2023:DHC:4018

$~ (Original)

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

Pronounced on: 2nd June 2023

\+ O.M.P.(EFA)(COMM.) 1/2019 & EX.APPL.(OS) 583/2019, EX.APPL.(OS) 1012/2020, EX.APPL.(OS) 1411/2021, I.A.3665/2019, I.A.3668/2019

THE UNION OF INDIA ..... Decree Holder

Through: Mr. Sanjay Jain, ASG with Ms.Mamta Tiwari, Ms. Swati Sinha, Mr.Vijay Kumar, Mr. Debesh Panda, Mr. Anurag Ahluwalia, Mr. Padmesh Mishra, Mr. Arkaj Kumar, Advs.

versus

RELIANCE INDUSTRIES LTD. & ANR.

..... Judgment Debtors

Through: Mr. Harish N. Salve, Sr. Adv. assisted by Mr.Sameer Parekh, Ms.Sonali Basu Parekh, Mr.Abhiram Naik, Mr.Ishan Nagar, Mr.Manu Bajaj and Mr.Prateek Khandelwal, Ms.Chetna Rai, Ms. Madhuriand Mr. Aruj Mal, Advs. for R-1 & 2

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T

% 02.06.2023

ACRONYMS USED IN THIS JUDGEMENT	
AT	Arbitral Tribunal
CI	Cumulative Investment
CNCI	Cumulative Net Cash Income
CP	Cost Petroleum
CRL	Cost Recovery Limit
DC	Development Cost

EC	Exploration Cost
EPOD	Expanded Plan Of Development
FPA	Final Partial Award
IM	Investment Multiple
IPOD	Initial Plan Of Development
MC	Management Committee
NIA	Notice Invoking Arbitration
NIT	Notional Income Tax
PC	Production Cost
PO	Procedural Order
PSC	Production Sharing Contract
PP	Profit Petroleum
RIL	Reliance Industries Ltd
SOC	Statement of Claim

1. This judgment adjudicates EA (OS) 583/2019, EA (OS) 1012/2020, EA (OS) 1411/2021, IA 3665/2019 and IA 3668/2019, in the present Execution Petition OMP (EFA) (Comm) 1/2019, preferred by the Union of India under Section 48[1] of the Arbitration and

[1] **48. Conditions for enforcement of foreign awards**. –
(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that—
(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
(2) Enforcement of an arbitral award may also be refused if the Court finds that –
(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
(b) the enforcement of the award would be contrary to the public policy of India.
Explanation 1. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -
(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

Conciliation Act, 1996 ("the 1996 Act"), seeking enforcement of a Final Partial Award passed by the learned Arbitral Tribunal ("the learned AT") on 12th October 2016 ("the 2016 FPA").

2. There is no dispute that the 2016 FPA does not specifically award any amount to the petitioner. The Execution Petition, nonetheless, claims, in para 7, that an amount of US $ 2314040750 is payable to the petitioner by the respondents-Judgment Debtors under the 2016 FPA, and seeks recovery thereof.

3. The respondents contend that such an execution petition is unknown to law. Briefly stated, the respondents' contention is that the 2016 FPA is one in a series of FPAs rendered by the learned AT in the arbitral proceedings between the parties. A reading of the 2016 FPA, conjointly with prior and later FPAs rendered by the learned AT, submits the respondents, discloses that, even as on date, the amount finally payable by either party to the other, in the arbitral proceedings, is yet to be determined. The petitioner, according to the respondents, is seeking to capitalize on certain interim findings of the learned AT, which are, even under the 2016 FPA, subject to the decision to be rendered on other claims of the respondents against the petitioner, regarding which the learned AT has specifically reserved

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(ii) it is in contravention with the fundamental policy of Indian law; or
(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (*e*) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

jurisdiction in the 2016 FPA itself. The petitioner cannot usurp this jurisdiction and work out, on its own basis, an intermediate amount allegedly payable by the respondents to it, and seek its recovery by execution. The exercise undertaken by the petitioner in the present Execution Petition is, therefore, according to the respondents, not only without authority of law, but is contrary to the terms of the 2016 FPA itself, read with subsequent FPAs issued by the learned AT.

4. I agree.

5. To me, too, it appears, on the face of it, that the present Execution Petition would not be maintainable for a variety of reasons, which I would elucidate presently. I also agree with the respondents that allowing the petitioner's prayer would be contrary to the 2016 FPA, as well as other FPAs and orders subsequently issued by the learned AT. The Execution Petition is also, therefore, in my considered opinion, premature.

6. In that view of the matter, I do not intend to enter into the intricacies of the disputes between the petitioner and the respondents, which are varied and involved. The recital of facts, hereinafter, would, therefore, be restricted to the extent necessary.

Facts

<u>The contractual backdrop, in brief</u>

7. Rights in petroleum situated below the surface of the earth, as a natural resource, vest in the Government. Two Production Sharing Contracts (PSCs) were, however, executed between the petitioner and a conglomeration of the respondents RIL, British Gas Exploration and Production India Ltd (BGEIPL) [which acquired interest from Enron Oil & Gas India Ltd (EOGIL) in 2002] and Oil & Natural Gas Corporation Ltd (ONGC) ("the contractors", collectively), with participating interests of 30%, 30% and 40% respectively, as per Article 1.63[2] of the PSCs. These PSCs permitted the contractors to extract oil from the Tapti and Panna Mukta Oil Fields. The contractors were to extract the oil at their own cost, recoverable as "Cost Petroleum" (CP), in the manner specified in the PSCs, from the petitioner; subject, however, to a specified upper Cost Recovery Limit (CRL). Additionally, the contractors and the petitioner would be entitled to shares in the profit earned by sale of the extracted petroleum – referred to as "Profit Petroleum" (PP). These shares were to be determined on the basis of an Investment Multiple (IM), to be calculated as per the formula provided in the PSCs.

Some relevant terms of the PSCs [Reference is made to the provisions of the Tapti PSC. The Panna Mukta PSC has similar provisions.]

8. Article 7.1(a) grants the contractors the exclusive right to carry out petroleum operations in the Contract Area and to recover costs

[2] **1.63** "Participating Interest" means the percentage of participation of the constituents of the Contractor at any given time in the rights and obligations under this Contract. Initially the Participating Interest of the constituents of Contractor are as follows:

1.	ONGC	40%
2.	RIL	30%
3.	EOGIL	30%

and expenses as provided in the PSCs.

9. Article 13.1 entitled the contractors to recover Contract Costs in each Financial Year. "Contract Costs" was defined, in Article 1.21 as meaning "Exploration Costs, Development Costs, Production costs, and all other costs related to Petroleum Operations as set forth in Section 3 of the Accounting Procedure". Of these, while Exploration Costs (EC) and Production Costs (PC) were permitted to be recovered in full, Article 13.1.1[3] capped the DC which the contractors could claim by the Cost Recovery Limit (CRL). CRL was defined in Article 13.1.2[4], and originally fixed, in the PSC, as US $ 545 million for the Tapti PSC and US $ 577.5 million for the Panna Mukta PSC. Article 13.1.3[5] enumerated the assumptions on the basis of which the CRL

[3] **13.1.1** Development Costs incurred by the Contractor in the Contract Area shall be aggregated, and the Contractor shall be entitled to recover out of Cost Petroleum the aggregate of such Development Costs at the rate of one hundrerd percent (100%) per annum, provided, however, that, subject to the remaining provisions of this Article 13.1, the Contractor shall not, for the purposes only of determining the value of Petroleum to which Contractor shall be entitled under Articled 13.1 as Cost Petroleum, claim as Contract Costs Contractor's Development Costs incurred after the Effective Date in connection with Development Operations under the Development Plan for mid- and south-Tapti Fields (as those Fields are determined in the Development Plan first approved by the Management Committee) which exceed Contractor's Cost Recovery Limit (as hereinafter defined).

[4] **13.1.2** For the purposes of this Article 13.1, Contractor's "Cost Recovery Limit" means costs incurred after the Effective Date relating to the construction and/or establishment of such facilities as are necessary to produce, process, store and transport Petroleum from within the Existing Discoveries, in order to enable Gas production of 4.2 million cubic metres per day in accordance with the Development Plan for the mid-and south-Tapti Fields. Such costs shall include costs incurred in relation to those items illustrated in Appendix "G", including the 30 additional infill wells, and matters in connection therewith. Appendix G further describes Companies' development concept based on an assumed project start date of July 1, 1993, and Parties understand and agree that the schedules and activities contained in such assessment shall be revised, subject to Management Committee approval, by the Contractor in Contractor's Development Plan first submitted pursuant to this Contract.

The Parties agree that for the purposes of this Article 13.1 the Contractor's Cost Recovery Limit shall be the sum of Five Hundred Forty-five Million U.S. Dollars (US$545,000,000).

[5] **13.1.3** The Parties acknowledge that the amount representing Contractor's Cost Recovery Limit has been agreed by Contractor on the basis of the following assumptions and/or factors and/or information:

(a) Included in calculations for the Cost Recovery Limit are costs relating to Gas compression offshore required for delivering GAS into GAIL's pipeline system and an onshore pig trap; excluded from the Cost Recovery Limit are Site Restoration and exploration or appraisal drilling:

(b) the Cost Recovery Limit does not include any costs for the development of any satellite Fields;

(c) the contractor being able to obtain all necessary approvals (including Government and

had been fixed. Importantly, Article 13.1.4(c) entitled the contractors to seek increase in the CRL "in the event that the Contractor's Cost Recovery Limit is exceeded as a result of

(i) delays in carrying out the Development Operations referred to in Article 13.1.3(c) due to a delay in obtaining any necessary approval;

(ii) material changes to the Development Plan for the mid- and south-Tapti Fields necessitated by the Contractor's review of data provided, if any, to the Companies by the Government and/or ONGC after the Effective Date available prior to the Effective Date then the Companies, acting reasonably, would have included such changes in the Development Plan for the mid- and south- Tapti Fields;

(iii) a material change to the international market conditions referred to in Article 13.1.3(e),

(iv) a variation to the Development Plan for the mid and south-Tapti Fields approved by the Management Committee; or

(v) an event of *force majeure* as provided in Article 31."

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state government approvals) to enable Contractor to carry out the Development Operations contemplated by the Development Plan for the mid- and south-Tapti Fields in accordance with the timing set out in such plan;

(d) the data relating to the Contract Area provided by ONGC from time to time prior to the Effective Date inclusive of the data package pertaining to the Contract Area prepared by ONGC and made available for inspection and purchase by the Companies pursuant to the Government's "Notice Inviting offers for Joint Ventures to Develop Medium – Sized oil and Gas Field in India, 1992";

(e) international market conditions relating to the availability and cost of materials and services in the international petroleum industry in constant 1993 United States Dollars;

(f) the range of physical reservoir characteristics in respect of the Oil and Gas Fields comprising the Existing Discoveries not being materially different from the ranges for such characteristics as revealed in the data referred to in Article 13.1.3(d) on which Companies based their assessment as described in Annex G-1 to Appendix G; and

(g) Companies' development concept contemplated use of existing ONGC-owned facilities for reseparation and handling of Condensate and Gas upon it's arrival at Hazira. ONGC and Companies will determine a payment, terms and conditions for the use of processing and treating facilities owned by ONGC, which payment shall be based on the principles detailed in Appendix I, or alternatively the Contractor install the necessary facilities, the cost of which shall be cost recoverable and not subject to the Cost Recovery Limit.

10. Article 13.1.5 envisaged reference of disputes to arbitration "in the event that:

(a) there is any dispute between the Parties whether or to what extent a circumstance referred to in Article 13.1.4(c) has arisen or resulted in the Contractor's Cost Recovery Limit being exceeded; or

(b) the Management Committee is unable to agree whether an increase should be made to the Contractor's Cost Recovery Limit or is unable to agree on the amount of any such increase".

11. Article 14 of the PSCs dealt with sharing of PP. Article 14.1 stipulated that the share of the Government and the contractors in the PP, in any Financial Year, would be calculated on the basis of the Investment Multiple ("IM", hereinafter) actually achieved by the contractors at the end of the preceding financial year for the contract area, as provided in Appendix D. Appendix D provided the following formula for calculating the IM (hereinafter "the IM equation"):

$$IM = \frac{\text{Cumulative Net Cash Income (CNCI)}}{\text{Cumulative Investment (CI)}}$$

where,

(i) as per Appendix D Clause 2[6] of the PSCs, the CNCI was

[6] The "Net Cash Income" of the Companies from the Contract Area in any particular Financial 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) incidental income of the Companies of the type specified in Section 3.4 of the

calculated as the sum total of the respondents' share in the CP, PP and Incidental Income, less the respondents' share in the Production Costs and respondents' Notional Income Tax (NIT), in other words,

> CNCI = (Respondent's share in CP) + (Respondents' share in PP) + (Respondents' share in Incidental Income) – (Respondents' share in Production Costs) – (Respondents' NIT), and

(ii) Appendix D Clause 3[7] worked out the CI as the sum of the Exploration Cost (EC) and the Development Cost (DC), of which the DC was capped by the CRL.

12. Clause 14.2 of the PSCs made the respective shares of the petitioner and the contractors in the PP was dependent on the IM at the end of the Financial Year, as per the following scheme:

Article of concerned PSC	**IM**	**Petitioner's share in PP**	**Contractors' share in PP**
Panna Mukta PSC			
14.2.1	< 2.0	5%	95%
14.2.2	≥ 2.0 but < 2.5	15%	85%
14.2.3	≥ 2.5 but < 3.0	25%	75%
14.2.4	≥ 3.0 but < 3.5	40%	60%
14.2.5	≥ 3.5	50%	50%

Accounting Procedure arising from Petroleum Operations and apportioned to the Contract Area, less
(iv) the Companies' share of all Production Costs and royalty/cess payments incurred on or in the Contract Area;
(v) 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;

[7] The "Investment" made by the Companies in the Contract Area in any particular Financial Year is the aggregate value for the year of:
(i) Exploration Costs incurred by the Companies in the Contract Area and apportioned to the Contract Area in the same proportion that said Costs were recovered pursuant to Articles 13.2 and 13.3.
plus
(ii) Development Costs incurred by the Companies in the Contract Area.

