Oil India Limited - Appellant @HASH ESSAR Oil Limited

Court: DELHI HIGH COURT

Date of Decision: Sept. 29, 2016

Acts Referred: Arbitration and Conciliation Act, 1996 - Section 34

Citation: (2016) 10 ADDelhi 609 : (2016) 6 ArbiLR 97 : (2017) 3 RAJ 481

Hon'ble Judges: Pradeep Nandrajog and Pratibha Rani, JJ.

Bench: Division Bench

Advocate: Mr. Ciccu Mukhopadhyay, Senior Advocate instructed by Mr. Navnit Kumar, Ms. Rashmi Gogoi and Mr. Shaan Mohan, Advocates, for the Appellant; Mr. Sandeep Sethi, Senior Advocate instructed by Mr. Rishi Agrawala, Ms. Misha Rohtagi Mohta, Ms. Nadia Rafiq and M

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J. - OIL issued a Notice Inviting Tender on July 19, 1993 to drill and set up four Offshore Oil/Gas Wells, three at

Saurashtra Offshore and one at Orissa Offshore. The work had to be executed on turnkey basis i.e. drillship, associated equipment, personnel and

services were to be provided by the bidder, called as operator under the NIT. In response, ESSAR submitted its bid on December 06, 1993.

There was an exchange of correspondence between the parties. Offer being accepted, OIL issued a letter of intent on February 20, 1995, which

was followed by a formal agreement executed by the parties on May 08, 1995. As per the agreement the operations had to be completed within

one year. Rates were fixed for payment. The three wells Offshore Saurashtra coast at locations L-2, L-3 and L-4 had to be completed first,

followed by drilling at the location at L-1; Offshore Orissa. Depth to which the wells had to be drilled was specified. Number of days required for

drilling and testing was recorded. Pertaining to location L-1, drilling days stipulated were 135. Testing days stipulated were 28. Meaning thereby,

total days to complete the well and tested was 163 days. Inter-location movement time was 1 day from L-2 to L-3 and L-3 to L-4. From L-4 to

L-1 inter-location movement time was 15 days. There was a delay in completing the works at location L-2, L-3 and L-4 and at the said three

locations the work was completed on July 16, 1996. Vide letter dated August 29, 1995, OIL extended the time for completion of the works till

March 31, 1997.

2. The dispute between the parties concerns what happened after August 29, 1995.

3. We propose to note the correspondence between the parties post July 16, 1996 when the work at location L-4 was completed till OIL

terminated the agreement on October 12, 1996 while noting the submissions of the learned Senior Counsels for the parties with reference to the

finding returned by the majority arbitrators against OIL, and at this stage simply note that there being an arbitration clause in the agreement

between the parties, an Arbitral Tribunal was set up comprising : Justice R.S. Pathak (Former Chief Justice of India), Justice Rajinder Sachhar

(Retired Chief Justice), Justice J.K. Mehra (Retd.), Justice R.S. Pathak was the Presiding Arbitrator. In view of the pleadings of the parties the

Arbitral Tribunal settled the following seven issues for adjudication:-

1. Whether the Claimant or the Respondent was obliged to obtain any clearance for drilling at location L-1 from the Government including DRDO

and Naval authorities?

2. Whether under the facts and circumstances of the case the Claimant was incompetent and incapable of performing the contract?

3. Whether under the facts and circumstances, the contract was rightfully terminated by the Respondent?

4. Whether the various claims and counter-claims made by the parties are maintainable under the contractual terms and conditions?

5. Whether under the facts and circumstances, the Claimant is entitled to relief on any or all of its claims?

6. Whether the Respondent is entitled to relief on its counterclaim?

7. To what other relief is the Respondent entitled?

4. By a split verdict, the award was pronounced three years after the Arbitral Tribunal concluded hearing. The majority, comprising Justice R.S.

Pathak and Justice J.K.Mehra awarded US$ 83,69,339 plus Rs. 68,30,504/- to ESSAR. The minority awarded US$ 4,416,047 plus Rs.

1,12,054/-. Put in a tabular form, the description of the claim and the amount awarded by the majority and the minority would be as under:-

Table Recording Amount Awarded By Majority And Minority In Arbitration

Claim Description of Claim Amount claimed by Amount awarded Amount awarded

No. ESSAR Oil Ltd. (in by Majority(in by Minority (in

US$/INR) US$/INR) US$/INR)

1. Invoice No. Disc/10/96/017 US$1,298,963.33 US$1,298,963.33 US$1,325,422/-

dated 1 August 1996 in the sum

of US$ 1,325,422 for lump sum

well completion charges for Well

L-4

2. Invoice No.Disc/10/96/018 US$ 750,000 US$ 750,000 NIL

dated 25.9.1996 in the sum of

US$ 750,000/- for Inter-location

move from L-4 to L-1

3. Invoice No. US$ 3,000,000 US$ 3,000,000 US$ 3,000,000

ESSAR/DISC/01/96/ 019 dated

16.10.1996 in the sum of US$

3,000,000/- for Demobilisation

4. Invoice No. ESSAR/DISC/021 US$ 900,000 US$ 540,000 NIL

dated 17.10.1996 in the sum of

US$ 900,000/- for waiting on

Location L-1

Telephone And Fax Charges

5. Invoice No. Misc-14 dated Rs. 50,630/- Rs. 49,226/- Rs. 49,226/-

10.3.96 in the sum of Rs.

50,630/-

6. Invoice No. Misc-15 dated Rs. 25,280/- Rs. 25,280/- Rs. 25,280/-

29.3.96 in the sum of Rs.

25,280/-

7. Invoice No. Misc-21 dated Rs. 37,797/- Rs. 37,548/- Rs. 37,548/-

7.7.1996 in the sum of Rs.

37,797/-

Material Procured By Essar For Oil

8. Invoice No. Misc-004 dated US$2,166 US$2,166 US$2,166

12.1.1996 in the sum of US$

2,166/- for TIW material

procured by ESSAR upon

instructions by Oil.

9. Invoice No. Misc-005 dated US$112,338 US$ 112,388 US$ 112,388

12.1.96 in the sum of US$

112,338/-for Brine Solution

procured by ESSAR upon

instructions by OIL.

