REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 27 OF 2013

Reliance Industries Ltd. & Ors. ...

Petitioners

Versus

Union of India

....Respondent

J U D G M E N T

SURINDER SINGH NIJJAR,J.

1. This petition has been filed under Section 11(6) of the Arbitration Act, 1996, with a prayer for appointment of the third and the presiding arbitrator, as the two arbitrators nominated by the parties have failed to reach a consensus on the appointment of the third arbitrator.

2. Petitioner No.1 is a company incorporated and

registered under the provisions of the Companies Act, 1956; Petitioner No.2 is a company incorporated in Cayman Islands, British Virgin Islands; Petitioner No.3 is a company incorporated according to the laws of England & Wales. The Respondent herein is Union of India (hereinafter referred to as "UOI"), represented by the Joint Secretary, Ministry of Petroleum and Natural Gas.

3. Briefly stated, the relevant facts are as under:

4. In 1999, UOI announced a policy-New Exploration and Licensing Policy (hereinafter referred to as "NELP"). Under NELP, certain blocks of hydrocarbon reserves were offered for exploration, development and production to private *contractor*s under the agreements which were in the nature of Production Sharing Contract. One of the said blocks was Block KG-DWN-98/3 ("Block KG-D6"). The joint bid made by the Petitioners No.1 and 2 for the Block KG-D6 was accepted by the UOI. Thereafter on 12th April,

2000, Production Sharing Contract (hereinafter referred to as 'PSC') was executed between the Petitioners No.1 and 2 as *Contractor* on one side and UOI on the other. The Arbitration Agreement in the PSC is contained in Article 33. Relevant facts thereof, is in the following words:

> "ARTICLE 33
> SOLE EXPERT, CONCILIATION AND ARBITRATION
> 33.1 * * *
>
> 33.2 * * *
>
> 33.3 Subject to the provisions of this Contract, the Parties hereby agree that any controversy, difference, disagreement or claim for damages, compensation or otherwise (hereinafter in this Clause referred to as a "dispute") arising between the Parties, which cannot be settled amicably within ninety (90) days after the dispute arises, may (except for those referred to in Article 33.2, which may be referred to a sole expert) be submitted to an arbitral tribunal for final decision as hereinafter provided.
>
> 33.4 The arbitral tribunal shall consist of three arbitrators. Each Party to the dispute shall appoint one arbitrator and the Party or Parties shall so advise the other Parties. The two arbitrators appointed by the Parties shall appoint the third arbitrator.
>
> 33.5 Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such

other Party fails to appoint an arbitrator within thirty (30) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Chief Justice of India or by a person authorised by him within thirty (30) days of the date of receipt of such request, from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings.

33.6 If the two arbitrators appointed by or on behalf of the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, at the request of either Party, the third arbitrator shall be appointed in accordance with Arbitration and Conciliation Act, 1996.

x ---------- x ----------x ----------x ----------x

33.12 The venue of the sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties agree otherwise, shall be New Delhi, India and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings before a sole expert, conciliator or arbitral tribunal and any pending claim or dispute.

33.13 * * *"

5. On 8th August, 2011, UOI granted its approval to the Petitioner No.1 to assign 30% of its participating interest in the Block KG-D6, under the PSC to

Petitioner No.3. On the same date, i.e. 8th August, 2011, Petitioner No. 3 also entered into PSC as a party. Further, Petitioner No.1 was appointed as the '*Operator*' for Block KG-D6, both under the terms of the PSC, and the Joint Operating Agreement that was executed between Petitioner No. 1 and Petitioners No. 2 & 3.

6. It appears that in the financial year 2010-2011, differences relating to the scope and interpretation of the provisions of the PSC arose between the Petitioners and Respondent after the publication of some media reports. These reports, according to the Petitioners, suggested that the Respondent was planning to disallow cost recovery of the expenditures incurred by the *Contractor* since the productions levels from the gas fields had fallen drastically. According to the Petitioners, all the disagreements and differences that have arisen between them and UOI will inevitably lead to serious

problems in the working of the PSC. To resolve this dispute, lengthy correspondence ensued between Petitioner No.1 and the officers/representatives of Respondent No.1.

7. On 16th September, 2011, RIL (Petitioner no.1) wrote to the Respondent and pointed out that any attempt to disallow or to restrict cost recovery of expenditures incurred by the *Contractor* since the production levels from gas fields had fallen, would be contrary to the provisions of the PSC and, requested that no such action should be taken. There was no response to the aforesaid letter from the Respondent.