Tapti PSC			
14.2.1	< 2.0	20%	80%
14.2.2	≥ 2.0 but < 2.5	40%	60%
14.2.3	≥ 2.5 but < 3.5	45%	55%
14.2.4	≥ 3.5	50%	50%

Sequence of Proceedings

13. Arbitral proceedings, within the meaning of the 1996 Act, commenced with the tendering of Notice of Arbitration dated 16th December 2010 by RIL and BGEIPL, the respondents herein, on the petitioner, under Section 21. The disputes between the petitioner and the respondents, according to the Notice of Arbitration, related to the manner in which the IM was to be calculated, particularly regarding the manner in which the DC and NIT were to be reckoned, apart from incidental and ancillary issues. In due course of time, the learned AT, consisting of three learned Members, was constituted.

14. Statement of Claim (SOC) was filed by the respondents before the learned AT on 5th August 2011. The reliefs sought by the respondents, in the SOC, were essentially declaratory in nature. Shorn of specific details, the respondents sought, from the learned AT, declarations that

(i) in working out the CI, which formed the denominator in the IM equation, the DC was not required to be capped by the CRL, but could include all DCs incurred by the respondents in the relevant Financial Year,

(ii) the Tapti CRL did not apply to DC incurred after 31st

December 2011 or 31st March 2012, and that all DCs incurred thereafter were fully recoverable,

(iii) DCs included expenses incurred in connection with

(a) early activities for post-Phase I expansion,

(b) recompletions involving zone transfers in 2001-02,

(c) recompletions in 2003-04,

(d) temporary compression,

(e) STD[8],

(f) Mid-Tapti early activities,

(g) infill wells in 2005-06 and

(h) NRPOD[9],

(iv) alternatively, that the Tapti CRL applied only DCs incurred in respect of works listed in Appendix G to the Tapti PSC, and that all DCs in excess thereof were fully recoverable,

(v) the Panna Mukta CRL did not apply to DCs incurred after 31st December 1999 or 31st December 2000, and that all DCs incurred thereafter were fully recoverable,

(vi) alternatively, that the Panna Mukta CRL applied only to DCs incurred in respect of works listed in Appendix G to the Tapti PSC, and that all DCs in excess thereof were fully recoverable,

(vii) the NIT, constituting a subtrahend in the numerator in the IM equation, included expenditure incurred in respect of physical assets used in connection with the exploration activities would include expenditure on wellhead platforms and

[8] Referring to the fourth Platform in South Tapti
[9] New Revised Development Plan, approved by the MC for Tapti on 15th March 2005

wells, but exclude expenditure on processing platforms, pipelines and living quarters,

(viii) the contractors' right to take provisional delivery, each quarter, of their CP entitlement under Article 13.10[10] of the PSCs was not conditional on approval by the MC,

(ix) similarly, the provisional allocation of PP by the contractors each quarter under Article 14.3[11] of the PSCs was not conditional on approval by the MC of the manner in which the IM achieved at the end of the preceding Financial Year had been calculated by the Contractors, and

(x) the respondents had not breached Articles 13.10 or 14.3 of the PSC.

15. Four counter-claims were filed by the petitioner. We need not, for the purposes of this judgment, concern ourselves with their content in explicit detail.

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[10] **13.10** Pending completion of the calculations required to establish definitively the Contractor's entitlement to Cost Petroleum from the Contract Area in any Financial Year, the Contractor shall take delivery, provisionally, of volumes of Crude Oil and/or Natural Gas representing its estimated Cost Petroleum entitlement calculated with reference to estimated production quantities, costs and prices for the Contract Area as established by the Contractor and approved by the Management Committee. Such provisional determination of Cost Petroleum shall be made every quarter on a cumulative basis. Within sixty days of the end of each Financial Year, a final calculation of the Contractor's entitlement to Cost Petroleum, based on actual production quantities, costs and prices for the entire Financial Year, shall be undertaken and any necessary adjustments to the Cost Petroleum entitlement shall be agreed upon between the Government and the Contractor and made as soon as practicable thereafter.

[11] **14.3** The value of the Companies' Investment Multiple at the end of any Financial Year in respect of the Contract Area shall be calculated in the manner provided for, and on the basis of 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 a cumulative 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 Financial 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 19 and 21 for Crude Oil and Natural Gas, respectively, shall be used. Within sixty (60) days of the end of each Financial Year, a final calculation of Profit Petroleum based on actual costs, quantities, prices and income for the entire Financial Year shall be undertaken and any necessary adjustments to the sharing of Profit Petroleum shall be agreed upon between the Government and the Contractor and made as soon as is practicable thereafter.

16. As already noted, various FPAs came to be passed by the learned Arbitral Tribunal, on various issues, from time to time. The first FPA in the arbitral proceedings between the parties came to be rendered on 12th September 2012. Certain issues were framed in the said FPA, of which three issues were addressed in FPA dated 10th December 2012 ("the 2012 FPA", referred to, in the 2016 FPA, as the "CRL award").

17. The 2012 FPA returned the following findings/declarations, in para 12 (to the extent relevant):

> "A. By a majority, the Tribunal, subject to what is stated in Paragraph B below:
>
> 1. in respect of the Tapti PSC:
>
> i. **finds** that on a true construction of the terms of Article 13.1.1 and Article 13.1.2 of the Tapti PSC, costs incurred after the Effective Date related to the construction and/or establishment of such facilities as are necessary to produce, process, store and transport Petroleum from within Existing Discoveries in order to enable gas production above the Tapti IPOD[12] Plateau Level are fully recoverable;
>
> ii. **finds** that the determination of these costs should be made at the time approval for such work is sought or obtained from the Management Committee and by reference to the stated purpose of the work at that time;
>
> iii. **finds** that where direct G&A and direct Service Costs are properly allocated as Development Costs, they would be recoverable in full by virtue of Article 13.1.1, 13.5 and 13.6 of the

[12] Initial Plan of Development

Tapti PSC unless they come within the CRL;

iv. **finds** as for indirect G&A and other Service Costs, where these costs are necessary for the production of gas at the IPOD Plateau Level, they would come within the CRL. If they are not, they do not come within the limit and are recoverable in full;

v. **finds** the CRL is a lump sum;

2. These findings **apply** mutatis mutandis, to the Panna Mukta PSC. If there were other costs which were necessary to enable oil production of 38,300 barrels of oil per day to be achieved, even though they did not fall within Appendix G, they will be capped.

3. The Claimants had no obligation to complete the Appendix G works under either the Tapti or the Panna Mukta PSC.

B. Notwithstanding the conclusions referred to in Paragraph A above, **orders** that whether the Claimants are entitled on the merits either in law and/or on the facts to succeed in their claim for Development Costs as falling outside the CRL depends upon the Tribunal's subsequent determination following further pleadings, evidence and submissions on the Claimant's entitlement to the same."

18. On 13th January 2014, the learned AT issued a Procedural Order setting out the following sequence for further arbitral proceedings, in a tabular fashion:

(i) Pleadings and filing of skeletal arguments would be completed by 17th October 2014. Thereafter, the following sequence was envisaged:

S.No	Date by	Action	Party
7	Either: a) 3 to 21 November 2014 in London; or	Hearing on the issues to be heard at the November 2014 hearing	Claimants Respondent Tribunal

	b) 1 to 22 November 2014 (including 1, 8, 15 and 22 November 2014 as hearing days) in London if by 17 September 2014, the Delhi High Court and the Supreme Court of India have rendered their decisions on the issues of royalties, cess and service tax and subject to the outcome of the OMP No 46 of 2013 in SLP No 20041 of 2013.	as set out in Table 2 below	
8	Provided the November 2014 hearing includes the issues of royalties, cess and service tax, the Tribunal to issue an award for the issues are at the November 2013 and November 2014 hearing and within three weeks of the release of the Tribunal's award	Any application for an increase in the CRL pursued by the Claimants	Claimants
9	Within two weeks of an application by the Claimants for an increase in the CRL, hearing dates in the period between September 2015 to December 2015 to be fixed *for the hearing of implications for accounts including the re-statement of accounts, re-calculation of the Investment Multiple, Profit Petroleum and Cost Petroleum arising from the Tribunal's*		Claimants Respondent Tribunal

	award in respect of all the issues and the award on the application for an increase in the CRL.		
10	15 June 2015 to 3 July 2015 (which dates may be subsequently revised)	Hearing on the issues to be heard at the June/July 2015 hearing as set out in Table 2 below	Claimants Respondent Tribunal
11	Hearing dates as fixed in the period between September 2015 to December 2015 pursuant to para 9 above	Hearing on the issues to be heard as set out in Table 2 below	Claimants Respondent Tribunal

(ii) Table 2, below Table 1 (part of which has been extracted hereinabove) set out the issues which were to be heard on various dates. The hearing fixed for 3rd to 21st November 2014 or, in the alternative, 1st to 22nd November 2014, was to address, among other things,

> "CRL:
>
> a) Liability – application of CRL based on the Tribunal's award of 10 December 2012 (as clarified on 23 July 2013)
>
> b) Quantum – which Development Costs incurred by the Contractor are inside the CRL and which are outside the CRL"

Regarding further hearings, Table 2 stipulated as under:

15 June 2015 to 3 July 2015 in London (which dates may be subsequently revised) Hearing to commence at 9:30 am	Hearing on either: a) The issues of royalties, cess and service tax in the event these issues have not been heard in November 2014 *and the Claimant's application (if any) for increase in the CRL*; or *b) implications for accounts including the statement of accounts, recalculation of the Investment Multiple, Profit Petroleum and Cost Petroleum arising from the Tribunal's award in*

	respect of all the issues
Hearing dates between September 2015 December 2015 as fixed pursuant to paragraph 9 of Table 1 above	Hearing, in the event the June/July 2015 hearing is on the issues of royalties, cess and service tax at the Claimant's application for an increase in the CRL, *or implications for accounts including re-statement of accounts, re-calculation of the Investment Multiple, Profit Petroleum and Cost Petroleum arising from the Tribunal's award in respect of all the issues at the then application by the Claimants for an increase in the CRL is made, the award in respect thereof*

The aforesaid Procedural Order was communicated to the parties under cover of letter dated 13th January 2014 which required the parties to note, among other things, the holding of additional hearing tranches "*on implications for accounts including re-statement of accounts, re-calculation of the Investment Multiple, Profit Petroleum and Cost Petroleum arising from the Tribunal's award in respect of all the issues and if an application by the Claimants for an increase in the CRL is made, the award in respect thereof*".

The Impugned Award

19. Thereafter, the 2016 FPA, of which the petitioner seeks enforcement, came to be issued on 12th October 2016, by a majority of two learned that Arbitrators to one. 69 issues were framed by the learned AT. The FPA concluded with 63 findings, numbered 74.1 to 74.63. To the extent relevant, para 74 of the 2016 FPA may be reproduced thus:

> "The Tribunal has carefully considered the entire evidence and all the submissions of the Claimants and the Respondent and rejecting all submissions to the contrary, hereby makes, issues and publishes this Formal Final Partial Award and for the reasons set out above **FINDS, DECLARES, DIRECTS, AWARDS, ORDERS, *RESERVES*** and **DISMISSES** as follows:

74.1 Finds and Declares that for the purposes of calculating the Investment Multiple, the Development Costs referred to in paragraph 3(ii) of Appendix D are limited to those Development Costs which are recoverable by the Claimants in the form of Cost Petroleum under Article 13 of the PSCs, i.e. capped by the CRL (where the CRL applies);

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74.4 Finds and Declares when calculating their Investment Multiple, the income tax rates which are actually applicable to the Companies under the Income Tax Act are to be applied;

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74.15 Finds and Declares that the provisional recovery of Cost Petroleum at the provisional allocation of Profit Petroleum carried out each quarter under Article 13.10 and 14.3 of the PSCs respectively, do not require prior Management Committee approval;

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74.18 Finds and Declares in respect of Tapti that the Claimants are estopped from departing from the common understanding of the basis for determining the applicability of the CRL, namely that the CRL applies to Development Costs incurred in respect of works listed in either the IPOD or Appendix G;

74.19 Finds, in respect of Tapti, that the Claimants are entitled to advance their alternative claim for Development Costs on the basis of Appendix G;

74.20 Finds and Declares in respect of Tapti that:

a. the Claimants are entitled to recover Development Costs in the sum of USD 15.28 million as the works in respect of which these costs had been incurred, were outside Appendix G and hence outside the CRL;

b. the Claimants are entitled to recover Development Costs in the sum of USD 216,076,276.00 as the works in respect of which these costs had been incurred, were outside Appendix G and hence outside the CRL;

c. the Claimants are entitled to recover Development

Costs in the sum of USD 121.43 million as the works in respect of which these costs had been incurred were outside Appendix G and hence, outside the CRL;

d. the Claimants are entitled to recover Development Costs in the sum of USD 22.94 million as the works in respect of which these costs had been incurred were outside Appendix G and hence, outside the CRL;

e. the Claimants are entitled to recover Development Costs in the sum of USD 7.98 million outside the CRL;

f. the Claimants are entitled to recover Development Costs in the sum of USD 13,593,497.12 outside the CRL;

74.21 Finds and Declares in respect of Panna Mukta that the Claimants are estopped from departing from the common understanding of the basis for determining the applicability of the CRL, namely that the CRL applies to Development Costs incurred in respect of works listed in either the IPOD or Appendix G;

