the learned Arbitrator.

45. The challenge to the impugned order dated 20.12.2017 passed by the learned Single Judge is on the ground that the observation of the learned Single Judge that there can only be one interpretation in respect of NEP, 2006, deserves to be set aside as it has disregarded the concept of Public Policy, as envisaged in the case of ***Board of Control for Cricket in India vs. Cricket Association of Bihar***, (2015) 3 SCC 251.

46. Also, the learned Single Judge has incorrectly accepted the representations of the claimant in terms of number of days and cost based upon the second extension granted for one month. Also, did not consider respondent's letter dated 27.08.2008 and letter dated 14.09.2006 written to the appellant.

47. It is pleaded that Arbitral Tribunal and learned Single Judge failed to take note that as per the PSC dated 08.01.2001, the budget cost submitted by

the Contractor has to be considered for determining unfinished work and as per NEP, 2006, the DGH *vide* letter dated 12.09.2006 had asked the respondent to deposit 10% of the amount of USD 14245000 *i.e.* 1424500.

48. However, the learned Tribunal failed to consider that as per letter dated 14.09.2006, the 10% cost of Unfinished Work Program was calculated on the basis of actual cost allegedly incurred by the respondent on 10.09.2006, which was USD 119,401 and was provisionally accepted, thereby, the Arbitral Tribunal failed to consider that the estimated liquidated damages ascertained by the respondent, were provisional which were based upon the assumptions.

49. **During the course of hearing, learned senior counsel appearing on behalf of the appellant submitted** that the learned Arbitral Tribunal has erroneously overlooked that the respondent had calculated less number of extra drilling days and that too, at a much less per day cost. Learned senior counsel submitted that as per audit report submitted by the respondent for the year 2006-2007, the total number of drilling days during second exploration phase was 43.48 and the cost incurred is USD 12,474,652.04, which is exorbitantly higher than the estimate given by the respondent at the time of seeking second extension. The respondent made the appellant and DGH believe that only seven extra days would be required to finish the minimum work, however, it took 35 days to complete the unfinished work at the daily cost of USD 289,484, which is much more excessive than the number of days and cost assumed by the respondent.

50. Further submitted that the Tribunal has erred in holding that the liquidated damages paid at the time of second extension were not

provisional and also that the additional liquidated damages could not be calculated on the basis of audit accounts submitted by the respondent, which is in contravention of respondent's letter dated 27.08.2008.

> *"• Total number of drilling days during the Second Exploration Phase- 43 days*
> *• Drilling days during First Extension period (08.09.2006 to 15.09.2006) – 8 days*
> *• Drilling days during Second Extension Phase- 35 days*
> *• The total cost incurred- USD 12,447,792*
> *• The per day cost- USD289,484*
> *• Total Cost for 35 days- USD 10,131,924*
> *• Total Liquidated damages (10% of 10,131,924)- USD1,013,192*
> *• Liquidated damages paid in 2006 USD 19,401*
> *• Liquidated damages paid on 15.02,2013-USD893,791 (Rs.4,76,30,122)"*

51. Further submitted that the learned Tribunal incorrectly accepted the calculation submitted by the respondent and calculated it to the tune of USD 51,171 payable by the respondent and thereby, directed the appellant to refund Rs.4,48,67,345.72/-.

52. Learned senior counsel for the appellant submitted that the Tribunal, while rejecting its counter-claim, failed to take into account the conversion rate applied by the respondent at the time of making payment of additional liquidated damages, which was premised upon its own bank namely, Axis Bank Limited instead of Reserve Bank of India. In fact, as per Article 20.3 of PSC dated 08.01.2001, the exchange rate determined by RBI has to be taken and since the respondent had already paid additional amount of USD 893,791, the DGH was directed to refund an amount of Rs.4,48,67,345.72/- calculated at the RBI referral rate of 53.99, as prevalent on 15.02.2013. This

acceptance of calculation submitted by the respondent resulted in erroneous rejection of the counter-claim raised by the appellant before the Tribunal.

53. **To the contrary, learned counsel appearing on behalf of the respondent** submitted that while seeking extension of the second exploration phase under the NEP, 2006, it had deposited liquidated damages to the tune of INR 55,10,357 (equivalent to USD 119,401), which were calculated on the basis of estimated cost to complete the unfinished minimum work program. The appellant had accepted this and granted extension, however, after a lapse of six years, the appellant calculated the liquidated damages based upon actual cost and directed the respondent to deposit the balance amount equivalent to USD 893,791, which was deposited by the respondent under protest. However, again the appellant directed the respondent to deposit INR 6,25,654 due to difference in exchange rate, which was not deposited by the respondent against which the appellant invoked arbitration.

54. Learned counsel for the respondent submitted that the scope of review under Section 37 of the Arbitration Act is narrower than a Court hearing an application under Section 34 of the Act. The ground raised by the appellant fall outside the scope of interference and call for no interference by this Court. Learned counsel submitted that in NEP, 2006 there is no mention of re-calculating the liquidated damages based upon the audit costs.