8. On 23rd November, 2011, Petitioner No.1 (RIL), through its Advocates, served upon the Respondent a notice invoking arbitration, in accordance with the arbitration agreement contained in Article 33 of the PSC. In this letter, Petitioner no.1 also nominated Mr. Justice S.P. Bharucha, former Chief Justice of

India, as its arbitrator and called upon the Respondent to nominate its arbitrator within 30 days of the receipt of this letter. Respondent replied to this letter on 21st December, 2011, and intimated Petitioner No.1 that the matter is under consideration and that "the Ministry needs more time to respond and would do so by 31st January, 2012." In its letter dated 2nd January, 2012, the Petitioners pointed out to the Respondent that, "the PSC, the UNCITRAL Rules and the Indian Arbitration and Conciliation Act, 1996 – set a period of thirty days for your making appointment of an Arbitrator." Nevertheless, as a matter of good faith, time for nomination of an arbitrator by the Respondent was extended until 31st January, 2012.

9. The Respondent, however, by a letter dated 25th January, 2012 addressed to Petitioner No.1 called upon the Petitioner to withdraw the Notice of Arbitration on the ground that the same was

premature, “for the reason that no ‘dispute’ has arisen between the parties to the Production Sharing Contract.” It is noteworthy that no objection was taken with regard to Petitioner No.1 being the only party under the PSC that seems to be raising the disputes.

10. Thereafter on 2nd February, 2012, Petitioner No.1 replied to the Respondent, by a letter through its advocates, wherein it was reiterated that there have been a long standing controversy, differences and/or disagreement as to whether the *contractor*’s right to recover its contract cost is capable of being limited by the Government, in the manner and on the grounds as is sought to be done under the PSC. It was also stated that: “Our client treats and construes your letter under reply as your refusal and failure to appoint an arbitrator.”

11. On 17th February, 2012, Respondent wrote a

letter to Petitioner No.1, wherein it was reiterated that no dispute concerning the cost recovery under the PSC has arisen between the parties to the PSC. The Respondent once again called upon the Petitioners to withdraw the notice of arbitration dated 23rd November, 2011.

12. In response to the aforesaid letter, Petitioner No.1, through its Advocates, addressed a letter dated 9th March, 2012 to the Respondent, wherein the demand made in the notice of arbitration dated 23rd November, 2011 was reiterated. The letter *inter alia* stated as under:

> "We are instructed to state that the assertion that disputes and differences have not arisen between the Government and the *Contractor* overlooks the previous correspondence that the ensured (sic: ensued) between the parties"
>
> * * *
>
> "The underlying reason for all this appears to be disputes that have arisen between the Contractor and the DGH…"
>
> * * *
>
> "The DGH, on its part has disagreed with the contractor inter alia on whether the factual; assertion that drilling of more wells would not augment the rate of production"

Annexure-I to the aforesaid letter listed some of the issues that have already arisen between the parties; which are as under:

(I) Whether the FDP implies a commitment of the contractor to produce particular or at a particular rate?

(II) Whether the FDP implies a commitment of the contractor to do a series of development activities even if there is a difference of opinion between the Government and the Contractor as to the efficacy of these activities?

(III) Whether the FDP is revised pro tanto by WP & B's from time to time approved by MC?

(IV) Whether the variation between the costs proposed in the FDP and the actual cost can be a basis for disallowing Capex?

(V) Is the recovery of cost related in any manner to the estimates of production even if the costs are within the sanctioned budgets?

(VI) Is the recovery of costs of facilities in any manner

related to the attainment of production estimates of the FDP or the estimates of deposits or reservoir characteristics?

(VII) Whether the FDP was a representation by the contractor to produce at a particular rate or to produce a particular quantity for a defined period, which by conduct became a binding contract between the parties?

(VIII) Would the drilling of additional wells result in increased production rates/volumes.

(IX) Did the approval of the WP & B's [FY 2009-10 (RE) and 2010-11 (BE)] result in a modification of FDP?

(X) Were the reasons given by the MoPNG/DGH for declining approval to the WP & B's for FY 2010-11(RE) and 2011-12 valid?

(XI) If the answer to (IX) and (X) is in the negative, what is the consequence?"

13. On 16th April, 2012, Petitioners No.1 & 2 filed Arbitration Petition No. 8 of 2012 under Section

11(6) of the Arbitration Act, 1996 before this Court (hereinafter referred to as "A.P. No. 8"), seeking constitution of Arbitral Tribunal in terms of Article 33.5 of the PSC. After filing of this petition, correspondence ensued between the Petitioners and the Respondent, wherein the subject matter related to cost recovery of expenditure incurred by the Contractor for the years 2010-2011 was discussed. This was done through letters/notice dated 2nd May, 2012; 4th May, 2012 and 8th June, 2012. In the letter dated 2nd May, 2012, the Respondent makes a reference to the PSC dated 12th April, 2000 in the following terms:

> "We write with reference to the Production Sharing Contract ("PSC") dated April 12, 2000 between Ministry of Petroleum and Natural Gas ("Government"), Reliance Industries Limited (being the operator) and Niko Resources Limited (collectively "Contractor"), in relation to block KG-DWN-98-3. The expressions used and not defined herein and defined in the PSC, shall have the meaning ascribed thereto in the PSC."