10. Considered Invoice No. Misc- US$ 2,580 US$ 2,580 US$ 2,580

009 dated 12.2.96 in the sum of

US$ 2,580/- for filter cartridges

procured by ESSAR upon

instructions by OIL

Interest For Delayed Payment of Invoices

11. Invoice No. US$ 124,277 US$ 124,277 NIL

ESSAR/11/7/Supplementary Ã¯Â¿Â½

1 to 8 : US$ 124,277/- Interest

@12% charged for delay in

payment of invoice No.

ESSAR/DISC/11/95/ 007 dated

1.12.95 for work done in

November 1995

12. Invoice No. EOA- US$ 12,740 US$ 12,740 NIL

12/95/08/Supplementary -1

dated 12.3.96 for US$ 12,740 :

Interest @12% charged for

delay in payment of invoice

No.ESSAR/DISC/11/ 95/008

dated 1.1.96 for work done in

December 1995

13. Invoice No. US$ 3,478 US$ 3,478 NIL

1/96/009/Supplementary/9 dated

1.4.1996 : US$ 3,478 Interest

@12% charged for delay in

payment of Invoice No.

ESSAR/DISC/11/95/ 009 dated

1.2.96 for work done in January

1996

14. Invoice No. US$ 27,707 US$ 27,707 NIL

094/96/013/Supplementary/1-2

dated 1.7.1996 and 20.7.1996

respectively : US$ 27,707/-

Interest @12% charged for

delay in payment of Invoice No.

ESSAR/DISC/11/96/ 013 dated

1.5.1996 for work done in April

1996

Deductions Made By Oil From Essar''s Invoices

15. Deduction on account of US$ 595,781.25 US$ 595,781.25 NIL

Liquidated Damages beyond the

scope of Article 15.2 of the

Contract-US$ 595,781.25

deducted from 8 Invoices of

ESSAR

16. Invoices No. US$ 897,726.95 US$ 882,101.95 NIL

ESSAR/DISC/11/95/ 00,

ESSAR/DISC/12/95/ 008 and

ESSAR/DISC/01/96/ 009 for

US$ 292,101.95, US$ 11,250

and US$ 94,375 respectively on

account of deductions made

disallowing the time spent on

remedial jobs subsequent to

completion of drilling until target

dept on Well L-2, aggregating

US$ 897,726.95

17. 5% Retention from Claimant''s US$ 94,374.30 US$ 94,374.30 NIL

Invoice

ESSAR/DISC/11/95/007 dated

1.12.1995 in the sum of US$

94,374.30

18. Invoice No.ESSAR/DISC/02/ US$ 281,875 US$ 259,375 NIL

96/010 dated 1.3.1996 : US$

259,375 and US$ 22,500

19. Invoice No. US$ 50,625 NIL NIL

ESSAR/DISC/03/96/ 012 dated

1.4.1996 in the sum of US$

50,625

20. Invoice No. US$ 353,589.38 NIL NIL

ESSAR/DISC/0496/0 13 dated

1.5.1996 in the sum of US$

102,083.33

21. Invoice No. US$ 1042 NIL NIL

ESSAR/015/08/96/01 6 dated 1

July 1996 in the sum of US$

1042

Claim For Expenses Incurred At Rajkot And Bhubaneswar

22. Claim for Expenses incurred at US$ 837,292 and US$ 313,985 and NIL

Rajkot and Bhubaneswar after Rs. 11,966,059/- Rs. 4,487,272/-

completing Location L-4 in the

sum of US$ 837,292 and Rs.

11,966,059/-

Towards Extra Work Done In L-2

23. Additional work on Location L-2US$ 4,350,674 US$ 349,423.51 NIL

in the sum of US$ 4,350,674/-

Damages For Wrongful Invocation Of The Bank Guarantee

24. Consequent to invocation of Rs. 8,58,72,150/- Rs. 7,31,178/- NIL

bank guarantee by OIL, loss

occurred to the tune of Rs.

29,800/- per day, which

accumulates to Rs.

8,58,72,150/- on 31.3.2001

25. Expenditure of Rs. 10,00,000/- Rs.10,00,000/- NIL NIL

on account of legal and other

fees in opposing the invocation of

Bank Guarantee

Damages For Wrongful Breach Of Contract

26. Towards Loss of Profit US$ 2,180,950 NIL NIL

27. Towards cost of litigation Rs. 40,00,000/- Rs. 15,00,000/- NIL

28. Loss and damage to the Rs. 50,00,00,000 NIL NIL

Claimant"s reputation goodwill

Interest

29. Considers Interest 12% p.a. from 1 12% starting from

January 1997 until only one month,

the date of the after the date of

Award and the order till the

thereafter 8% p.a. date of the

till actual payment payment

Total Amount Accrued US$ 8,369,339 andUS$ 4,416,047

Rs. 68,30,504 &Rs. 1,12,054

5. OIL filed objections to the majority award under Section 34 of the Arbitration and Conciliation Act, 1996 which was registered as O.M.P. No.

416/2006.

6. In the objections filed to the award, no preliminary objection predicated on the plea of three years" delay in pronouncing the award being a

ground in itself to set aside the award was taken, but during arguments as noted by the learned Single Judge, it was urged by OIL that being

pronounced after three years of hearing concluding, as per the decision reported as 2009 (I) AD (Delhi) 50 Harji Engg. Works Pvt. Ltd. v.

M/s Bharat Heavy Electricals Ltd. the award was liable to be set aside. The response thereto by ESSAR was that the arbitration between the

parties was governed by the ICA Rules and that as per Rule 58 of the said Rules a party which failed to raise an objection to the non-compliance

of said Rules at the first available instance was deemed to have waived its right to object. Since Rule 63 of the said Rules required the Arbitral

Tribunal to pronounce the award within 2 years, and admittedly the Arbitral Tribunal did not complete the proceedings in two years and OIL

continued to participate without demur, it could not raise the said preliminary objection. Alternatively, relying upon the judgment reported as 146

(2008) DLT 543 Reliance Industries Ltd. v. Madan Stores Pvt. Ltd., it was pleaded that without demonstrating prejudice caused, mere

delay could not be made a ground to challenge the award.