55. Learned Single Judge has agreed with the Arbitral Award that the liquidated damages have to be determined at the time of grant of extension and since at the said time, only estimated costs are available, the liquidated

damages have to be calculated based upon the estimated cost of Unfinished Minimum Wage Program.

56. Learned counsel submitted that the actual cost incurred by the respondent to complete the unfinished MWP is less than the estimated cost and the respondent was unable to fulfil the assumptions that it would drill 825 meters by 15.09.2006 and as such there was no misrepresentation by the respondent.

57. The Tribunal, therefore, rightly referred to the End of Well Report to rebut its assumption that it would drill 825 meters by 15.09.2006. However, for calculating the actual number of days taken to drill the well based upon which the cost of UMWP was to be calculated, was not required to be considered. Also submitted that the Tribunal has applied the exchanged rate issued by the Reserve Bank of India and directed the appellant to refund the excess liquidated damages to the tune of INR 4,48,67,345.

58. **The submissions advanced by counsel representing both the sides were heard at length; and this Court has carefully perused the impugned order dated 20.12.2017 passed by the learned Single Judge as well as the Arbitral Award dated 21.08.2017.**

59. Pertinently, the appellant-Union of India challenged the Arbitral Award dated 21.08.2017 before the learned Single Judge to the limited extent it holds that the demand of Ministry of Petroleum and Natural Gas for liquidated damages to the tune of USD 893791 *vide* its letter dated 10.09.2012 was not in accordance with NEP, 2006; and thereby, directed the appellant to refund INR 4,48,67,345.27 *i.e.* USD 842,619 to the respondent

alongwith interest @ 12% p.a. from 15.02.2013 till the date of the award and future interest @ 12% from the date of award till the date of payment.

60. It is not in dispute that parties to the present appeal had entered into a Product Sharing Contract dated 08.01.2001 for exploration of natural resources of oil and gas. The exploration work was divided into three phases, Phase-I was to be completed within a period of three years; and Phase-II and Phase-II were to be completed within two years each and as per PSC, the respondent was required to complete minimum work program during first exploration phase. The respondent completed its first phase on 15.03.2004. However, it could not complete the second exploration phase till 15.03.2006 and therefore, sought further extension of six months till 15.09.2006 to complete the minimum wage program. In the meanwhile, NEP, 2006 was notified, which stipulated that the Contractor could get six months extension, subject to the condition of furnishing 100% bank guarantee and deposit 10% cash of the unfinished MWP.

61. The respondent *vide* letter dated 10.09.2006 sought extension of time to complete the second phase work, however, the DGH *vide* letter dated 12.09.2006 asked the respondent to furnish 100% bank guarantee and deposit 10% of liquidated damages in terms of NEP, 2006. The respondent *vide* its letter dated 13.09.2006 represented that by 15.09.2006, it will be able to drill 825 meters, thereby leaving unfinished MWP only to 475 meters and to complete the task, it would take seven additional days from 15.09.2006 for which it will incur cost of USD 1.194 million a day. In such circumstances, the appellant *vide* letter dated 14.09.2016 claims to have

called upon the respondent to submit 10% estimated liquidated damages on the cost/expenditure stated by the respondent in its letter dated 13.09.2006.

62. The appellant has claimed that the acceptance of amount towards the pre-estimated Liquidated Damages by the appellant vide its letter dated 14.09.2006 are provisional in nature.

63. It is relevant to note here the contents of letter dated 14.09.2006, relevant para whereof reads as under:-

> *"We are examining the details of cost submitted by you with respect to the R.E. 2006-07. At present we do not have any documentary evidence of the cost estimate on account of actual cost incurred. However, at present we agree with the details for calculation of LD on unfinished job. As per the calculation, the estimated cost to be incurred to reach 1300 mtr. Committed well depth comes to be US$1,194,011.*
>
> *Please confirm acceptance of condition of submitting 10% pre-estimated liquidated damage amounting US$ 119,401 immediately. Otherwise, block stands relinquished on 16.9.2006 and any activity thereafter will be violation of PSC. You may deposit demand draft of US$ 119,401 in favour of Pay & Accounts Officer, MOP&NG, payable at New Delhi. Further this cost of unfinished work programme has been accepted taking your submission that HOEC will be able to drill 825 mtrs. by 15.9.2006. In case it is not achieved, pre estimated LD will be changed accordingly."*

64. Also prior to the afore-noted communication dated 14.09.2006, the appellant vide letter dated 12.09.2006 had communicated to the respondent as under:-

> "*This is with reference to your letter No. CY-OSN-97/1 - 10906 dated September 2006 requesting for further extension of phase-II by upto one month. Please note that Management Committee (MC) held on 7.12.2005 approved the 1st extension of phase-II by 6 months i.e. (16. 3.2006 to 15. 9.2006) in accordance to the Article 3.6 of PSC. The extension was granted to complete the Minimum Work Programme (MWP) of phase-II i.e. to drill one exploratory well upto 1300 mtrs. or basement.*
>
> *XXXXXX*
>
> *As per the R.E. 2006-07 cost of one exploratory well is US$ 14,245,000 and US$3,43,8000 for testing of well. In your case liquidated damage comes as US$1,425,500 (i.e. 10% of the cost). Apart from LD, you have to agree to submit BG for US$14,245,000. You are requested to accept other conditions."*

65. Thereafter, vide its communication dated 29.07.2011, the respondent accepted *post facto* ratification of DGH decision of granting second extension from 16.09.2006 till 15.10.2006, on the same condition as mentioned in NEP, 2006. Relevantly, the appellant in none of its communications dated 12.09.2006, 14.09.2006 as well as 29.07.2011, mentioned that the liquidated damages were considered as 'provisional'.