74.22 Finds, in respect of Panna Mukta, that the Claimants are entitled to advance their alternative claim for Development Costs on the basis of Appendix G;

74.23 Finds and Declares in respect of Panna Mukta that:

a. the Claimants are entitled to recover Development Costs in the total sum of USD 634,414,472.00 in respect of which are outside Appendix G and/or the IPOD and hence outside the CRL;

b. further Development Costs in the total sum of USD 1,195,035,528.00 have been incurred in respect of which are inside Appendix G and/or the IPOD and are hence subject to the CRL;

*****

74.40 Finds and Orders:

a. the Respondent to reimburse, under Article 15.6.1 of the PSCs, the total sum of INR 116,577,521 in respect of Cess paid by the Contractor in excess of the sum of INR 900 per metric ton as the result of the imposition of Cess under Section 93(1) of the 2004 Act and Section 138(1) of the 2007 Act;

b. That the above total sum be allocated amongst the constituents of the Contractor in accordance with their profit share entitlement under the PSCs i.e. 40% of the sum of INR 116,577,521 is to be allocated to ONGC, 30% of the sum of INR 116,577,521 to RIL and 30% of the sum of INR 116,577,521 to BG;

*****

74.43 Reserves the issue as to whether the Claimant is are entitled to the reliefs they seek in respect of Service Tax for determination together with any application the Claimants may make for an increase in the CRL;

*****

74.56 Reserves for determination the issue:

a. In respect of the alleged incorrect calculation of the Respondent's Profit Petroleum share resulting in the sum of USD 52,018,292 being withheld as part of the Second Withholding;

b. whether either Party is entitled to interest if so, at what rate and from which date(s);

to that stage of the arbitral proceedings when the necessary adjustments to the IM are to be determined;

*****

74.61 Reserves for determination whether the Claimants were justified in insisting on there being any agreement on an increase in the CRL as a pre-condition for drilling the two infill wells in South Tapti either in the context of any application the Claimants may make for an increase in the CRL or in the event no such application is made, on the basis of the submissions filed at the evidence adduced to date;

*****

74.63 Dismisses all other claims and counter claims.

20. Issue 20, as framed by the learned AT, read:

"Estoppel in respect of the Tapti CRL".

21. Paras 24.24 and 24.25 of the 2016 FPA in, in respect of Issue 20, thus:

> "24.24 Accordingly, the Tribunal accepts the Respondent's submissions that the Claimants are estopped from departing from the common understanding of the basis for determining the applicability of the CRL, namely that the CRL applies to Development Costs in respect of works is taking either the IPOD or Appendix G.
>
> 24.25 To be clear, in so concluding, there cannot be there is no conflict between any of the Tribunal's views as expressed in the CRL Award at any use expressed by the Tribunal in this Final Partial Award. This is because the Tribunal's (by a majority) views expressed in the CRL Award were arrived at on the basis of a literal interpretation of the provisions of, inter alia, the Tapti PSC, whilst the basis for the conclusion on the Respondents estoppel case the conduct of the parties to the Tapti PSC."

22. Similarly, Issue 27, framed by the learned AT, read thus:

> "Estoppel in respect of the Panna Mukta CRL."

23. As in the case of Issue 20, which dealt with the Tapti CRL, the learned AT found, in respect of Issue 27, as under, in para 31.14 and 31.15 of the 2016 FPA:

> "31.14 Accordingly, the Tribunal accepts the Respondent's submissions that the Claimants are estopped from departing from the common understanding of the basis for determining the applicability of the CRL, namely that the CRL applies to Development Costs in respect of works is taking either the IPOD or Appendix G.
>
> 31.15 To be clear, in so concluding, there cannot be there is no conflict between any of the Tribunal's views as expressed in the CRL Award and any views expressed by the Tribunal in this Final Partial Award. This is because the Tribunal's (by a majority) views expressed in the CRL Award were arrived at on the basis of a literal interpretation of the provisions of, inter alia, the Tapti

> PSC, whilst the basis for the conclusion on the Respondents estoppel case the conduct of the parties to the Panna Mukta PSC."

24. Issues 24 and 29, as framed by the learned AT, dealt with the entitlement, of the respondents, to recovery of the DCs incurred prior to 31st March 2012 in respect of each category of works ("the Agreement's Case"), and read as under:

> "Issue 24 Are the Development Costs incurred prior to 31 March 2012 in respect of eight categories of works recoverable because the parties had agreed that these would be recoverable?
>
> Issue 29 Are the Development Costs incurred in respect of six categories of work recoverable because the parties agreed that these would be recoverable?"

25. The learned AT held, in paras 28.5 and 33.12 of the 2016 FPA, that Issues 24 and 29, no longer fell for determination in view of the finding in respect of Issues 20 and 27 *supra*.

26. Certain clarifications, in respect of the 2016 FPA, were sought by the parties, resulting in the issuance, by the learned AT, of a Clarificatory Order dated 28th December 2016.

Judgment dated 16th April 2018 of the UK High Court and the 2018 FPA

27. The respondents challenged the 2016 FPA before the UK High Court under the relevant provisions of the English Arbitration Act, 1996 ("the English Act"), *vide* Case No CRL-2016-000685, which was decided *vide* judgment dated 16th April 2018[13] . The High Court

[13] **[2018] EWHC 822 (Comm)**

identified nine challenges as having been raised, before it, by the respondents. While otherwise upholding the 2016 FPA, the UK High Court held, in respect of the findings of the learned AT on Issues 24 and 29, as framed by it relating to the "Agreement's Case", as under:

> "87. Accordingly I conclude that the Agreement's Case fell for determination and the Tribunal failed to address it. That is a serious irregularity. It gives rise to a substantial injustice. Despite the force of Mr. Flynn's submissions in relation to some of the particular elements of the Agreement's Case, including in particular the NRPOD work program, it is clear from the nature of the submissions recited in the Award that the Claimants meet the threshold of establishing that the Tribunal might have reached a decision in their favour, at least in respect of some items were a substantial amount, had addressed the Agreement's Case. It cannot be said from the face of the Award that the Tribunal would have considered its findings in relation to the estoppel issue dispositive as a matter of fact of all the issues arising in respect of the Agreement's Case."

28. Thus, in the final Order passed by the UK High Court in CL-2016-000685, para 28.5 and 33.12 of the 2016 FPA were remitted to the learned AT for reconsideration, with a further direction that a fresh award be made within three months of the date of the said order, extendable by the Court.

29. This resulted in FPA dated 1st October 2018 ("the 2018 FPA"), wherein the learned AT held as under:

> "**IV. FORMAL FINAL PARTIAL AWARD**
>
> The Tribunal for the reasons set out under section III above and rejecting all submissions to the contrary, hereby makes, issues and publishes this Formal Final Partial Award and DECLARES and RESERVES as follows:
>
> 4.1 Declares that the Claimants are entitled to costs recover the following Development Costs:

a. By way of an increase of the CRLs for Tapti and Panna Mukta (as for increasing the CRL, the Tribunal's considerations as set out in para 3.16 above are to apply):

i. the sum of USD 177,470,000.00 incurred in respect of the NRPOD;

ii. the sum of USD 129,655,511.00 incurred in respect of the initial 18 infill wells;

iii. the sum of USD 86,512,015.00 incurred order four PF infill wells ("Item Code" "PD-53") and four PE infill wells;

iv. the sum of USD 139,828,000.00 for the firm EPOD Work Program and USD 3,350,000.00 pre-EPOD work;

b. In addition to the sum of USD 483,862.00 in respect of which there are Tribunal had already permitted cost recovery outside Appendix G and hence the CRL in Issue 31 of the FPA, the sum of USD 23,293,547.00 incurred by the Claimants in respect of 'Other costs: (a) HR 3D Seismic data A&P (b) Panna Gas Lift Execution';

4.2 Reserves jurisdiction in respect of all other issues/matters."

30. Part of the respondent's claim, in the Agreement's Case, related to Development Costs incurred in the Expanded Plan of Development (EPOD), particularly whether such DCs would also be capped by the CRL. In the 2018 FPA, the learned AT declined, in para 3.22 of the 2018 FPA, to express any view on the said aspect, opining that it involved documents which, though present on the arbitral record, had not been relied upon by the respondents in the specific context of the Agreement's Case.

Order dated 28 February 2020 passed by the UK High Court and 2021

FPA

31. The 2018 FPA was challenged, before the UK High Court, both by the petitioner as well as by the respondents. The petitioner's challenge was dismissed, *vide* judgment dated 12th February 2020, whereas the respondents' challenge was allowed to the extent of holding that the learned AT did have the jurisdiction to examine the entitlement, of the respondents, to the DCs involved in the EPOD. Resultantly, the High Court, in respect of the respondents' challenge in that regard before the learned AT, held thus:

> "(a) paragraph 3.22(d) of the Award is varied, by deletion in whole (except that the text from the 18 "By the minority of the Tribunal" is not varied), under section 67(3)(b) of the Act, and insertion of the wording below in place of the deleted wording, which variation will have the effect as part of the Award:
>
> > "This variation is inserted by order of the Court: Pursuant to the remission ordered by Popplewell J by Order dated 2 May 2018 ("**the Remission Order**"), the Tribunal has jurisdiction, in relation to the Claimants' Agreements Case concerning the costs of the EPOD **("the EPOD Agreements Case")**, to take into account (a) documentary and other evidence which had not previously been referred to by the Claimants in the context of the EPOD Agreements Case before the FPA, provided that it was evidence which was already on the record in the arbitration prior to the release of the FPA, and (b) submissions in respect of such evidence.
> >
> > The Claimants have sought to rely upon such evidence and submissions in order to establish their entitlement to the balance sum of US$ 259,488,003 (US$ 402,666,003 – US$ 143,178,000) in respect of the EPOD Agreements Case. For the avoidance of doubt, this includes:
> >
> > > (i) the evidence referred to at paragraphs 148-156 of the Claimants' skeleton argument for the 30-31 July 2018 remission hearing ("**the Remission Hearing**") dated 25 July 2018, including the documents listed at paragraph 156 of that

document; and

(ii) the submissions which the Claimants made in respect of that evidence in their skeleton argument for the Remission Hearing and in their oral submissions at the Remission Hearing.

The Tribunal therefore has jurisdiction and is entitled to make further directions for the determination of the above claim.

For the avoidance of doubt, any exercise of discretion by the Tribunal is to be exercised on the basis that the above evidence and submissions are within its jurisdiction."

(b) the time for the Tribunal to make its fresh award, pursuant to the Remission Order, on the matters referred to in sub-paragraph (a) above is hereby extended to 28 May 2020 or such later date as the parties may agree in writing or the Court may order."

The EPOD Agreement's Case was, therefore, remitted to the learned AT for decision afresh on merits.

32. The *de novo* proceedings culminated in FPA dated 29th January 2021 ("the 2021 FPA"). The operative Part XVI of the 2021 FPA read as under:

"**XVI. FORMAL FINAL PARTIAL AWARD**

The Tribunal for the reasons set out above and rejecting all submissions to be contrary, hereby makes, issues and publishes this Formal Final Partial Award and REJECTS, DECLARES and RESERVES as follows:

16.1 **Rejects** the Respondents threshold matters/objections in respect of the Balance EPOD Agreement's Case;

16.2 **Declares** that the Claimant's are entitled to costs recover Development Costs in respect of the EPOD of further sum of USD 111.282 million by way of an increase of the CRL for Panna Mukta (as for increasing the CRL, the Tribunal's considerations as set out in paragraph 3.16 of the Agreement's Case Award apply mutatis mutandis);

16.3 **Reserves** jurisdiction in respect of all other issues/matters."

33. Importantly, the petitioner chose to raise, before the learned AT, the contention that the respondents were not working their accounts in accordance with the principles enunciated in the 2016 FPA. The contention was categorically rejected by the learned AT in para 13.7 of the 2021 FPA, which reads thus:

> "13.7 As for the Respondent's submissions – albeit raised in the context of the 7 October 2000 for MC resolution (as to this see para 15.25 below) that:
>
> *"The Claimants do not give effect to the audit issues determined by the Tribunal in [the] 2016 FPA.*
>
> > *(i) For instance, the Tribunal directed in para 74.51 of 2016 FPA, 'in respect of the Marketing Margin Counterclaim, the Claimants to recompute the Profit Petroleum by accounting* [for] *all the competence of sales including the marketing with consequential adjustments to the Parties' corresponding share of Profit Petroleum to follow; the Petroleum produced at the same to be increased as follows: by the sum of USD 5,826,668 in respect of Panna Mukta ...' . The Claimants are yet to compute the Profit Petroleum as directed above.*
> >
> > *(ii) Another illustration is that, in para 74.23 of [the] 2016 FPA the Tribunal determined that '... Development Costs in the total sum of USD 1,195,035,528 have been incurred in respect of works which are inside Appendix G and/or the iPod and are hence subject to the CRL'. The Claimants open defiance [of] the said binding award, in its accounts continue to show cause to the recoverability at USD 1,195,035,528 without capping it by the CRL.*
>
> *The Claimants quantified/updated the Contractors audited accounts annually in not less than 3 years subsequent to the 2016 FPA, in none of which the Claimant's give effect to the quantum and the principles determined in [the] 2016 [FPA], as illustrated above. The Claimants also failed to give effect to whatever was finally determined in the 2016 FPA as per the MC Resolutions dated 10 December 2003, 7 October 2004 and 16 March 2006*

> *namely, the Bundle C5/122, 126 and 129 respectively. In the absence of the Claimants giving effect to the determinations made in [the] 2016 FPA, the mechanism contemplated in the MC [r]esolutions also cannot be given effect in order to allow cost recovery towards EPOD",*
>
> the Tribunal sees no merit in these. The Respondent has not shown that the above matters concerning audit exceptions which would, in any way, effect the Tribunal's determination of the Balance EPOD Agreement's Case. It appears to the Tribunal these matters concerning the adjustment of the accounts – an exercise to be undertaken after the Tribunal has determined all outstanding matters between the Parties, notably the Balance EPOD Agreement's Case and the CRL Increase Applications."
>
> (Italics in original; underscoring supplied)

34. On the date when judgment was reserved by me in the present matter, the 2021 FPA was under challenge, at the instance of the petitioner, before the UK High Court. I have not been informed of the outcome of the said challenge.