7. On merits, the reasoning by the minority arbitrator was projected by OIL to challenge the finding returned by the majority arbitrators, to bring

home the point that the finer points argued by OIL and noted by the minority arbitrator has been glossed over by the majority and thus there was

lack of judicious approach by the majority. The signature tune of the argument being that with passage of time - memory blurring; has resulted in

the majority overlooking the nuanced points which were noted by the minority. The non-judicious approach highlighted was with reference to the

correspondence exchanged between the parties after the well at location L-4 was successfully completed and tested and ESSAR Discoverer, the

drillship of ESSAR (hereinafter referred to as the ''Drillship'') along with equipment sailed to the Orissa Coast and at the forefront was the stated

mechanical approach by the majority, which had referred to Article 5.1 of the Agreement dated May 08, 1995; and the point urged was that the

termination of the Agreement was as a matter of fact referable to Article 5.2 of the Agreement.

8. The learned Single Judge has rejected the preliminary objection to the majority award predicated on account of delay in pronouncing the award,

holding that mere delay would not be a ground alone to set aside an award, but would be a factor to be kept in mind while examining the award

and for which the learned Single Judge relied upon a judgment pronounced by a learned Single Judge of this Court reported as 2012 (V) AD

(Del.) 573 UOI v. Niko Resources. The learned Single Judge has held that OIL has failed to establish any prejudice caused to it on account of

the delay. The learned Single Judge has highlighted that OIL never invoked its right under Section 14(1) and (2) of the Arbitration and Conciliation

Act, 1996 to have the mandate of the arbitral tribunal terminated.

9. Concededly OIL terminated the agreement vide letter dated October 12, 1996, which reads as under:-

Dear Sirs,

Whereas you are incompetent and incapable of performing your obligations under the aforesaid contract, please take notice that Oil India Limited

hereby terminate the above contract in terms of the relevant conditions thereof with immediate effect.

This is without prejudice and in addition to all other rights and contentions which Oil India Limited has against you under the aforesaid contract and

in law.

10. From the tabular statement made in paragraph 4 above, it is apparent that the difference of opinion between the majority and the minority is

whether the termination of the agreement was legal and valid. For if the termination was valid, ESSAR would not be entitled to claim No.1, 4, 15,

16, 17, 20 and 22 and as a result other claims granted by the majority which are the consequence of said claims being allowed but not granted by

the minority, and vice versa, the claims to be allowed if the termination was invalid. Thus, at the heart of the matter was the issue : whether the

termination was valid.

11. Having noted the letter of termination dated October 12, 1996 above, and highlighting that the reason for termination alleged by OIL against

ESSAR is its incompetence and incapability to perform the contract, we proceed to note the source of the power under the agreement; Article 5 of

the agreement and in particular Article 5.1 and 5.2. The two read as under:-

5.1 Operation may be giving 30 daysÃ¯Â¿Â½ written notice to the contractorÃ¯Â¿Â½s office and/or with a copy to their head of team at drill site, terminate

this contract at any point of time during the period of contract. If operator is satisfied that the contractor is incompetent and incapable of

performing any of his obligations under this contract including change of any crew member in spite of being advised in writing to improve upon his

performance.

5.2 If at any time during the term of this agreement a breakdown of contractorÃ¯Â¿Â½s equipment resulting in contractor being unable to perform its

obligations hereunder for a period of 15 successive days (not including force majeure delay or breakdown of contractorÃ¯Â¿Â½s equipment caused by

a well blowout or the consequences thereof), operator at its option, may terminate the agreement in its entirety without further right or obligation on

the part of either party, except for the payment of money then due. No notice shall be served by operator under the condition stated above.

12. From a perusal of the contents of the letter terminating the agreement, concededly it is Article 5.1 of the agreement which has been used as the

reservoir of power by OIL to terminate the agreement and not Article 5.2. This was conceded to by Sh. Ciccu Mukhopadhyay learned senior

counsel for OIL, but the argument was that it is settled law that if there is a power vested, as long as there is a source of the power and an action

or a decision can be traced to the said source, reference in the decision to a wrong source of power would be irrelevant. This proposition of law

was accepted to be correct by Sh.Sandeep Sethi learned senior counsel for ESSAR and thus at this stage it would suffice to note that as per

learned Senior Counsel for ESSAR, OIL had failed to establish that ESSAR was either incompetent or incapable to perform its obligations under

the agreement and thus neither Article 5.1 nor Article 5.2 of the agreement was attracted.

13. Since there was no issue between the parties concerning the delay in completing the work at locations L-2, L-3 and L-4 and notwithstanding

there being delay in executing the works at the three locations, we note that the work at L-4 was completed on July 16, 1996 requiring inter-

location movement to be commenced to proceed from the coast at Saurashtra to the coast at Orissa i.e. from the western coast to the eastern

coast of the country. Undisputedly the movement of the Drillship commenced from locations L-4 to location L-1 on September 03, 1996 and the

Drillship reached the location L-1 on September 24, 1996. In between these dates, the correspondence exchanged between the parties concerned

two distinct issues. The first regarding a Blow-Out-Preventer (BOP) and one out of the two Offshore Supply Vessels (OSV), which vessels were

an integral part of the drillship because once the Drillship was stationed offshore and drilling operations commenced, till the same were completed

the Drillship had to remain at the offshore location and the Offshore Supply Vessels were to be used to ferry the material and manpower, if

required, to the Drillship. The second issue concerned clearance to be obtained from the Government of India, and we note it was the Indian

Navy/Off-Shore Defence Advisory Group (ODAG) as also Defence Research Development Organization (DRDO). Regarding the latter issue,

case of ESSAR was that the permissions under the agreement had to be obtained by OIL and the case of OIL was that the permissions had to be

obtained by ESSAR. On the former issue, admitting to the point that the Blow-Out-Preventer has been sent to Abu Dhabi for repair as also one

Offshore Supply Vessel, case of ESSAR was that but for the agreement being terminated, having moved the drillship to location L-1 on

September 24, 1996, by the time the Blow-Out Preventer had to be used in the operations, the same would have reached the site of L-1 and so

also the second offshore supply vessel. As per ESSAR the real reason to terminate the agreement was the decision by DRDO that no drilling

operation could continue beyond December 31, 1996 and since the agreement required 163 days to complete the work at location L-1, by the

time DRDO granted permission on October 01, 1996, the number of days left till December 31, 1996 would be 92 and thus OIL realised that due

to the delay in obtaining the clearance the work could not be completed and hence it contrived to allege against ESSAR that by not having the

Blow-Out-Preventer as also the second offshore supply vessel and additionally it not having obtained clearance from the Naval Authorities,

ESSAR was in breach of the agreement.