66. The appellant has further claimed that the respondent was granted extension of time as per terms of NEP, 2006, where-under the Contractor was required to make payment of 10% of unfinished MWP as agreed as pre-estimated Liquidated Damages, but the Tribunal failed to consider Article 5.7 of the PSC dated 08.01.2001 which provides that the budget cost

submitted by the Contractor may be considered for determining unfinished work programme.

67. The learned Arbitral Tribunal on this aspect observed as under:-

> *"As. stated earlier under PSC the only provision for grant of extension of time for completion of the MWP for an Exploration Phase was that contained in Article-3.6 which provided for grant of extension by a period not exceeding six months. HOEC had availed the benefit of extension for a period of six months for completing the MWP for Phase-II under Article 3.6. Since there was no provision for grant of further extensions under PSC and HOEC had failed to obtain further extension for one month on the ground of Force Majeure the only course open for HOEC was to comply with the requirements of Article-5.7 of PSC wherein it is provided:*
>
> XXXXX
>
> *The NEP applied uniformly to proposal for extension under the PSC which were currently valid and were at various stages of exploration. It is in the nature of beneficial provision where under a Contractor /Operator is able to seek further extension and thereby avoid the liability for an amount equal to the amount which would be required to complete the unfinished MWP for the particular Exploration Phase as is contemplated by Article -5.7 of PSC, NEP serves a dual purpose."*

68. This Court finds that as per Article 5.7 of PSC dated 08.01.2001, in order to evaluate / determine the amount which would be required to complete said MWP, relevant information including the proposed budget has to be taken into account. But since the respondent had chosen to opt for

NEP, 2006, on deposit of 10% of the estimated Liquidated Damages, it was able to avoid the liability to pay the amount equal to the unfinished MWP.

69. In aforesaid facts and situation of the case and in view of the fact that the respondent was unable to fulfil its assumption vide letter dated 13.09.2006, and vide letter dated 15.09.2006 respondent stated that completion of unfinished work shall take more seven days, which shall incur expense of USD 1,194 Million and agreed to extend the existing bank guarantee for USD 6.74 million related to unfinished minimum work, premised whereupon the estimated cost to be incurred to reach 1300 mt. committed well depth comes to USD 1194,011; so, the respondent was required to deposit USD 119401, equivalent to Rs.55,10,357 as 10% of pre estimated cost, which the respondent deposited on 15.09.2006 under protest.

70. On the asking of the appellant, the respondent furnished audited accounts, as per which cost of 35 days for drilling the work was determined as USD 10,131,924; 10% whereof was USD l,013,192. After deducting amount of USD 119401 (already deposited) from USD l,013,192 (as per audited accounts), the appellant called upon the respondent to deposit USD893,791, in terms of Clause A.1(b) of the letter dated 14.09.2006 written by the DGH to the respondent, as has been noted in Para-64 above.

71. In our considered opinion, the learned Arbitral Tribunal has rightly noted that the appellant/DGH vide letter dated 14.09.2006 has observed that the amount of USD 119401 has been determined as pre-estimated Liquidates Damages, on the basis that respondent would drill 825 mt. by 15.09.2006 and if failed, then the cost will be revised. The respondent by 15.09.2006 was able to drill 631 mt. The respondent's claim of damages to

USD893,791 by DGH is premised upon total drill cost uptil depth of 1300 mr. based upon audited accounts, whereas it should have been calculated on the basis of estimated cost of unfinished MWP which is from 631 mt. till 1300 mt. On the basis of calculation sheets provided by the parties, the Tribunal has rightly held that 9.85 days were required to drill the remaining 679 mt., the estimated cost whereof would be USD1,705,730 and after deducting the amount of USD119401 by the respondent on 15.09.2006, the balance amount of USD51,172 was required to be paid by the respondent.

72. So far as challenge to the grant of rate of interest @12% w.e.f. 15.02.2013 by the learned Tribunal is concerned, the learned Single Judge has observed that the appellant in its counter claim had claimed interest @18%, however, averred that as per Clause 1.7.3 of Appendix C to the PSC, the parties shall be provided compound interest on daily basis, was to be awarded and held that the appellant in its objection petition there was no reference to Clause 1.7.3. Therefore, in our opinion, the appellant cannot be now permitted to agitate its claim for 18% interest.

73. Finding no error in the impugned judgment dated 20.12.2017, the present appeal is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 24, 2024
r