The CRL increase application filed by the respondents

35. On 8th June 2018, the respondents filed an application under Article 13.1.4(c) of the PSCs seeking increase in the Tapti CRL from the original figure of US $ 545 million to US $ 1120.74 million and in the Panna Mukta CRL from US $ 577.5 million to US $ 1849.28 million. The said application is, apparently, still being heard.

36. This, then, is the factual and procedural backdrop in which the present petition is required to be decided.

Rival Contentions

Petitioner's contentions

37. The petitioner contended thus:

(i) The Panna Mukta PSC and the Tapti PSC were both dated 22nd December 1994, and lapsed in 2019, on the expiry of 25 years. Under the PSCs, RIL and BGEIPL were to produce oil and gas. RIL and BGEIPL were entitled to retain the CP and a share in the PP. The petitioner was also entitled to a share in the PP.

(ii) Article 27.1[14] of the Tapti PSC declared the petitioner to be the sole owner of the underlying petroleum produced under the PSCs, except for that part in which title passed to any other person thereunder.

(iii) The principal grievance of the petitioner was that RIL failed to part with the petitioner's share in the PP and appropriated, to itself, a larger part of the share in the PP than was its due.

[14] The Government is the sole owner of Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract except that part of Crude Oil or Gas the title whereof has passed to each constituent of the Contractor or any other person in accordance with the provisions of this Contract.

(iv) Articles 13.10 and 14.3[15] of both PSCs permitted the allocation of CP and PP to RIL only on approval of the Managing Committee (MC) and the petitioner.

(v) However, RIL unilaterally allocated, to itself, higher shares in the CP and PP than were its entitlement, without the approval of the MC or the petitioner.

(vi) The allocation of CP and PP by RIL to itself was

(a) in excess of the quantum allowed under the PSCs, and

(b) in disregard of the Cost Recovery Limit (CRL) stipulated in the PSCs.

(vii) Article 13.1.2[16] of the PSCs stipulated that CP could not be recovered in excess of the CRL which was fixed at

(a) US$ 577.5 million for the Panna Mukta PSC and

(b) US$ 545 million for the Tapti PSC.

(viii) However, RIL retained, for itself, CP of

[15] **14.3** The value of the Companies' Investment Multiple at the end of any Financial Year in respect of the Contract Area shall be calculated in the manner provided for, and on the basis of 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 a cumulative 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 Financial 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 19 and 21 for Crude Oil and Natural Gas, respectively, shall be used. Within sixty (60) days of the end of each Financial Year, a final calculation of Profit Petroleum based on actual costs, quantities, prices and income for the entire Financial Year shall be undertaken and any necessary adjustments to the sharing of Profit Petroleum shall be agreed upon between the Government and the Contractor and made as soon as is practicable thereafter.

(a) US$ 1,100 million in the Panna Mukta PSC and

(b) US$ 395 million in the Tapti PSC.

(ix) Under the PSCs, RIL was to execute the work during the contract period of 25 years, during which period the profit proceeds were apportioned, after deduction of costs.

(x) Computation of PP

(a) Petroleum produced from the contract area was allowed to be sold by respondents.

(b) The amounts earned from such sale were to be divided in terms of the PSCs, and in accordance with the approval of the MC and the petitioner.

(c) Respondents were was required to remit, to the petitioner, the share of the PP due to it.

(d) The shares were to be calculated after deducting statutory levies, royalty and cess receivable by the petitioner under the PSCs.

(e) Article 13[17] of the PSCs entitled respondents to the CP, which was the cost incurred toward production of the petroleum.

[17] **13 Recovery of costs**
13.1. The Contractor shall be entitled to recover Contract Costs out of the total volume of Petroleum produced and saved from the Contract Area in each Financial Year in accordance with

(f) Article 1.21[18] of the PSCs stipulated that CP would consist of the Exploration Costs (EC), Development Cost (DC) and Production Cost (PC).

(g) EC and PC were fully recoverable by respondents.

(h) Article 13.1.2 of the PSCs, however, capped the recovery of DC by the CRL.

(i) After deduction of the recoverable CP, the remaining returns from sale of petroleum were to be used to calculate the PP entitlement of the parties as per an Investment Multiple (IM).

(j) PP, defined in Article 1.69[19] was, thus, the difference between Total Petroleum and CP.

(k) Article 14.2[20] of the PSCs required the shares of the petitioner and the contractors in the PP to be

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the provisions of this Article, and, in respect of sole risk or exclusive operations, Article VII of the Operating Agreement.

[18] **1.21** "Contract Costs" means Exploration Costs, Development Costs, Production costs, and all other costs related to Petroleum Operations as set forth in Section 3 of the Accounting Procedure.

[19] **1.69** "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.

[20] **14.2** Profit Petroleum

14.2.1 When the Investment Multiple of the Companies at the end of any financial year than two (2.0), the Government shall be entitled to take and receive twenty percent (20%) and the Contractor shall be entitled to take and receive eighty percent (80%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Financial Year.

14.2.2 When the Investment Multiple of the Companies at the end of any Financial Year in respect of any Contract Area is equal to or more than two (2.0) but is less than two and one-half (2.5), the Government shall be entitled to take and receive forty percent (40%) and the Contractor shall be entitled to take and receive sixty percent (60%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Financial Year.

14.2.3When the Investment Multiple of the Companies at the end of any Financial Year in respect of the Contract Area is equal to or more than two and one-half (2.5) but is less than three and one-half (3.5), the Government shall be entitled to take and receive forty-five percent (45%) and the

determined as per the IM, the formula for which stands reproduced in para 11 *supra*. In applying the formula, however, respondents did not, however, cap the DC by the CRL, resulting in depression of the IM (as the CI was the denominator in the IM equation).

(l) This was specifically disallowed in para 74.1 of the 2016 FPA.

(m) There were, essentially, two disputes before the learned AT:

(i) The first dispute pertained to the determination of the NIT (which formed part of the numerator in the IM formula, but was a subtrahend) and the DCs (which formed part of the denominator in the IM formula). The respondents increased the NIT and increased the DCs, thereby artificially bringing the IT below the minimum level and correspondingly reducing the petitioner's share of PP.

Contractor shall be entitled to take and receive fifty-five percent (55%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Financial Year.

14.2.4 When the Investment Multiple of the Companies at the end of any Financial Year in respect of the Contract Area is equal to or more than three and one-half (3.5), the Government shall be entitled to take and receive fifty percent (50%) and the Contractor shall be entitled to take and receive fifty percent (50%) of the total Profit Petroleum from the Contract Area with effect from the start of the succeeding Financial Year.

(ii) The second dispute arose because the respondents did not cap the DCs by the CRL and unilaterally recovered the entire DCs.

(xi) The learned AT framed 69 issues, of which 66 were decided in favour of the petitioner and three in favour of the respondents.

(xii) The petitioner was seeking, by way of the present Execution Petition, payment of the dues which accrued to it consequent on the decision in 66 issues in its favour.

(xiii) The learned AT had held, in the 2016 FPA, that

(a) the DC was required to be capped by the CRL, which was US $ 577.5 million in the Panna Mukta PSC and US $ 545 million in the TPSC, and

(b) the actual rate of income tax was to be used to calculate the IM, not the notional rate of 50%.

(xiv) On this basis, the petitioner had worked out the actual share of PP due to it during the various years, as against the share as worked out by the respondents, in Tables A and B.

(xv) In doing so, the petitioner had merely applied the findings and declarations in the FPA to the Statement of Accounts submitted by the respondents to the petitioner, so that the amount due to the petitioner could be quantified. The

respondents could not, therefore, legitimately object thereto, as the petitioner was merely enforcing the findings in para 74 of the 2016 FPA on the basis of the audited accounts of the respondents.

(xvi) The respondents were was seeking to contend, *per contra*, as under:

(a) The 2016 FPA had not awarded any amount to the petitioner.

(b) The only two sums awarded by the 2016 FPA were in favour of the respondents, not the petitioner.

(c) Other findings/directions in the 2016 FPA were merely declaratory in nature.

(d) The learned AT had itself reserved the issue of giving effect to the declarations rendered by it by reworking the accounts to a future stage.

(e) This was clear from the Procedural Order dated 13th January 2014, which envisaged fixing of additional tranches of hearing to determine the implications, on the accounts, arising from the awards rendered by the learned Arbitral Tribunal on all issues, including the CRL increase applications earlier preferred by the respondents as well as then pending.

(f) If the respondents' CRL increase application were to be allowed, the respondents would owe no amount whatsoever to the petitioner.

(g) The subsequent 2018 FPA (the Agreements Case Award) and 2021 FPA (the Balance EPOD Agreements Case Award) also envisaged adjustment of accounts only after the learned AT rendered its final findings on all issues including the respondents' CRL increase application.

(h) The learned AT was yet to recalculate the IM. Determination of the share of the petitioner in the PP could not be undertaken till then.

(i) Allowing the present Execution Petition would defeat the very purpose of rendering FPAs.

(xvii) These submissions were without merit, for the following reasons:

(a) The learned AT was *functus officio* in respect of the issues decided by the 2016 FPA.

(b) The petitioner was only seeking execution of that part of the 2016 FPA in respect of which, thus, the learned AT had become *functus officio*.

(c) The possible later adjustment of accounts by the learned AT could not impede the execution of the 2016 FPA in respect of the issues which had attained finality thereby.

(d) Neither the 2018 FPA, nor the 2021 FPA, injuncted or impeded, in any way, the parties from acting on the basis of the FPAs already rendered.

(e) The learned AT had reserved orders on the determination of the impact of the 2018 FPA (in para 3.16 thereof) and 2021 FPA (in para 13.6 thereof). This did not, however, restrain either party from seeking enforcement of the 66 issues finally decided by the 2016 FPA.

(f) The possible restatement of accounts at the final stage did not mean that the respondents would not pay, to the petitioner, the amount which had become due to it under the 2016 FPA.

(g) The respondents' contention that no determination, of the petitioner's share in the PP, could be made until the learned AT recalculated the IM, was without substance, as the petitioner was not disputing the templates suggested by the respondents themselves and used by them since the beginning to calculate the IM and

shares in the PP, and the petitioner had worked out its entitlement on the basis of the concluded findings in the 2016 FPA using the said templates.

(h) If it became necessary, readjustment of accounts could always be done after the respondents' CRL increase applications were decided by the learned AT, to account for the determinations made by the learned AT in that regard.

(i) That said, any increase in CRL, as demanded by the respondents, would depend on whether the respondents was able to satisfy the learned AT that the conditions for increasing the CRL, as stipulated in Article 13.1.4[21], were satisfied.

[21] **13.1.4** Having regard, inter alia, to the matters referred to in Article 13.1.3, the Parties agree as follows:
(a) Included in calculations for the Cost Recovery Limit are costs relating to Gas compression offshore required for delivering Gas into GAIL's pipeline system and an onshore pig trap; excluded from the Cost Recovery Limit are Site Restoration and exploration or appraisal drilling:
(b) the costs of developing the reserves and/or potential reserves. and/or satellite Fields referred to in Article 13.1.3(b) shall not be subject to the Cost Recovery Limit, notwithstanding that the development, within the Contract Area, of such reserves and/or potential reserves and/or satellite Fields may include shared flowlines, injection lines, Gas-lift lines and other facilities with those constructed as part of the Development Plan for the mid- and south-Tapti Fields;
(c) in the event that the contractor's Cost Recovery Limit is exceeded as a result of:
(i) delays in carrying out the Development operations referred to in Article 13.1.3(c) due to a delay in obtaining any necessary approval;
(ii) material changes to the Development Plan for the mid- and south-Tapti Fields necessitated by Contractor's review of data provided, if any, to the Companies by the Government and/or ONGC after the Effective Date available prior to the Effective Date then the Companies, acting reasonably, would have included such changes in the Development Plan for the mid- and south-Tapti Fields;
(iii) a material change to the international market conditions referred to in Article 13.1.3(e);
(iv) a variation to the Development Plan for the mid- and south-Tapti Fields approved by the Management Committee; or
(v) an event of force majeure as provided in Article 31;
then the Management Committee shall, at the request Of the Operator, in a meeting convened under Article 5.8, promptly consider what, if any, increase should be made to the Contractor's Cost Recovery Limit to fairly reflect the circumstances in question PROVIDED THAT in the case of delays referred to in Article 13.1.3 (c) the Management Committee shall not be obligated to

(j) The MC had rejected the respondents' application for an increase in CRL.

(k) Even if the learned AT were to accept, in its entirety, the respondents' claim for increasing the CRL, the IM would nonetheless stand increased because the learned AT had

(i) held that the actual rate of income tax had to be applied while calculating the IM, and not the notional rate, and

(ii) rejected the respondents' method for computation of revenue.

(l) The CRL increase applications had been instituted by the respondents after the 2016 FPA.

(m) Objections, filed by the respondents against the 2016 FPA, had been dismissed by the competent Court in the UK.