14. We therefore labour on the correspondence exchanged between the parties as also between OIL and DRDO, OIL and the eastern naval

command and OIL and Ministry of Defence.

15. Drillship, as noted above completed its work on location L-4 on July

16. 1996. In view of issues raised by OIL in respect of the Blow-Out Preventer (BOP), and other equipments, namely the Offshore Supply

Vessel, the same were sent for repair to Abu Dhabi. This was informed to OIL by ESSAR vide letter dated July 31, 1996 i.e. before the inter-

location movement of the Drillship. OIL requested ESSAR for presentations to it regarding the readiness of equipment. Accordingly, ESSAR gave

two presentations on August 26, 1996 at Rajkot, Gujarat and on September 02, 1996 at Delhi. 16. The Drillship commenced its movement from

site L-4 to L-1 on September 03, 1996 and reached site L-1 on September 24, 1996. In the meantime, on September 21, 1996, OIL sent a letter

to ESSAR stating that the Drillship must reach Paradip port with its associated servicesÃ¯Â¿Â½ for clearances from different authorities before moving

to site L-1. ESSAR replied vide letter dated September 23, 1996, stating that there was no requirement for Drillship to reach Paradip and

therefore it was proceeding to site L-1. On the same day OIL wrote back to ESSAR informing that the obligation to obtain "all clearances

including clearance from Naval Authorities before entering into location L-1 stood against ESSAR". ESSAR replied vide letter dated September

23, 1996, stating that this contention of OIL was not accepted and took the stand that OIL should urgently obtain all clearances including

clearances from Naval Authorities/ODAG. On September 25, 1996, ESSAR wrote to OIL informing that Drillship had reached Location L-1 and

if the clearances from ODAG were not obtained then ESSAR would start charging Day Rates. ESSAR insisted for the prior clearances by its letter

dated September 26, 1996. On September 28, 1996, OIL wrote that the responsibility to take clearances was upon ESSAR. On October 01,

1996, OIL wrote two letters, one directing ESSAR to obtain Naval clearances and the other to commence Spudding at the location.

17. Relevant would it be to highlight that in none of the letters the absence of the BOP or the additional off-shore supply vessel was made an issue

by OIL. As per learned senior counsel for OIL it could not have raised this issue because it could have detected this absence only if the Drillship

was brought to Paradip Port for inspection. ESSAR disputed his position on the stand that under the agreement there was no requirement of either

inspection or to move to Paradip. ESSAR, therefore, submitted that its inter-location movement from location L-4 on September 03, 1996 to the

actual arrival at the location L-1 on September 24, 1996 was to be paid for.

18. The contention of OIL relates to the application of Clause 6.9 of the Agreement which obligates ESSAR to take the permissions. ESSAR

contradicted this contention by referring to clause 9.9(B) of the agreement which obligates OIL to obtain ''all permits, licences and other

governmental authorizations if any, which are required to be obtained by operator for the performance of the contract'' apart from the clearances

mentioned in Article 6.9. Additionally, ESSAR also referred to Clause 7.2 of the Appendix-E to urge that OIL was required to obtain all permits

and licences required ''for drilling site''.

19. It was the case of ESSAR that while OIL had engaged ESSAR in correspondence in respect of putting the obligation to obtain permissions on

ESSAR, it was simultaneously seeking permissions from the authorities; namely Defense Research and Development Organisation (DRDO) and

Offshore Defense Advisory Group (ODAG).

20. An application dated July 17, 1998 filed by ESSAR before the Arbitral Tribunal resulting in an order being passed by the Tribunal directing

OIL to discover on oath and file the correspondences between it and DRDO as also ODAG and pursuant thereto we find that OIL produced the

following:-

(a) Letter dated April 27, 1996 written by OIL to DRDO informing about the commencement of drilling operations at location L-1.

(b) Letter dated July 25, 1996 from OIL to Easter Naval Command informing about commencement of drilling operations at location L-1.

(c) Letter dated August 02, 1996 written by Ministry of Defence (DRDO) to OIL requesting for drilling area sketch indicating the latitude and

longitude of location L-1.

(d) Letter dated August 08, 1996 written by DRDO to OIL requesting for further details of Location L-1.

(e) Fax dated August 19, 1996 sent by DRDO to OIL rejecting OIL''s request for drilling operations at L-1 due to major missile launches at

Location L-1.

(f) Letter dated September 11, 1996 written by the Petroleum Secretary, Government of India to Dr.A.P.J.Abdul Kalam, then Scientific Advisor

to Raksha Mantri, Ministry of Defence stating that in case DRDO permission is not given to OIL it would result in OIL paying US$ 3.5 million to

ESSAR on account of early termination of the drilling contract and force majeure condition.

(g) Letter dated September 16, 1996 written by OIL to Ministry of Petroleum and Natural Gas requesting for instructions to Naval command to

carry out inspection of drillship.

(h) Letter dated September 25, 1996 written by OIL to DRDO requesting for approval for drilling of operations at location L-1.

(i) Letter dated October 01, 1996 written by DRDO to OIL granting permission for drilling till December 31, 1996.

(j) Letter dated October 18, 1996 granting permission by the Naval Authorities to OIL for conducting the drilling operations, noting that ''our team

visited ESSAR Discoverer on October 11, 1996 for according naval security clearance to the vessel for operation off Paradip in position 20

16Ã¯Â¿Â½ 35'''' N, 87 25Ã¯Â¿Â½ 54'''' E''.

21. Concededly for the drilling operations at locations L-2 to L-4 all permissions were obtained by OIL and none by ESSAR. Taking this into

account we find that on issue No. 1 : who was obliged to obtain clearance for drilling at location L-1; as also the letters dated July 15, 1995, July

18, 1995 and September 08, 1995, the majority held that it was OIL and not ESSAR which was obliged to obtain prior clearance from the

Government including DRDO and the naval authorities. The majority arbitrators have noted that Clause 18 of the Petroleum Exploration License

issued in the name of OIL by the Ministry of Petroleum and Natural Gas in respect of the Orissa Offshore area required all vessels deployed in the

area by the contracted party to undergo naval security inspection prior to their deployment while Clause 13 of the Petroleum Exploration License

required the contracted party to secure clearance of the project from the DRDO. According to the majority arbitrators, Article 3.4 and Article 6.9

of the contract restricted the obligation of ESSAR to obtain clearances only in respect of deployment of foreign nationals as well as the national

crew in the drilling unit and associated third party services, the use of communication system established by OIL at shore base at Paradip and in

respect of labour, material, services and supplies to be furnished by it. These Articles were exhaustive and did not cover security clearances. On

the other hand, Article 9.9B required OIL to gain all permits, licenses and other governmental authorizations which were not covered by Article

6.9. Since security clearance did not cast the burden to obtain security clearances on ESSAR, as per the provisions of Article 9.9B, it became the

responsibility of OIL to secure the clearances from DRDO and the Navy. The majority arbitrators noted that the conduct of the parties indicated

that it was understood that the responsibility of securing the clearances was on OIL. Security clearances for Locations L-2, L-3 and L-4 has been

obtained by OIL. According to the majority arbitrators, the conduct of OIL clearly reflected that it interpreted the contract between the parties to

mean that the burden to secure security clearances was on it. It was noted by the majority arbitrators that it was only on September 21, 1996 that

OIL informed ESSAR that the burden to secure the security clearances rested upon it. According to the majority arbitrators, correspondence

between OIL and DRDO, Naval headquarters and the Eastern Naval Command respectively before September 21, 1996, clearly showed that

OIL had sought grant of security clearances for location L-1.

22. The minority view taken is that from the correspondence and the conduct it was apparent that it was in the interest of both parties to obtain the

clearances and there was no specific responsibility upon either to do so. As per the minority this was of no consequence because the clearance has

been granted on October 18, 1996.

23. Now, it is settled law that to determine the validity and legality of a majority opinion a Court is not to contrast the reasoning of the majority vis-

a-vis that of the minority. Thus, we are not to compare and contrast the reasoning on issue No. 1 by the majority and the minority, and suffice it to

record that the majority has looked into the competing clauses of the contract relied upon; the past conduct of the parties concerning drilling

operations at locations L-2 to L-4 and the three letters having bearing on the issue to bring home the point that contemporaneous conduct of the

parties was relevant as to how the parties understood and interpreted the contract. The majority has highlighted that it was as late as September

21, 996 that OIL raised the issue of ESSAR being obliged to obtain the clearances.

24. It is settled law that interpretation of a contract and giving meaning to various clauses of a contract is within the domain of the Arbitral Tribunal

as also appreciation of evidence concerning contemporaneous conduct of the parties. Effect of letters exchanged between the parties and

inferences to be drawn is also within the domain of arbitration. Unless conclusions arrived at are manifestly perverse, while considering challenge to

an award, a Court is not to re-appreciate the evidence.

25. Having noted the rival positions taken by the parties, the contemporaneous conduct of the parties and the contractual terms, it cannot be said

that the view taken on issue No.1 by the majority is perverse and needs to be set aside. In this connection the letters noted by us in paragraph

20(a) to 20(j) above do determinately bring home the point that OIL understood the agreement as casting a liability on it to obtain clearances from

the naval authorities, DRDO and ODAG. We are unable to agree with the view of the minority that the issue of which party was required to obtain

clearances from DRDO and Naval authorities was of no consequence since as we have recorded herein above this issue goes to the heart of

whether the termination of the agreement by OIL was justified and consequently, whether ESSAR was entitled to damages arising out of invalid

termination of agreement.

26. The majority arbitrators have noted that the termination letter dated October 12, 1996 sent by OIL to ESSAR merely recited the provisions of

Article 5.1 of the agreement and did not specify any reasons for termination of the agreement. According to the majority arbitrators, the evidence

on record did not show that any substantial grievance was raised by OIL with regard to the work done by ESSAR at L-2, L-3 and L-4. In fact,

OIL extended the agreement between the parties till March 31, 1997 vide letter dated August 20, 1996 in order for ESSAR to complete the wells

at L-4 and L-1. The majority arbitrators noted that ESSAR made 2 presentations to OIL on August 26, 1996 and September 2, 1996 to prove its

competence. It was only September 3, 1996 that ESSAR commenced movement of its drillship from L-4 to L-1. If OIL had concerns about the

competence of ESSAR even after the presentations on August 26, 1996 as well as September 2, 1996, ESSAR would not have commenced

movement of its drillship on September 3, 1996. It was even conceded by Tradip Kataky RW-2 in his cross examination that after the two

presentations on August 26, 1996 and September 2, 1996 OIL was substantially satisfied of ESSAR''s competence and no doubts regarding

ESSAR''s competence was expressed by OIL after the two presentations. The majority arbitrators noted that after the arrival of ESSAR''s drillship

on the L-1 site on September 24, 1996, OIL directed ESSAR to commence spudding of the well vide letter dated October 1, 1996. According to

the majority arbitrators, this reflected that neither did OIL have any reservations on the competence of ESSAR at this point nor did OIL consider

the refusal of ESSAR to send its drillship to Paradip as per its instructions a serious breach necessitating termination. The majority arbitrators noted

that OIL sent another letter dated October 5, 1996 directing ESSAR to commence operations at the L-1 site. According to the majority

arbitrators these communications indicate that OIL was satisfied of ESSAR''s competence to perform its obligations under the agreement. Since

the Petroleum Exploration License granted to OIL by the Ministry of Petroleum and Natural Gas for the drilling of wells in the NEC area clearly

provided no drilling activity could be commenced in the NEC area without grant of the requisite clearances by the DRDO and the Navy, directions

in letters dated October 1, 1996 and October 5, 1996 sent by OIL directing the ESSAR to commence operations at the L-1 site could not have

been followed and the same was even communicated by ESSAR to OIL vide letter dated October 8, 1996. The majority arbitrators recorded that

under Article 5.1 of the agreement, an opportunity to improve its performance was to be provided to ESSAR prior to termination of the

agreement, but no such opportunity was actually provided. Further, a notice of 30 days before termination was to be provided under Article 5.1 of

the agreement, which was not provided by OIL. The submission of OIL that the complete Drilling Unit was not present at the L-1 site as was

required by the agreement, since the BOP and one OSV were in Abu Dhabi and this reflected the incompetence of ESSAR was not accepted by

the majority arbitrators. According to the majority arbitrators, as per Article 1.3 of the contract, the entire Drilling Unit was required to be present

on the "commencement date", which was the date the Drilling Unit was to arrive at the first or standby location, which in this case was L-2. As per