(n) Merely because the respondents had lodged claims with the learned AT, the amounts due to the petitioner under the 2016 FPA, which had attained finality, could

consider any increase where, and to the extent that, such delay has been caused by the Companies' failure to act in a diligent manner.

not be withheld. Reliance was placed, for this purpose, on ***BWL Ltd v. M.T.N.L.***[22]

(o) The respondents' prayer, if allowed, would amount to granting attachment before judgment in favour of the Judgment Debtors even without their succeeding in proving their claims in accordance with law. The petitioner cited, in this context, the judgment of this Court in ***Intertoll ICS Cecons O & M Co. v. NHAI.***[23]

(p) The Procedural Order dated 13th January 2014 merely left a window option for additional hearings after adjudication of the respondents' CRL increase claim, if required. Even so, the learned AT, in its own wisdom, went on to render final findings on 66 issues in the 2016 FPA which were, therefore, enforceable.

(q) The Procedural Order dated 13th January 2014 was merely a case management/housekeeping order. It was not intended to render the 2016 FPA tentative or inconclusive.

(r) The respondents had themselves accepted the 2016 FPA as final by challenging it under Sections 67 and 68 of the UK Arbitration Act and failing in the challenge.

[22] **2000 (53) DRJ 437**
[23] **(2013) 1 Arb LR 515 (Del)**

(s) Para 74.56 (a) of the 2016 FPA did not overlap with the findings in paras 74.1, 74.4, 74.23, 74.24, 74.32-74.34, 74.49, 74.51 and 74.52, for the enforcement of which the present Execution Petition has been filed. Rather, para 74.56 (b) held earlier determinations to be conclusive and that only the aspect of interest was to be examined later.

(xviii) In violation of the 2016 FPA, the respondents had appropriated to themselves, during the period October 2016 to December 2019, an additional amount of US $ 2715 million.

(xix) The respondents' request that, in the first instance, the maintainability of the Execution Petition be decided, was contrary to the judgment of the Supreme Court in ***L.M.J. International v. Sleepwell Industries***[24], which required the executing court to consider the maintainability of the execution petition and the aspect of enforceability of the arbitral award simultaneously. The judgment of this Court in ***Cairn India v. Govt of India***[25] also echoed the same view, and the SLP against the said decision was also dismissed by the Supreme Court.

(xx) The respondents could not, therefore, seek a decision on the aspect of maintainability of the execution petition before filing objections under Section 48 of the 1996 Act.

[24] **(2019) 5 SCC 302**
[25] **2020 SCC OnLine Del 1426**

(xxi) The grounds of challenge available under Section 48 were watertight, as held in ***Vijay Karia v. Prysmian Cari E. Systemi Srl***[26] and ***Gemini Bay Transcription Pvt Ltd v. Integrated Sales Services Limits***[27]. The plea that the 2016 FPA was declaratory and therefore non-executable was outside Section 48.

(xxii) The 2016 FPA had declared all the inclusions and exclusions for calculating the IM. The petitioner was entitled to apply the declared principles and seek, from respondents, the amount due to it. Russell on Arbitration was cited for the proposition that it was not unusual for an arbitral award to declare the principles to be applied and leave the actual arithmetic to be worked out by the parties.

(xxiii) The 2016 FPA was certain, clear, unambiguous, final and conclusive regarding the obligations and rights of the parties. It was, therefore, complete in all respects and capable of execution, when supplemented by simple arithmetic.

Respondent's Submissions

38. The respondents submitted, *per contra*, as under:

(i) The order dated 15th September 2020 passed by this Court in the present proceedings reserved the respondents' right

[26] **(2020) 11 SCC 1**
[27] **(2022) 1 SCC 753**

to file objections under Section 48 of the 1996 Act if EA 1012/2020 was rejected, or preliminary issues on maintainability were framed and decided against the respondent.

(ii) Provisional recovery of CP and provisional allocation of PP did not require the prior approval of the MC. The 2016 FPA, too, said so, in para 21.16.

(iii) A similar argument, advanced by the petitioner, was rejected by the learned AT in para 11.7 of the 2021 FPA dated 29th January 2021.

(iv) The petitioner's lawful share of the PP had already been paid by the respondents, in accordance with Articles 13.10 and 14.3 of the PSCs.

(v) The Execution Petition was based on unilateral computations by the petitioner based on a self-serving interpretation of the 2016 FPA. The 2016 FPA neither asked, nor authorized, the petitioner to do so. The computation of its supposed dues, by the petitioner, was neither confirmed nor approved by the learned AT or by the Court.

(vi) In fact, the petitioner argued, before the learned AT, that the respondents had disregarded the 2016 FPA while preparing accounts for subsequent Financial Years. The argument was specifically rejected by the learned AT in the 2021 FPA, which

held that restatement of accounts could take place only following a determination of all outstanding matters.

(vii) It was wrong to allege that the respondents had either recovered excess CP or depressed the IM, in view of the following findings contained in the 2016 FPA itself:

> (a) The respondents' interpretation of the CRL and the IM was consistent with the plain wordings of the PSCs, as well as with the construction, placed thereon, by the 2012 FPA. As such, it could not be suggested that the respondents had recovered CP or PP otherwise than in a *bona fide* manner.
>
> (b) The implications of the findings of the learned AT in the 2016 FPA, as well as all other FPAs, on the respondents' accounts, including restatement of accounts and recalculation of IM, CP and PP, had to be determined at the final quantification stage of the arbitration.

(viii) The original CRL values as envisaged in Article 13.1.2 of the PSCs were outdated and revisable in view of the substantial increase in CRL allowed by the 2018 and 2021 FPA.

(ix) The final revised CRL was unknown as the learned AT was still hearing the application filed by the respondents for a further increase in the CRL under Article 13.1.4(c) of the PSCs.

(x) The final quantification would be undertaken by the learned AT only thereafter.

(xi) The 2012 FPA held that Articles 13.1.1 and 13.1.2 of the Tapti PSC permitted full recovery, by the respondents, of the costs incurred after the Effective Date, related to the construction and/or establishment of facilities necessary to produce, process, store and transport petroleum from within existing discoveries so as to enable gas production above the Tapti IPOD Plateau level.

(xii) Thus, the 2012 FPA accepted the respondents' manner of construction of the provisions relating to CRL fixation. Recovery of CP by the respondents, thereafter, had always been as per the said construction.

(xiii) However, the 2012 FPA did not decide on the respondents' entitlement to DC above the CRL. It held that the respondents' entitlement to recover DCs, and the extent thereof, would have to await the determination, by the learned AT, following further pleadings, evidence and submissions.

(xiv) That "subsequent determination" had been done in the 2016 FPA.

(xv) The 2016 FPA held the respondents to be estopped from relying on the construction of Article 13.1.1 and 13.1.2 of the PSCs as undertaken in the 2012 FPA. Instead, it held the CRL

to apply to DCs, as per the common understanding of the parties.

(xvi) The 2016 FPA did not, however, require the respondents to reverse the CP recovered by it in the past, during earlier Financial Years. Nor did the 2016 FPA require the respondents to prepare accounts for subsequent financial years in accordance with the "common understanding".

(xvii) This was because the 2016 FPA recognized the fact that CP recovery depended on the outcome of the CRL increase application preferred by the respondents under Article 13.1.4(c) of the PSCs. Reference was invited to paras 30.13, 35.7(b), 35.7(e) and 35.8(d) of the 2016 FPA. In these paras of the 2016 FPA, the learned AT had held that the respondents' submissions that (a) DC in respect of all infill drilling would be fully recoverable, and (b) in respect of the EPOD, DC would be fully recoverable, would more appropriately be addressed in any application that the respondents would choose to increase the CRL.

(xviii) *Mutatis mutandis*, this position applied in the case of allocation of PP between the parties.

(xix) In the matter of capping the DC by the CRL,

(a) no such provision was contained in the PSCs,

(b) rather, para 3(ii)[28] of Appendix D to the PSCs merely referred to the DCs incurred by the respondents in the contract area, with no reference to any cap,

(c) the respondents did not, therefore, apply the CRL cap to the DC in the denominator of the IM formula, in computing the respective shares of the petitioner and respondents in the PP,

(d) however, the learned AT, in the 2016 FPA, accepted the petitioner's contention that the DC in the denominator of the IM formula had to be capped by the CRL,

(e) even while so holding, the learned AT recognized that the manner in which the respondents had computed the PP was in accordance with the plain reading of para 3(ii) in Appendix D to the PSCs,

(f) the learned AT was, moreover, aware that the final CRL value would depend on the outcome of the respondents' CRL increase application, and that it was only thereafter that the learned AT's decision regarding the application of the DC to the denominator of the IM formula could be given effect to,

(g) this was apparent from the fact that the 2016 FPA itself, in para 2.461 (4) - (5), referred to the PO dated 13th January 2014,

[28]The "Investment" made by the Companies in the Contract Area in any particular Financial Year is the aggregate value for the year of:

(i) Exploration Costs incurred by the Companies in the Contract Area and apportioned to the Contract Area in the same proportion that said Costs were recovered pursuant to Articles 13.2 and 13.3.Plus

(ii) Development Costs incurred by the Companies in the Contract Area

(h) this position stood reiterated by the learned AT in the 2021 FPA, and

(i) for this reason, the 2016 FPA, too, did not direct, as a consequence of its findings, either the recomputation, by the respondents, of the PP allocated by it in the past, or the following, by the respondents, of a different procedure in future financial years.

(xx) The petitioner was, therefore, seeking a premature payment following an intermediate step in the arbitral reference based on certain declarations in the 2016 FPA, ignoring the subsequent 2018 FPA and 2021 FPA, which were not favourable to the petitioner, and, additionally, pre-empting the award which the learned AT was yet to pass on the CRL increase application of the respondents.

(xxi) The originally stipulated CRL, in the PSCs, was substantially increased in the 2018 and 2021 FPAs. The learned AT had already found,

(a) in the 2018 FPA, that the Tapti CRL was required to be increased to allow full recovery of the DC of US$ 177.470 million and that the Panna Mukta CRL was required to be increased to allow full DC recovery of US $ 359.345 million, and,

(b) in the 2021 FPA, that the Panna Mukta CRL was required to be further increased to allow a recovery of further DC of US$ 111.282 million.

(xxii) In view of para 3.16 of the 2018 FPA and 13.6 of the 2021 FPA, therefore, all that was required to be done was a final quantification of the amount by which the CRL had to be increased to enable full recovery of the DC.

(xxiii) The originally stipulated CRL could not, therefore, be used as the basis for demand of excess recovery of CP by the respondents, or to calculate the IM and work out the respective shares of the petitioner and respondents in the PP.

(xxiv) Thus, the PO dated 13th January 2014, as well as the 2018 and 2021 FPAs, unanimously recognized that the respective shares of the petitioner and respondents, and the aspect of whether there had been any excess recovery by the respondents, could only be decided after the final determination of the revised CRL and the rendition of the final award, by the learned AT, following thereupon.

(xxv) The petitioner had sought to challenge the 2018 FPA and 2021 FPA, and both challenges had been dismissed by the UK High Court on 12th January 2020 and 9th June 2022 respectively. Further, on 2nd August 2022, the UK High Court also dismissed the petitioner's application seeking permission to appeal.

(xxvi) The value of the new/revised CRL was, therefore, unknown. If the CRL increase application of the respondents,

being heard by the learned AT, were to be allowed, it would allow full cost recovery of US $ 398.27 million in the Tapti PSC and US $ 801.14 million in the Panna Mukta PSC.

(xxvii) The demand for an increase in the stipulated CRL had been made ever since the inception of the arbitration. The contractors had applied to the MC for increase in the Tapti CRL in June 2008; the Panna Mukta CRL had not been exceeded till then. The request for increase in the Tapti CRL was reiterated in the Notice of Arbitration dated 16th December 2010. Insofar as increase in the Panna Mukta CRL was concerned, the learned AT had, in the 2019 FPA, noted/held that

(a) it was clear from the Notice of Arbitration and the Statement of Claim that the contractors had, at all times, asserted their entitlement to certain DCs both in respect of the Tapti and Panna Mukta PSCs,

(b) since the PO dated 13th January 2014, it was clear that the respondents would apply for increase in the CRL in the event they did not succeed in other cases,

(c) any application for increase in the CRL could be made only after the 2016 FPA as it was only then that the quantum and nature of works which fell within and outside the CRL would be known,

(d) the application for increase in CRL was needed only in respect of works falling inside the CRL, where the stipulated/existing CRL had been exceeded,

(e) the petitioner was seeking to read the PO dated 13th January 2014 as stating that the respondents had already applied for increase in the CRL between 2008 and 2011, before commencement of arbitration and that all that was left after the 2016 FPA was updating of the relevant parts of the SOC, by respondents, in respect of these earlier CRL applications,

(f) that, however, was not how the PO dated 13th January 2014 read or had been applied,

(g) in fact, it was the case of the UOI of the petitioner, as set out under Issue 29 of the FPA that the DCs in respect of certain items, as claimed by the respondents for the Panna Mukta PSC could be recovered only if the CRL was increased,

(h) the learned AT had made its determinations under Issue 31 of the FPA in respect of these submissions,

(i) as the petitioner had disputed the respondents' entitlement to certain DCs, and the 2016 FPA had determined this issue largely in favour of the petitioner, the respondents were entitled to apply for increase in the Panna Mukta CRL, which had been exceeded,

(j) the PO dated 13th January 2014 was also to the same effect, and

(k) it must have, therefore, been clear to the petitioner, when it disputed the respondents' entitlement to DCs in respect of the Tapti and Panna Mukta PSCs, asserting that certain costs were recoverable only by way of

increase in the CRL, that, in the event the petitioner succeeded, the respondents would ultimately apply for increase in the CRLs for both PSCs in respect of any DCs that had yet not been awarded to the respondents by the learned AT or finally determined in any earlier FPA.

(xxviii) The learned AT, *vide* PO dated 13th April 2018, directed the respondents to file their SOC in respect of the CRL increase application. The respondents had duly complied with the said directions.

(xxix) The 2016 FPA had, in para 30.13, confirmed, unequivocally, that it was the parties' inability to agree on a CRL increase that led to the commencement of the arbitral proceedings in the first place.

(xxx) The allegation that the respondents had appropriated any CP or PP at Panna Mukta after October 2016, in violation of the 2016 FPA was categorically denied.

(xxxi) The repeated emphasis, by the petitioner, that it had worked out the amounts due to it, in Table A and Table B, on the undisputed templates provided by the respondents, was completely misleading. Paras 33.1 to 42.14 of the 2016 FPA, in fact, addressed audit exceptions notified by the petitioner in respect of the respondents' accounts. An entire phase of the arbitration was devoted to the determination of these audit

exceptions, till the 2018 FPA which dealt with the said audit exceptions.

(xxxii) The usage of the templates provided by the respondents made no difference. What mattered were the figures inserted in the said templates. None of the said figures found any mention in the 2016 FPA. Nor had the learned AT, in the 2016 FPA, directed payment of any amount by the respondents to the petitioner. That position would emerge only after the passing of the final quantum award by the learned AT.

(xxxiii) The execution petition was not maintainable for the following reasons:

(a) The 2016 FPA did not direct payment of any quantified amount to the petitioner. It was merely declaratory, in respect of certain provisions of the PSCs.

(b) The learned AT had expressly reserved and retained jurisdiction over quantification to the declaratory findings contained in the 2016 FPA as well as all other FPAs, having deferred the said exercise to the final stage of the arbitration.

(c) No party could, therefore, in violation of this decision of the learned AT, unilaterally or piecemeal,

attempt to compute any liability payable by one to the other.

(d) Several findings in the 2016 FPA stood unseated by the 2018 FPA and the 2021 FPA.

(e) That apart, the findings in the 2016 FPA, which formed the basis of the execution petition, were subject to the outcome of the CRL increase application preferred by the respondents and being heard at that time.

(f) The learned AT retained exclusive jurisdiction to make the said determination. The exercise carried out by the petitioner was, therefore, in breach of the said exclusive jurisdiction which vested in the learned AT.

(xxxiv) It was an admitted position that the 2016 FPA did not quantify any amount as payable by the respondents to the petitioner. Equally, it was indisputable that the amounts claimed in the execution petition found no mention in the 2016 FPA, and were the result of a computation unilaterally undertaken by the petitioner. The findings, in the 2016 FPA, which could be stated to be in favour of the petitioner, were merely declaratory.

(xxxv) The 2016 FPA contained two express directions for monetary payments to be made by the petitioner to the

respondents. Where, therefore, any amount was found to be payable, the 2016 FPA expressly directed payment thereof. Insofar as payment by the respondents to the petitioner was concerned, the 2016 FPA contained no such direction; ergo, it was not capable of execution in terms of money payable by the respondents to the petitioner.

(xxxvi) The petitioner was essentially requesting this Court to add to, vary, modify and supplement the 2016 FPA with directions for payment not to be found therein, using an arithmetic not even contemplated in the FPA.

(xxxvii) The present case is not one in which the arbitral award set out exhaustively the principles on which liability is to be computed, and merely leaves the parties to do the math. Rather, the subsequent PO dated 13th January 2014, as also the 2021 FPA, categorically recognised that the learned AT reserved the jurisdiction on the aspect of final quantification of liability between the petitioner and the respondents, including re-statement of accounts and the recalculation of the IM, PP and CP, arising from the award of the learned AT in respect of all issues, to be decided at the final stage of arbitration. This jurisdiction, expressly reserved by the learned AT in itself, was being sought to be usurped by the petitioner by means of the present Execution Petition.

(xxxviii) To emphasise the point, the respondents underscored the following errors in the manner in which the petitioner claims to have computed the amount payable by the respondents to the petitioner in terms of the 2016 FPA:

(a) The petitioner had included significant sums of "differential" or "additional" royalty in its computations, on the premise that paras 74.32 to 74.34 of the 2016 FPA authorised such payment. However, the said paragraphs did not authorise any right to claim additional royalty. They merely rejected the respondents' claim for reimbursement of certain royalty amounts paid to the petitioner. The highest that the petitioner could gain from the said paragraphs was the right to retain the said royalty amounts. No claim, for being pay any additional royalty, had even been advanced by the petitioner before the learned AT. Reliance has been placed, in this context, on the following averments contained in affidavit dated 10th August 2020, filed by the petitioner:

> "The short-paid royalty is therefore obviously the difference between the Royalty payable as per the statute and the amount already paid by the Respondents and *it does not require any determination by the Tribunal*, which is rather a clerical job extending over many years."
>
> (para 23 of the affidavit)

> "The Tribunal decided that marketing margin indeed formed part of value of Petroleum. I state that *there is no occasion for the Tribunal to separately determine its impact on the associated taxes such as Royalty*, sales tax, income tax etc. which would also increase accordingly."

(para 26 of the affidavit)

Addition of royalty, unauthorised by the 2016 FPA or by the learned AT was not a matter of simple arithmetic.

(b) The petitioner proceeded on the assumption that certain DCs incurred after 31st March 2013 (of US $ 510.04 million at Panna Mukta and US $ 34.29 million at Tapti) were subject to the CRL. There was no basis for this assumption, as the 2016 FPA dealt only with DCs incurred up to 31st March 2013. Again, in its affidavit dated 10th August 2020, the petitioner, in this regard, averred that "such determination", regarding DCs incurred between 2013 and 2016, "is not required because in the 2016 FPA, the Tribunal has determined the principles based on which the Development Costs are to be segregated within and outside the CRL." That this premise was completely flawed became apparent from the 2019 FPA, in which the learned AT confirmed that "Development Costs incurred after the Contractor's audited financial statements for the Financial Year ending 31st March 2013 were not the subject of the Tribunal's determination in the [2016] FPA".

(c) The respondents disputed the right of the petitioner to add back 60% of the Contract Costs of US $ 1,110 million at Panna Mukta and US $ 369 million at Tapti, though its claims, in that regard, were disallowed in the

2016 FPA, while calculating the revised NIT figure for use in the numerator of the IM equation. This, again, was a dispute which could not be treated as a matter of simple arithmetic, and would require adjudication by the learned AT.

(d) Though the learned AT had, in the 2016 FPA, directed NIT to be calculated at actuals, the petitioner had applied the average of the income tax rates applicable. Again, in its affidavit dated 10th August 2020, the petitioner had acknowledged that "whether an average of income tax rates should be used or the individual rate of income tax applicable to each respondent should be used separately in the IM template, was not an issue referred to the Tribunal". Any unilateral decision on this issue could not, therefore, be said either to flow from the 2016 FPA, or be treated as a matter of simple arithmetic.

(e) Yet another issue which, admittedly as per the affidavit dated 10th August 2020 of the petitioner, had not been referred to arbitration by the learned AT and was not, therefore, subject matter of the 2016 FPA, but on which the petitioner adopted a unilateral stance, was subjecting of the pre-PSC costs of US $ 375,000, incurred by the respondents at Panna Mukta and Tapti, to the CRL.

(f) The petitioner, with respect to its GAIL Withholding Counterclaim, demanded, while working out the amounts allegedly due from the respondents, figures pertaining to the Financial Years 1999/2000 to 2001/2002, though the declaration of the findings in the 2016 FPA related only to the financial years 2002/2003 to 2004/2005. This fact also stood acknowledged in the affidavit dated 10th August 2020 of the petitioner.

(g) Similar was the situation with respect to the claim, by the petitioner, relating to the Marketing Margin Counterclaim. Though the findings in the 2016 FPA related only to Financial Years 2005-2006 to 2006-2007, the petitioner, in its Execution Petition, included figures for the Financial Year 2007-2008. The learned AT had merely directed the respondents to produce records as to whether they had charged marketing margin for other Financial Years. The respondents had complied with the direction, but no additional Counterclaim was filed by the petitioner.

(h) In its computation, the petitioner had also included an amount of US $ 74.834 million as incremental sales revenue in respect of sale of crude oil produced by the Panna Mukta fields to Indian Oil Corporation Ltd (IOC), relying, for the purpose, on paras 74.49 to 74.51 of the 2016 FPA. Paras 74.49 to 74.51 point of the 2016 FPA,

however, related only to sale of natural gas to GAIL and third parties, and not to sale of crude oil to IOC. In fact, paras 74.50 of the 2016 FPA specifically held the petitioner not to be entitled to the reliefs sought in respect of the IOC Acknowledgement Counterclaim, and this finding was reiterated in the subsequent Clarificatory Order dated 28th December 2016 issued by the learned AT.

(i) The computations by the petitioner also included substantial amounts towards interest, though no interest was awarded by the learned AT in the 2016 FPA.

These unilateral additions and inclusions, in the computation adopted in the Execution Petition, on the basis of which the petitioner had worked out its demand against the respondent could not be regarded as mere arithmetic, and involved, in each case, disputed elements. Such disputed amounts could not unilaterally form the subject matter of an Execution Petition, where they found no place in the award being executed.

(xxxix) The Execution Petition usurped the jurisdiction of the learned AT which had, expressly, preserved and retained jurisdiction over the quantification of the final amounts payable by the respondent to the petitioner, or *vice versa*, to be computed after the learned AT returned its findings on all issues in dispute between the parties. Even while this

jurisdiction continued to be retained by the learned AT, the present Execution Petition had been filed by the petitioner. Especial reference was invited, in this context, to para 4.18 of the 2019 FPA, in which the learned AT had specifically confirmed that "it is imperative that this Tribunal determine the matters which are in dispute between the Parties including the Claimants allege the entitlement to Development Costs because – as is clear from the Procedural Order dated 13 January 2014 – *ultimately the IM will need to be recomputed on the basis of the Tribunal's determination*."

(xl) Neither the 2016 FPA, nor any other FPA issued by the learned AT, authorised either party to unilaterally, provisionally, or in a piecemeal fashion, compute the amounts payable, consequent on the completion of each intermediate step in the arbitration. It had been mutually agreed between the parties that the statement of accounts would be undertaken by the learned AT at the final stage of arbitration. This understanding was reflected in the PO dated 13th January 2014, and reiterated in the 2016 FPA, 2019 FPA and 2021 FPA.

(xli) Even in its application dated 10th October 2018, whereby the petitioner sought extension of time to file its response to the respondents' CRL increase application, it was acknowledged, in para 23, that "there are only two phases remaining in this arbitration now which is the issue of whether there is a case made out for CRL increase and if so what extent and in the

computation of the investment multiple and the statement of the accounts." Thus, the ultimate exercise of the computation of the accounts was to be undertaken, not by either party, but by the learned AT, and this exercise included recalculation of the IM, CP and PP. The learned AT had specifically reserved this computation to the final stage of undertaking following the evidence, the submissions and a dedicated quantum hearing.

(xlii) Apart from the various occasions when the learned AT has itself held that the findings in the 2016 FPA could only be effectuated/implemented at the final quantification stage following determination, by the learned AT, of all outstanding issues, the petitioner, too, in its challenge to the 2021 FPA before the UK High Court did not object to the finding, in the said FPA, that adjustments to accounts, to give effect to the decisions in the 2016 FPA could only be undertaken following the determination of all outstanding issues by the learned AT. Nor did the petitioner never apply for amendment or modification of the PO dated 13th January 2014.

(xliii) The cumulative effect of the 2018 FPA and the 2021 FPA was that the learned AT had upheld the entitlement, of the respondents, to full cost recovery of DCs of further sums of

(a) US $ 177.47 million at Tapti and US $ 470.627 million at Panna Mukta by way of increase in the CRL and

(b) US $ 23.293 million at Panna Mukta as representing costs which fell outside the CRL, and the recovery of which was not, therefore, subject to the CRL.

The claim in the Execution Petition effectively included the superseded findings of the 2016 FPA, ignoring the findings favouring the respondents in the 2018 FPA and the 2021 FPA.

(xliv) In view of the declarations contained in the 2018 FPA and the 2021 FPA, the original CRL specified in Article 13.1.2 of the PSCs already stood outdated. The petitioner could not, therefore, seeks fresh computation of the IM by reference to the outdated CRL.

(xlv) The computation, by the petitioner, in the Execution Petition also included DCs of US $ 23.293 million which fell outside the Panna Mukta CRL. Even in the 2016 FPA, the learned AT had held that DCs, in the denominator of the IM question, were to be capped by the CRL only where the CRL applied. The petitioner could not, therefore, add the figure of US $ 23.293 million.

(xlvi) The petitioner's submission that the learned AT was *functus officio* also effectively missed the point. The learned AT was not required to revisit the findings in the 2016 FPA which had attained finality. The issue was of implementation of the said findings. The learned AT had itself held that the implementation of the findings at necessarily to await

resolution of all issues in dispute in the arbitral proceedings and the final quantification of the liabilities of the parties in the award. The learned AT was certainly not *functus officio* in undertaking the exercise.

The Applications

39. Of the five applications which this judgment decides, IA 3665/2019, IA 3668/2019, EA (OS) 583/2019 and EA (OS) 1411/2021 have been preferred by the petitioner-UOI, whereas EA (OS) 1012/2020 has been preferred by the respondents.

40. Of the four applications preferred by the UOI,

(i) IA 3665/2019 seeks examination and attendance of the Judgement Debtor (JD)-respondents and/or direction to the principal officers of the respondents to file, on affidavit, details of their movable and immovable property,

(ii) IA 3668/2019, by the petitioner, seeks condonation of delay of 285 days in refiling the Execution Petition,

(iii) EA (OS) 583/2019 and EA (OS) 1411/2021 seek interim relief by way of a direction to the respondents-JD to deposit some amount, to the extent of their participating interest, by way of security to secure the amount due to the petitioner and

(iv) EA (OS) 1012/2020, by the petitioner, seeks framing and decision of the following preliminary issues:

(a) Whether an execution petition seeking the payment of money under the foreign award is maintainable under

Part II of the Act in circumstances where the award sought to be enforced is merely declaratory, does not award it any monetary relief or contain any payment directions in favour of the party seeking enforcement?