Article 2.3 of the contract, the only requirement from ESSAR with regards to presence of the drilling unit at locations other than the first or standby

location was that the drilling should continue uninterrupted. Even if the operations had commenced on October 12, 1996 the BOP and the OSV

transporting it would have reached site of L-1 by the time they were required on the site as per the schedule of operations. Further, according to

majority, OIL despite being aware that ESSAR''s drillship had reached the L-1 site on September 24, 1996 without the BOP and one OSV, gave

instructions to ESSAR to commence spudding vide letter dated October 1, 1996, which clearly proved that OIL did not consider the presence of

the BOP and OSV necessary to commence drilling. The majority noted that OIL never instructed ESSAR to make the BOP and OSVs available

for inspection prior to October 11, 1996 and held therefore that the absence of the BOP and one OSV could not be made a ground for

termination of contract. The submissions of OIL that ESSAR''s incompetence was reflected by i) the delay in completion of drilling work at

locations L-2 and L-4, (ii) the delay in movement of ESSAR''s drillship from L-4 to L-1 and (iii) the unwillingness of ESSAR to drill at L-1 were

rejected in the majority award. It has been held by the majority arbitrators that no evidence that these grounds were the basis on which the

contract was terminated was adduced before the tribunal. Further, the majority award has recorded that even on merits these submissions did not

reflect the incompetence of ESSAR inasmuch as : (i) OIL chose to proceed with the agreement despite delay in completion of L-2 and L-4, (ii)

inclement weather conditions prevented the movement of ESSAR''s drillship from L-4 to L-1, and (iii) ESSAR''s proposal vide letter dated August

20, 1996 to postpone drilling at L-1 to January 1997 on the fear of inclement weather between October and December did not have any effect on

OIL"s determination to have well drilled at L-1. The majority award recorded that it was conceivable that OIL realised that the period of

clearance obtained by it from the DRDO and the Navy, up till December 31, 1996, were insufficient to complete the drilling at L-4, for which a

time period of 163 days was provided under the contract.

27. We note that the important findings are to be found in paras 13.2, 13.4 and 13.7 of the majority award, which after noting the

correspondence, which we have culled out in paragraph 20(a) to 20(j) above and the other correspondence exchanged between ESSAR and

OIL. They read:-

13.2 .. Accordingly, so far as the contract is concerned the burden rests on OIL to obtain the requisite security clearances from DRDO and the

Naval authorities.

13.4 .. A stream of correspondence between OIL and the Naval authorities establishes that OIL understood the obtaining of security clearances

from the Naval authorities to be its specific obligations.

13.7 ...Accordingly, the Arbitral Tribunal holds that it is OIL and not ESSAR who was obliged to obtain prior clearance from the Government,

including DRDO and the Naval authorities, for drilling at Location L1.

28. On Issue Nos.2 and 3 - whether ESSAR was incompetent and incapable of performing the contract and whether the contract was rightly

terminated, the findings by the majority in para 14.2, 14.3, 14.4, 14.9, 14.12, 14.15, 14.16, 14.18 and 14.23 are as under:-

14.2 ..It will be noted that beyond reciting literally the provisions of article 5.1 the notice of termination does not indicate the grounds for, and the

circumstances in which, OIL concluded that ESSAR was incompetent and incapable of performing its obligations under the contract.

14.3 ...The evidence shows that OIL, was anxious that after completing the well at location L4 ESSAR should proceed immediately to take up the

drilling of the well at location L1.

14.4 ...RW-2, Tradip Kataky, concedes in cross-examination that after the two presentations at Rajkot and Delhi OIL was substantially satisfied

that ESSAR was willing to move to location L1 and that some of OILÃ¯Â¿Â½s doubts and apprehensions about the competence of ESSAR were

removed after the two presentations. He concedes further that no doubt was expressed by OIL in writing after the two presentations.

x x x

14.9. ... Evidently OIL was satisfied that ESSAR was competent to carry out its obligations in regard to the drilling at Location L1.

x x x

14.12.However, on 12 October 1996, OIL suddenly terminated the Contract in the terms mentioned earlier. It is difficult to understand how OIL

could have at this stage considered that ESSAR was incompetent and incapable of performing its obligations under the Contract. There is nothing

on the record to indicate that until 12 October 1996, when the Contract was terminated by OIL, the latter was dissatisfied with the competence

and capability of ESSAR to perform the Contract. No document of the period between 1 October 1996 and 11 October 1996 has been placed

before us by OIL recording such dissatisfaction. On the contrary, the directions issued by OIL to ESSAR almost up to the date of termination of

the Contract indicates that ESSAR was capable of performing its obligations in respect of the well at Location L-1.

x x x

14.15 The submission on behalf of the OIL that the presence of only the drillship (and that without a BOP) was available on 1 October 1996 when

spudding was directed demonstrates the incompetence and incapacity of ESSAR is without substance. When viewed in this background, that is to

say, no drilling operation could be commenced in the absence of clearance of the vessel on Naval inspection. OIL has placed great emphasis on its

submission that the contract requires that the entire drilling unit, and not merely the drillship, should be present at all times in order that ESSAR can

be said to have complied with the Contract. It is pointed out that when the drillship reached Location L1, it was not equipped with the BOP and

was not accompanied by both OSVs. The BOP was undergoing overhauling and repairs at Abu Dhabi, and one of the OSVs was in waiting there.