(b) Whether an executing court has jurisdiction to add to, supplement, vary or modify a foreign award in proceedings under Part II of the Act?

(c) Whether an execution petition seeking the payment of money under the foreign award is maintainable under Part II of the Act in circumstances where some of the declaratory findings in the award sought to be enforced – since the filing of the execution petition – been set aside by the courts at the seat of the arbitration and superseded by further declaratory findings in subsequent awards of the arbitral tribunal (rendered on remission and in favour of the parties against whom enforcement is sought), all of which has been disregarded in the execution petition?

(d) Whether an execution petition seeking the payment of money under the foreign award is maintainable under Part II of the Act in circumstances where the monetary impact (if any) of the declaratory findings in the award which are sought to be enforced – that have not been superseded by subsequent awards – also remain subject to the arbitral tribunal's future decisions on claims that are yet to be determined in an ongoing arbitral reference and that are admittedly related to the findings in the partial award sought to be enforced?

(e) Whether an execution petition seeking the payment of money under the foreign award is maintainable under Part II of the Act in circumstances where the amounts claimed in the execution petition are nowhere to be found in the award sought to be enforced but are instead admittedly based on unilateral computations performed by the party seeking enforcement in breach of the arbitral Tribunal is exclusive jurisdiction to quantify its findings (which jurisdiction was vested in the Tribunal with the agreement of the parties), more so where the arbitral tribunal has expressly reserved and retained jurisdiction over such quantification until the final (and as yet pending) stage of the ongoing arbitral reference?

(f) Whether an execution petition seeking the payment of money under a foreign award is maintainable under Part II of the Act in respect of claims that were admittedly outside the scope of the arbitral reference and in circumstances where the award sought to be enforced does not contain any findings on such claims?

(g) Whether an execution petition seeking the payment of money under a foreign award is maintainable under Part II of the Act in circumstances where no arbitral tribunal or court has certified or established the correctness of the computation of the amounts claimed in the execution petition, as unilaterally performed by the party seeking enforcement and seriously disputed by the parties against whom enforcement is sought?

(h) Whether an execution petition seeking the payment of money under the foreign award is maintainable under Part II of the Act in circumstances where the execution petition seeks enforcement of the award that is akin to a preliminary decree as opposed to a final decree?

(i) Whether a Party which has never pursued a declaratory or monetary claim in the arbitration, can claim substantial sums of money in an execution petition based solely on the fortitude of declarations against the opposite Party in the arbitration?

Para 12 of EA (OS) 1012/2020 goes on to pray that the aforenoted objections be not only framed but determined as preliminary issues, as they are pure questions of law and, if decided in favour of the respondents, would result in complete dismissal of the Execution Petition.

41. Arguments were mainly addressed in EA (OS) 1012/2020. The petitioner, as the non-applicant in the said application, disputed the application at two levels. It was initially contended that the law did not permit bifurcation of the exercise of consideration of an execution petition preferred under Section 47 of the 1996 Act and that the objection to maintainability had to be simultaneously decided along with the grounds, if any, urged under clauses (a) to (e) of Section 48 (1). Without prejudice, the reply asserted that, in fact and in law, the petitioner was entitled to seek execution of the 2016 FPA by recovering, from the respondents, the amount claimed therein.

42. Detailed arguments were heard in this matter, spanning 11th January 2022, 19th January 2022, 7th February 2022, 25th February 2022, 4th April 2022, 6th May 2022, 23rd May 2022, 24th May 2022, 25th May 2022, and 4th August 2022, on which date orders were reserved. The arguments spanned, essentially, both the aspects urged by the petitioner in its response to EA (OS) 1012/2020, i.e., that the plea of maintainability could not be decided independently and that, even on merits, the 2016 FPA was unenforceable in the matter sought by the petitioner. Mr. Jain, the learned ASG, further contended that, as the law did not permit a two-stage hearing of the Execution capitation, and no objections relatable to any of the clauses in Section 48(2) of the 1996 Act had been urged by the respondents, the petitioner was entitled, *ipso facto*, to execution of the 2016 FPA in the matter sought in the Execution Petition.

Analysis

43. The dispute between the petitioner and the respondents revolves around the CP and share in the PP to which the respondents are entitled and, consequently, the share in the PP to which the petitioner is entitled.

44. The CRL constitutes a major and, in fact, determinative ingredient in computing CP as well as PP. CP was defined, in Article 1.21, as meaning ECs, DCs, PCs and other costs relating to petroleum operations. The IM, on the basis of which the PP was to be computed, also involves the CRL, as the CI, as the denominator in the IM

equation, is the sum of the EC and DC, of which Article 13.1.1 of the PSCs capped the DC by the CRL.

45. It is also clear that, if the CRL is higher, the respondents would be entitled to greater CP as well as PP. If the CRL were to cover the entire DC, as prayed by the respondents in the CRL increase application which was pending hearing before the learned AT, the CP would cover the entire cost incurred by the respondent and the IM would also be substantially reduced, thereby proportionately reducing the share of the PP to which the petitioner would be entitled.

46. It cannot, therefore, be disputed that, so long as the CRL remains fluid, there can be no definitive ascertainment either of the CP to which the respondents would be entitled or of the shares in which the PP would be divisible between the petitioner and the respondents.

47. Article 13.1.4(c) of the PSCs entitles the respondents to seek increase in the CRL. There is no dispute that, after the passing of the 2016 FPA, the respondents did, in fact, seek increase in the CRL thrice, that their requests were accepted on two occasions in the 2018 FPA and the 2021 FPA, and that a third request for increase of CRL to cover the entire DC was pending before the learned AT.

48. It is obviously in arbitral recognition of this contractual position that the learned AT, in the PO dated 13th January 2014, as well as in the 2016 FPA, the 2018 FPA, the 2019 FPA and the 2021 FPA,

clearly fixed a schedule for hearing the applications filed by the respondents for CRL increase and also clarified, unequivocally, that the findings and decisions of the learned AT in the 2016 FPA *could be implemented only at the final state of reconciliation of accounts, after all issues had been decided by the learned AT.*

49. Perhaps even more significantly, the petitioner itself acknowledged this position, in its application dated 10th October 2018, whereby the petitioner sought extension of time to file its response to the respondents' CRL application [in which it was acknowledged that "there are only two phases remaining in this arbitration now which is the issue of whether there is a case made out for CRL increase and if so what extent and in the computation of the investment multiple and the statement of the accounts"] and affidavit dated 10th August 2020. No request for reconsideration of the PO dated 13th January 2014, which specifically fixed schedules in that regard, was ever made by the petitioner. Nor, in its challenge before the UK High Court to the 2021 FPA, did the petitioner choose to challenge the finding that the decisions in the 2016 FPA could be implemented only by the learned AT itself after all outstanding issues, including the respondents' CRL increase applications, were finally decided. It is truly surprising, therefore, that, in derogation of the clear views expressed by the learned AT as well as their own acceptance of the position that the findings in the 2016 FPA would call for application and implementation only after all issues had been arbitrated upon, the petitioner has chosen, midway, and, even while the third CRL

increase application of the respondent is under consideration – two having already been allowed – to file the present Execution Petition.

50. The contractual and arbitral position that obtains, therefore, is thus. The PSCs entitles the respondents to retain CP subject, however, to capping of the DC element in the computation of the CP, by the CRL. The DCs also constitute part of the denominator in the IM equation. The share of the petitioner in the PP is dependent on the IM in a slab-wise manner as reflected in para 12 *supra*. The entitlement of the respondents to CP, and the respective shares of the petitioner and respondents in the PP essentially require, therefore, knowledge of the CRL. The CRL is an indispensable and essential element in the exercise. It is fundamentally not possible, therefore, to determine the amount due from the respondents to the petitioner, or *vice versa*, unless the CRL is finally determined. So long as the request for CRL increase, made in accordance with Article 13.1.4(c) of the PSCs, was pending, therefore, there can be no determination of the entitlements of the petitioner or the respondents in the CP or PP. It is for this reason that, even while directing amounts payable to the respondents by the petitioner, which did not involve any element of CRL, to be paid, the 2016 FPA does not direct payment of *any amount whatsoever* by the respondents to the petitioner. The liability of the respondents to the petitioner being, at that stage, not therefore definitively quantifiable, it was obviously both illogical and illegal for the petitioners to contend that any specific amount was payable by the respondents to the petitioner merely on the basis of the findings in the 2016 FPA which were by themselves insufficient to work out liability,

till the CRL was definitely known. The very basis of the present Execution Petition is, therefore, flawed.

51. Essentially, therefore, the petitioner is seeking execution of an award which does not determine all the elements which are required to be determined in order for the liability of the respondents to the petitioner, if any, to be fixed. In doing so, the petitioner is proceeding unmindful of the specific clarification, voiced many times over by the learned AT, and also acknowledged by the petitioner itself, that *application* of the findings in the 2016 AT *would have to await resolution of all issues by the learned AT and the rendering of its final quantum award thereafter*.

52. The entire arbitral process, in which the petitioner and respondents are locked, is one, emanating from a single Notice invoking arbitration, dated 16th December 2010, issued by the respondents to the petitioner, and a single Statement of Claim filed by the respondents before the learned AT (though the petitioner filed counter-claims). Each FPA is, therefore, merely an additional step towards resolution of the disputes between the petitioner and the respondents. No FPA, therefore, completely resolves the disputes between them. Inasmuch as all elements of the disputes are intertwined, and, unless they are all resolved, the reciprocal rights and liabilities cannot be contractually ascertained, no FPA can be executed by itself, even while other pertinent issues, relevant to the determination of the liability of the respondents to the petitioner, if

any, remain pending. That, however, is precisely what the petitioner seeks to do by the present petition.

53. To the extent that the petitioner seeks its enforcement in execution, there is no dispute about the fact that the 2016 FPA is purely declaratory in nature, and does not specifically award a single farthing to the petitioner. Can such a purely declaratory award be enforced?

54. The issue is vexed. There is no real authoritative pronouncement by any Indian court on the issue. Foreign Courts have differed on the point. Even in a case where the award was not purely declaratory but merely failed to quantify the amount payable thereunder, the Queens' Bench Division, through Diplock, LJ., held, in ***Marguiles Brothers Ltd v. Dafnis Thomaides & Co. (UK) Ltd***[29], that the award was not enforceable. The Supreme Court of Victoria, before whom ***Marguiles Brothers***[29] was cited, however, distinguished the decision on the ground that the award in question in that case was uncertain regarding the amount to be paid, and held, in ***AED Oil Ltd v. Puffin FPSO Ltd***[30], relying on Russell on Arbitration for the purpose, that, "provided the terms of the award are sufficiently clear there is now no reason why a declaratory award cannot be enforced under section 66".

[29] **[1958] 1 WLR 398**
[30] **[2010] VSCA 37**

55. The proposition is, however, easier stated than applied. While I also subscribe to the view that there is no proscription against enforcement of a declaratory award – no such proscription being contained in the 1996 Act either – the enforcement would, clearly, require the declaration to be *practically enforceable.* This principle would have to be applied keeping in mind the fact that the executing Court merely executes; it does not pronounce or adjudicate. The executing Court can, therefore, execute only if the award – or decree – is executable, and not otherwise. Mere declarations, which cannot be reduced to hard cash cannot, therefore, be executed in terms of money. If, however, the declarations are sufficiently explicit as to require a mere application of the principles declared to accepted facts and figures and application of mere arithmetic to arrive at the liability, then the award would probably be executable; but not otherwise. Russell, therefore, correctly expressed the principle in the passage on which the petitioner itself relies:

> "It is, however, sufficiently certain if the award sets out the method of calculation of the amount due to be paid, so that *all that is required to determine the actual amount is "mere arithmetic".* It is not unusual, for example, for an award to set out the basis on which interest is to be calculated, without actually including a specific figure."
>
> (Emphasis supplied)

What would be required, therefore, for a purely declaratory award to be executed like a money decree is, therefore, that the award must, firstly, identify one of the parties to the dispute as entitled to receive a quantifiable sum of money from the other, and, secondly, to set out the principles on the basis of which such quantification is to be done,

so that all that is required to be done by the executing Court is application of pure arithmetic.

56. By no stretch of the imagination, in my view, can the 2016 FPA be said to be so explicit and clear regarding the existence of a definite liability of the respondents to the petitioner, and regarding the method of computing and quantifying that liability, that all that is required, to work out the annas and paise, is mere arithmetic. Nor can the manner in which the Execution Petition works out the amount which, according to the petitioner, is due to it from the respondents, be said to be a purely arithmetical exercise, fitting figures into the formula which the FPA provides.

57. At the cost of repetition, this exercise would, in any case, not be possible till the CRL increase application of the respondents was finally decided, as the CRL is an essential contractual element in determining the CP and PP entitlements of the respondents and the petitioner.

58. Rather, the learned AT is explicit in its declaration that the *implementation* of the findings in its 2016 FPA would be undertaken *by the learned AT itself* after it pronounced on all issues in the arbitral proceedings and went on to deliver its final quantum award. Prior thereto, applying the principles cited *supra*, it cannot be said that an enforceable declaratory award stood rendered by the learned AT, in the form of the 2016 FPA.