It seems to the Arbitral Tribunal that the Contract does not require the assemblage of the entire drilling unit at all times. The Contract requires the

entire drilling unit together on the ""commencement date"" is the date when the drilling unit arrives on the first or standby location (vide Article 1.3)

and the first location in the present case is Location L2. At other times, what is necessary is to ensure that the absence of any equipment of OSV

does not interrupt the drilling operations. Article 2.3 indicates that in so far as the presence of the drilling unit at different drilling locations is

concerned, the sine qua no should be that the drilling operations continue uninterrupted. In the event that the operations have to be suspended due

to break-down of the contractorÃ¯Â¿Â½s equipment, Article 15.2 provides the circumstances in which a penalty is attracted. Even if the contract had

not been terminated on 12 October 1995, the BOP and OSV transporting it would have reached the drillship in time according to the schedule of

operations for the BOP to be installed and to commence its functions at the stage when it was required, and this would have taken place without

interrupting the drilling operations. The OSVs could also have been inspected by the naval authorities without interruption of the drilling operations.

14.16 ... OIL was aware that when the drillship reached Location L1 it was without the BOP and lacked the present of both OSVs. It was open

to OIL to refuse to treat with the drillship on the ground that it did not conform to the strict definition of a drilling unit as provided in the Contract.

On the contrary, it directed ESSAR on 1 October 1996 to commence spudding. Evidently, it did not consider that the presence of the BOP and

the second OSV was mandatory for the commencement of the drilling operations.

x x x

14.18 The Arbitral Tribunal is of the opinion accordingly that the circumstances that the drillship did not contain the BOP and was not

accompanied by both OSVs on 1 October 1996 at Location L1 cannot be made the subject of a grievance by OIL.

x x x

14.23 The Arbitral Tribunal has examined the evidence before it and finds that none of the grounds urged in the submissions were considered by

OIL as an impediment to proceeding with the Contract. Upon all the aforesaid considerations, the Arbitral Tribunal finds that the basis on which

OIL seeks to justify its conclusion that ESSAR was incompetent or incapable of performing its obligations under the contract is not established.

29. The view taken by the minority is that in the absence of the BOP and the second offshore supply vessels ESSAR could not have performed its

obligations under the agreement and thus it was incapable of performing its obligations.

30. The minority arbitrator framed the following sub-issues:-

(i) Did ESSAR carry out inter se location movement from L- 4 to L-1 as per the contractual terms;

(ii) Was the inter-location movement from L-4 to L-1 delayed on account of not obtaining security clearance from the naval authorities and who

was responsible for obtaining this clearance;

(iii) Even after reaching L-1, was the contractor in a position to execute the work at L-1 and was he equipped with all the necessary instruments

like the BOP and OSV at L-1which was mandatory to start the drilling.

31. The minority arbitrator noted that admittedly ESSAR completed work at L-4 on July 16, 1996 and was obligated to move the drillship unit to

L-1 within 15 days in accordance with clause 4.3. read with 3.3 of the contract. The learned minority arbitrator further noted that even though

clearance has been obtained from DRDO to commence drilling operations till December 1996, ESSAR persistently made attempts to delay the

mobilisation of the Drillship Unit at L-1. The minority arbitrator referred to various letters dated as early as August 13, 1996 by ESSAR to OIL

requesting for extension of time for de-anchoring of the Drilling Unit from L-4 to L-1 and then letter dated August 20, 1996 for time for

mobilisation of the Drilling Unit at L-1 till January, 1997. This delay occasioned from July 16, 1996, when the drillship ought to have been de-

anchored from L-4 but which commenced movement to L-1 only on September 3, 1996 resulting in a total delay over 170 days. The minority

arbitrator opined that ESSAR had failed to give any good reason for delay in inter-location movement of its equipment from L-4 on July 16, 1996

to L-1 on September 24, 1996. Reference was also made to letter dated August 22, 1996 by OIL to ESSAR clearly stating its disapproval of

delay in inter location movement as well as of ESSAR''s request for extension of time till January, 1997 by the minority arbitrator. The minority

arbitrator noted that the main conflict arose on September 20, 1996 when ESSAR declined to move the drillship unit along with all associated

services from L-4 to the Paradip Port for vessel inspection and security clearance, and instead moved it directly to L-1. This, it was noted, was

contrary to ESSAR''s confirmation to OIL to do so vide its letter dated September 13, 1996. OIL vide its letter dated September 25, 1996

objected to ESSAR''s persistent refusal to bring the drillship to Paradip port for inspection and security clearance. The minority Arbitrator referred

to the definition of a Drilling Unit in Clause 1.1. of the Contract and noted that it specifically mentioned a BOP Stack (25.1 Annexure 3) and all

associated services including OSV (A of Annexure 4) as part of the drillship. The minority arbitrator noted that even upon reaching L-1 on

September 24, 1996, ESSAR Drillship was without the required BOP and one of the OSVs and this he opined, apart from persistent delays, was

further evidence of ESSAR''s incompetence and unwillingness to perform the contract. The minority arbitrator noted that while on October 1,

1996 ESSAR refused to spud wells at L-1 as instructed by OIL on the ground that required naval clearance had not been secured by OIL, the

BOP and OSV had not reached L-1 till that date and therefore, ESSAR was in fact not in a position to commence drilling. Reference was made to

fax dated October 3, 1996 by TMI, a freight forwarder, to ESSAR stating that the BOP in Abu Dhabi on October 07, 1996. In view of the

aforesaid, the minority arbitrator opined that the termination of contract did not hinge on the issue of naval clearance but the readiness of ESSAR

to commence drilling at L-4 on September 24, 1996 or October 1, 1996. The minority arbitrator opined that even as of 18th October, 1996, the

date on which naval clearance was finally obtained, it could not be presumed that the BOP and OSV would have reached the location of L-1 since

ESSAR had not provided any evidence proving expected arrival of the BOP and the OSV to the location of L-1 by this date. The minority

arbitrator noted the fax dated October 07, 1996 from TMI to ESSAR recorded that the BOP would be despatched from Abu Dhabi to Paradip

port only after October 07, 1996 and the ship carrying the BOP to Paradip port has been chartered for 30 days, giving rise to the conclusion that

the BOP would reach the location of L-1 only after November 07, 1996. The minority operator rejected ESSAR''s interpretation of clause 2.3

and clause 1.3 of the contract to mean that the ""drilling unit"" was only to be provided on the commencement date, and opined that the Drillship at

all times had to be complete with associated services including the BOP and OSV for drilling operations at all the 4 locations L-1 to L-4. The

minority arbitrator opined that the presence of the BOP and OSV was an express requirement under the terms of the contract and could not be

modified at the will of the parties. The minority arbitrator opined that in view of the admitted absence of BOP and OSV at L-1 without which

drilling operations could not commence at L-1, OIL was not wrong in concluding that ESSAR was incompetent and incapable of performing the

contract and therefore had rightly terminated the contract. The minority arbitrator held that the conduct of the parties in relation to operations at L-

2, L-3, L-4 was irrelevant for deciding the competence of the parties in relation to commencement of operations at L-1. The minority arbitrator

held that ESSAR was never in a position to start work at L-1 and in view of this incompetence, OIL was under no obligation to give any notice of

30 days under clause 5.1 and instead liability was to be attributed to ESSAR for delay in work for 15 consecutive days on account of breakdown

of its equipment and thus OIL was right in terminating the contract under Clause 5.2 thereof. The minority arbitrator further opined that ESSAR

could not claim benefit of the 30 days notice on account of its own incompetence.

32. Concededly on October 01, 1996 OIL directed ESSAR to commence spudding operation at location L-1. Admittedly on July 31, 1996

ESSAR had informed OIL that the BOP and the offshore supply vessels has been sent to Abu Dhabi for repair. Admittedly on October 03, 1996

information was available with OIL that the BOP and the offshore supply vessels was still at Abu Dhabi and was likely to be shipped from Abu

Dhabi on October 07, 1996. In spite thereof OIL had directed ESSAR to commence spudding operations and the reason is obvious. Though this

aspect has not been highlighted by the majority, but since it sustains the reasoning of the majority we note that the agreement provided for a drilling

time schedule for the location at L-1 and as per the schedule at serial No.12 is the activity : ""Rune & Test 18 3/4" B.O.P." This activity is on the

33rd day of the commencement of the work. Meaning thereby that the requirement of BOP at the site would be on the 33rd day when the

operations commenced at site L-1. It is apparent that officers of OIL were aware of the fact that the BOP would be needed at site on the 33rd

day of operations commencing and thus in the knowledge of the fact that the BOP was not at site and was to be shipped from Abu Dhabi on

October 07, 1996, gave the go ahead on October 01, 1996 for the operations to commence; terminating the contract on October 12, 1996

realising that the real cause was the permission granted by DRDO to complete the operations by December 31, 1996 and move out of the site. As

noted above as per the contract 163 days were needed to commence and complete the work.

33. By no stretch of imagination the reasoning by the majority can be called perverse. The finding is based on the conduct of the parties, the

construction of the agreement and how the parties understood the same when operations commenced on locations L-2 to L-4 and the

correspondence between the parties.

34. We do not burden the reader of this opinion with the reasoning of the minority which we find was the fulcrum of the argument by OIL, albeit

with the care that it was not contrasting the two lines of reasoning but to highlight that with the passage of time the nuanced points which were

noted by the minority were overlooked by the majority.

35. The exercise was tricky for the reason embedded in the same is to look at the reasons given by the majority and the minority and thus we

simply highlight that no nuanced point of the kind which would qualify in its omission to be a non-judicious approach by the majority came out of

the debate between learned senior counsel for the parties. The straight line reasoning of the majority would be that when operations commenced at

locations L-2 to L-4 all clearances were obtained by OIL and this would constitute evidence to resolve a harmonious interpretation of clause 6.9

of the contract relied upon by OIL and clause 9.9(b) and clause 7.2 of Appendix E to the contract relied upon by ESSAR and therefore the

obligation to obtain clearances would be that of OIL. Further, the letters which we have noted in para 20(a) to 20(j) above would show that OIL

was seeking the necessary permissions from the naval command, DRDO and ODAG. It withheld said information from ESSAR and for the first

time on September 23, 1996 wrote to ESSAR that the obligation to obtain clearance was on it. Conscious of the fact that on October 01, 1996

DRDO granted permission only till December 31, 1996 to complete the work and realising that minimum time required under the agreement to

complete the work was 163 days, to avoid paying compensation OIL terminated the contract on October 12, 1996, which termination could not

be sustained with reference to either Article 5.1 or Article 5.2 of the agreement. The contention of OIL that ESSAR''s refusal to bring the drillship

to Paradip port for inspection despite instructions amounted to delay in obtaining permission from the naval authorities overlooks two points.

Firstly, there is no letter proved by OIL that the naval authorities required the drillship to be anchored at Paradip Port for being inspected and

secondly, the naval authorities inspected the drillship at the L-1 location and accorded approval on October 18, 1996, albeit after the agreement

has been terminated, which establishes that the naval authorities did not insist on the drillship to be anchored at Paradip port to facilitate inspection.

36. On the issue of award being vitiated into delay we agree with the reasoning of the learned Single Judge that on account of OIL not exercising

its right either under the ICA Rules or under the Arbitration and Conciliation Act, 1996 to terminate the mandate of the Arbitrators it would be

estopped from urging said point and additionally that mere delay in pronouncing an award sans prejudice caused shown would not be a ground by

itself to set aside an award under Section 34 of the Arbitration and Conciliation Act, 1996.

37. Therefore, we dismiss the appeal but without any order as to costs noting that learned counsel for the parties conceded that if issues 1 to 3 as

decided by the majority arbitrators were upheld, the award would follow.

38. Pursuant to the interim order dated January 22, 2013 the appellant has deposited the amount as per the said order in the name of the Registrar

General of this Court which has been released to the respondent on furnishing bank guarantees. In view of the fact that the appeal is dismissed the

two bank guarantees furnished on behalf of the respondent in favour of the Registrar General of this Court are discharged. The Registry shall

release the original bank guarantees by handing over the same to learned counsel for the respondent.