59. Considerable reliance was placed by the learned ASG on Section 48(1) of the 1996 Act to contend that, as the grounds urged by the respondents to oppose the Execution Petition were not among those enumerated and envisaged in clauses (a) to (e) of Section 48(1), the 2016 FPA was *ipso facto* enforceable. The argument misses the wood for the trees. Clauses (a) to (e) of Section 48(1) merely set out the circumstances in which the Court could refuse to execute an arbitral award, at the instance of the opposite party against whom the award is being sought to be executed. It does not, in any way, imply that an award which is *per se* inexecutable should be executed by the Court. When the CRL has to be known in order for the respondents' liability to the petitioner to be quantifiable, and the arbitral award, while pronouncing on all other issues, defers the CRL determination to a later stage, can it be said, nonetheless, that, as this factor is not one of those enumerated in Section 48(1), the Court should proceed to execute the award, even though all factors which are required to be known for the award to be executed are still not known? The answer, quite obviously, has to be in the negative.

60. As against Section 48(1), which refers to the grounds which are required to be raised by the opposite party for execution of an award to be refused by the Court at its instance, Section 48(2) sets out the circumstances in which the Court could, of its own motion, refuse to execute a foreign arbitral award. Clause (a) envisages a situation in which the dispute was non-arbitrable in the first instance and clause (b) a situation in which enforcement of the award would be contrary to the public policy of India. Explanation 1 to Section 48(2)

"clarifies" that *an award is in conflict with the public policy of India if, inter alia, it is in contravention with the fundamental policy of Indian law*.

61. To my mind, Explanation 1 to Section 48(2) of the 1996 Act is a rare case of a statutory anomaly; and I say so in full awareness of the principle that anomaly is ordinarily not to be attributed to the legislature. Why, according to me, Explanation 1 is indeed a statutory anomaly is because, while Section 48(2)(b) refers to "*the enforcement of the award*" being "contrary to the public policy of India", Explanation 1 "clarifies" not when the *enforcement of an award* would be contrary to the public policy of India, but when *an award itself* would be contrary to the public policy of India. Indeed, the legislature appears, apparently innocently, to have imported, into Section 48, Explanation 1 in Section 34, which applies to Section 34(2)(b)(ii), and which envisages, as one of the grounds on which an arbitral award can be challenged, the award itself being in conflict with the public policy of Indian law.

62. The anomaly is, however, minimal, and is easily resolved by reading clause (ii) in Explanation 1 below Section 48(2) to read:

> "*Explanation 1*. – For the avoidance of any doubt, it is clarified that *the enforcement of an award* is in conflict with the public policy of India, only if –
>
> *****
>
> (ii) it is in conflict with the fundamental policy of Indian law"

63. In ***Phulchand Exports Ltd v O.O.O. Patriot***[31], the Supreme Court held that the ambit of the expression "public policy of India", as used in Section 48(2)(b) of the 1996 Act, was narrower than the ambit of the expression as used in Section 34(2)(b)(ii). Nonetheless, in para 29 of the report in the said decision, the Supreme Court clarified that "enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) *fundamental policy of Indian law*; or (2) the interests of India; or (3) *justice* or morality."

64. The scope and ambit of the expression "fundamental policy of Indian law" was exhaustively examined by the Supreme Court in ***M.M.T.C. Ltd v. Vedanta Ltd***[32], albeit in the context of Section 34 of the 1996 Act, in which it was held:

> "11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided Under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, *the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [**Associated Provincial Picture Houses v. Wednesbury Corporation**[33]] reasonableness*."
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> (Emphasis supplied)

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[31] **(2021) 10 SCC 300**
[32] **(2019) 4 SCC 163**
[33] **(1948) 1 KB 223 (CA)**

65. "Adopting of a judicial approach" and "compliance with the principles of natural justice" are, therefore, inalienable insignia of the "fundamental policy of Indian law". Where adopting of a judicial approach, or complying with the principles of natural justice, would justify refusing to execute a foreign arbitral award in the manner in which the execution petitioner desires it to be executed, the Court may, therefore, justifiably refuse to execute the award, applying Section 48(2)(b) read with Explanation 1(ii) thereto.

66. In the present case, can it be said that, in the teeth of the views expressed by the learned AT itself, and the fact that the prayer of the respondent for third CRL increase, as was permissible under Article Article 13.1.4 (c) of the PSCs, was still pending before the learned AT after it had already been increased twice *after the passing of the 2016 FPA*, execution of the 2016 FPA as the petitioner seeks would be "adopting of a judicial approach", or in compliance with the principles of natural justice?

67. With respect, I should think not.

68. As, even applying the limited grounds envisaged in Section 48 of the 1996 Act in which a Court could refuse to execute an arbitral award, the 2016 FPA is found by me to be unexecutable, I do not feel that, in adopting the said view, I am in breach of the principles enunciated in ***Vijay Karia***[26]. ***Vijay Karia***[26], in fact, envisages failure, on the part of the Arbitral Tribunal, to decide on the issues which arose for consideration before it as a legitimate ground on which the

executing court could, under Section 48(2)(b), refuse to execute the award. *Mutatis mutandis*, I would hold, the 2016 FPA cannot be enforced where one of the issues – of determination of the CRL to be applied – was still under *seisin* before the learned AT which had yet to pronounce thereon.

69. The learned ASG cited, in his support, the decision in ***L.M.J. International***[24], to oppose the prayer of the respondents that the issue of maintainability be decided as a preliminary issue before proceeding to other issues. The learned ASG submits that the issues of maintainability and enforceability cannot be decided separately, and have to be decided simultaneously.

70. ***LMJ International***[24], in fact, supports the view, being taken by me in this case, that the issues of maintainability of the execution petition and enforceability of the foreign award are inextricably interlinked. In fact, in that case, the issue which arose for consideration was whether the appellant LMJ International ("LMJ", hereinafter), having already raised substantive objections questioning both the maintainability of the execution petition and the enforceability of the foreign award, and having failed uptil the Supreme Court, could thereafter maintain a separate challenge to the enforceability of the award. It was in this context that the Supreme Court, in paras 16 and 17 of the report, held thus:

> "16. We first proceed to examine the preliminary issue *as to whether it was open to the petitioner to raise grounds regarding enforceability of the foreign awards despite the judgment of the High Court dated 4-12-2014, rejecting the objections in the context*

of maintainability of the execution petition and which decision had attained finality consequent to rejection of the special leave petitions by this Court and including the review petition by the High Court. The petitioner contends that on the earlier occasion, the objections were limited to the questions of maintainability of the execution case on grounds as were urged at the relevant time and not in reference to the enforceability of the subject foreign awards as such. This argument, to say the least, is an attempt to indulge in hair-splitting and nothing more. It is an argument in desperation only to protract the execution of the foreign award on untenable grounds. Indeed, *the petitioner had not filed any formal application to raise the issue of maintainability of the execution case but the Court had permitted the petitioner to orally urge "all available grounds". The learned Judge had then reproduced the five points, which alone were orally urged on behalf of the petitioner through its counsel, as extracted in para 5 above. The High Court examined the said grounds which, obviously, were transcending in the realm of enforceability of the subject foreign awards. In the special leave petitions filed before this Court, the petitioner had articulated questions of law and the grounds also in reference to the scope of Section 48 of the Act which included the enforceability of the subject foreign awards*. That can be discerned from the close reading of Questions and Grounds in the previous SLPs, reproduced in para 6 above. Additionally, the learned Single Judge of the High Court vide order date 17-3-2015 had made it amply clear that the subject foreign awards were deemed to be decrees, which presupposes that the same were enforceable. *That order came to be upheld by the Division Bench whilst disposing of the appeals preferred by the petitioner. These orders have become final and have not been challenged by the petitioner. The petitioner thereafter unsuccessfully resorted to the remedy of review before the High Court. Even the order passed in review petition has become final.*

17. Be that as it may, the grounds urged by the petitioner in the earlier round regarding the maintainability of the execution case could not have been considered in isolation and *dehors* the issue of enforceability of the subject foreign awards. For, *the same was intrinsically linked to the question of enforceability of the subject foreign awards.* In any case, all contentions available to the petitioner *in that regard* could and *ought to have been raised specifically and, if raised, could have been examined by the Court at that stage itself.* We are of the considered opinion that the scheme of Section 48 of the Act does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning the foreign awards, in the first place; and then the issue

> of enforceability thereof. Whereas, *keeping in mind the legislative intent of speedy disposal of arbitration proceedings and limited interference by the courts, the Court is expected to consider both these aspects simultaneously at the threshold*. Taking any other view would result in encouraging successive and multiple round of proceedings for the execution of foreign awards. We cannot countenance such a situation keeping in mind the avowed object of the Arbitration and Conciliation Act, 1996, in particular, while dealing with the enforcement of foreign awards. For, the scope of interference has been consciously constricted by the legislature in relation to the execution of foreign awards. Therefore, the subject application filed by the petitioner deserves to be rejected, being barred by constructive res judicata, as has been justly observed by the High Court in the impugned judgment."
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> (Emphasis supplied)

In the present case, the respondents have, in Ex Appl. (OS) 1012/2020, indeed raised specific issues regarding the maintainability of the execution petition and enforceability of the 2016 FPA. These two issues are, in fact, interlinked, and any attempt at unravelling the skeins of one from the other is bound to be an abortive exercise. Though, superficially, an execution petition could be maintained for enforcement of *any* award, whether it is executable or not, the award can be regarded as enforceable only if it is actually executable. Actual executability would require, as its *sine qua non*, determination, by the learned AT, of all the issues on the basis of which the liability of the parties towards each other can be fixed. Absent such determination, the award remains inchoate – as in the present case – and *ex facie* unenforceable. *In the present case, the learned AT has itself held as much, on more than one occasion, most recently reiterating the position in the 2021 FPA by holding that the adjustment of the accounts was "an exercise to be undertaken after the Tribunal has determined all outstanding matters between the*

Parties, notably the Balance EPOD Agreements Case and the CRL Increase Applications." The 2016 FPA cannot, therefore, be enforced in isolation at this stage, as the petitioner would desire. As a petition which seeks enforcement of an unenforceable award, the present Execution Petition would also, *ipso facto*, not be maintainable.

71. The manner in which the supposed liability of the respondents towards the petitioner, as it emerges – according to the petitioner – from the 2016 FPA, has been worked out, is itself a pointer to its unenforceability. The petitioner has, in computing the amount to which it claims itself to be entitled, applied the contractual CRL, even after it has been revised, upward, in the 2018 FPA, and the challenge, to the 2018 FPA, *at the instance of the petitioner, before the UK High Court, has failed.* Such a procedure is unknown to the law. Even on the ground that it applies a CRL which was no longer applicable, the claim in the Execution Petition completely fails. The petitioner cannot seek execution of the 2016 FPA applying a CRL which was no longer applicable, and seek to contend that, as and when the CRL would finally be determined, the accounts could be adjusted. Section 48 of the 1996 Act does not envisage any such exercise; indeed, it would militate against the very ethos of the provision, as it would result in a multitude of enforcement petitions arising out of one arbitral proceeding, which the law does not, and could not, envisage.

72. The petitioner has also sought to contend that the respondents have restated their accounts contrary to the findings contained in the 2016 FPA. That, however, is an issue outside the scope of the present

petition, which is concerned only with the execution of the 2016 FPA. As, in my view, the 2016 FPA is incapable of execution, and the present petition is, therefore, wholly premature, the issue of considering whether either party has been acting, thereafter, in accordance with the 2016 FPA cannot be examined in the present proceedings. I do not, therefore, propose to express any view thereon.

Conclusion

73. I am, therefore, of the view that the 2016 FPA is not an executable arbitral award, for the following reasons:

(i) The 2016 FPA does not award any amount to the petitioner.

(ii) The 2016 FPA cannot be likened to an award which sets out the manner in which the liability is to be computed, and leaves the parties to do the math. The manner of computation of liability, in the Execution Petition, goes far beyond a mere academic exercise, and transgresses the boundaries of the 2016 FPA.

(iii) The CRL is one of the most essential elements which go towards determining the CP entitlement of the respondents, or the shares of the petitioner and respondents in the PP. So long as the applicable CP had not been finally determined by the learned AT, the liability of the respondents towards the petitioner, if at all, remained inchoate and unknown. An

execution petition, under Section 48 of the 1996 Act, could not lie for execution of a partial award *which decided only some of the issues, while deferring the decision regarding the remaining issues, which too were essential to ascertain the liability of the parties, for later*. Any attempt at execution had necessarily, in such a situation, to await such latter determination.

(iv) Enforcement and execution of the 2016 FPA is being sought contrary to the orders passed by the learned AT itself, which clearly hold that the findings in the 2016 FPA can be implemented only after the CRL increase application of the respondents, as well as all other issues, are finally decided and a final quantum award is passed.

(v) The petitioner seeks, therefore, by the Execution Petition, to pre-empt this exercise, and effectively usurp the jurisdiction which the learned AT has consciously vested in itself.

(vi) The petitioner seeks enforcement of the 2016 FPA by viewing the FPA in isolation, and ignoring the subsequent 2018 and 2021 FPAs, even after it has failed in its challenge, before the UK High Court, against the 2018 FPA. This is impermissible, as the arbitral proceedings are integrated, and one FPA cannot be sought to be enforced in isolation *de hors* the findings contained in other FPAs.

(vii) This legal position stood recognized by the petitioner itself. The Execution Petition was, therefore, contrary to the

legal position which the petitioner itself acknowledged as being applicable.

74. Ex Appl (OS) 1012/2020, insofar as it seeks determination, at the outset, of the aspects of maintainability of the present execution proceedings and enforceability of the 2016 FPA, therefore, succeeds. The Court holds that the 2016 FPA is not executable, for the reasons stated hereinabove, and that OMP (EFA) (Comm) 1 of 2019 is premature and not maintainable.

75. OMP (EFA) (Comm) 1 of 2019 does not, therefore, survive for adjudication on merits. It is, accordingly, dismissed.

76. Liberty would, however, stand reserved with the parties to move for execution of any executable award which may come to be passed, at that stage.

77. Pending applications do not survive for adjudication and are, accordingly, disposed of.

C.HARI SHANKAR, J

JUNE 2, 2023
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