The letter claims that the Petitioners have failed:

"to fulfil your obligations and to adhere to the terms of the PSC and are in deliberate and wilful breach of PSC and have thereby caused immense loss and prejudice to the Government. You have also repeatedly failed to meet your targets under the PSC." Thereafter the specific instances of the breach have been highlighted in detail. Finally, it is recorded as under:-

> "In this regard, we have been instructed to state that any such purported attempt to unilaterally adjust any amounts as threatened or otherwise would be completely illegal and constitute a serious breach of the provisions of the PSC and that our client reserves all its right under the PSC, the Arbitration Act, and the UNCITRAL Arbitration Rules if the Government attempts to proceed to implement the purported decision threatened or otherwise."

14. The Petitioners by an equally detailed letter denied the claims made by the Respondent on 8th June, 2012. In paragraph 31 of the aforesaid letter, the Petitioners again called upon the Respondent to appoint an arbitrator forthwith (without raising any other procedural issues designed to delay the dispute resolution process) so that the vital project

undertaken by the parties is not put in jeopardy on account of the continuing uncertainty.

15. In its letter dated 5th July, 2012, the Respondent makes a reference to the letter dated 2nd May, 2012 addressed to Contractors of the block KG-DWN-98/3 and to the letter dated 8th June, 2012 written by the Solicitors on behalf of Petitioner No.1 and stated that the Ministry had nominated Mr. Justice V.N.Khare, former Chief Justice of India as the arbitrator on behalf of the Government of India. The letter also called upon the Petitioners to withdraw the A.P. No. 8. On 16th July, 2012, the Petitioners, through its advocates, addressed a letter to the Registrar of this Court, wherein it was requested that the A.P. No. 8 may be disposed of. Accordingly, the A.P. No. 8 was disposed of by this Court by an order dated 7th August, 2012. It would be appropriate to notice here the relevant extract of the order:

> "Both the parties have no objection to the Arbitrators nominated by each other. Under the arbitration clause, the two nominated Arbitrators are to nominate the third Arbitrator. In view of the above, in my opinion, no further orders are required to be passed in this Arbitration Petition. The Arbitration Petition is disposed of as such."

16. On 12th July, 2013, Petitioner No.1 addressed a letter to Mr. Justice S.P. Bharucha and Mr. Justice V.N. Khare, requesting them to nominate the third arbitrator. On 1st August, 2013, Mr. Justice Bharucha wrote a letter to Petitioner No.1, *inter alia,* as follows :

> "Undoubtedly, there has been a delay in the appointment of a third arbitrator. I had made a suggestion to my fellow arbitrator, which was not acceptable to him. I asked him to make a counter suggestion which he said he would do. I have not heard any counter suggestion as yet.
>
> In the circumstances, you must consider whether the court should be approached for the appointment of a third arbitrator."

17. It was in these circumstances that the present arbitration petition came to be filed under Section 11(6) of the Arbitration Act, 1996.

Submissions:

18. I have heard elaborate arguments, and perused the written submissions submitted by the learned senior counsel appearing for the parties.

19. Mr. Harish N. Salve, learned senior counsel, appearing for the Petitioners has made the following submissions:

I. Re: International Commercial Arbitration

20. It was submitted that the present arbitral proceedings relate to an International Commercial Arbitration, as defined under Section 2 (1) (f) of the Arbitration Act, 1996. Ld. senior counsel pointed out that two out of the four parties to the arbitration agreement are based outside India; Petitioner No. 2 being a U.K. based company and Petitioner No.3 being based in Canada. Substantiating this submission, it was pointed out by Mr. Salve that each of the Petitioners is a party to the PSC, as

defined under Article 28.1 of PSC; and each of the Petitioners comprise a "*Contractor*", under Article 2 of PSC.

21. It was also submitted that Petitioner No. 1, as "*Operator*," performs each and every function of the *Contractor* under the PSC on behalf of all the constituents of the *Contractor*, as defined under Articles 7.1 and 7.3 of the PSC. Mr. Salve mentioned that the Appendix 'C' to the PSC provides accounting procedure which is required to be followed by the *Contractor* and the Government. Learned senior counsel also brought to our attention the accounting procedure that is required to be followed by the contractor and the Government. Sections 1.4.2 and 1.4.4 of Appendix 'C' to the PSC indicate that the accounts are to be maintained by the *Operator* on behalf of the *Contractor*s. On the basis of the aforesaid it was submitted that for the purpose of cost recovery,

only one set of accounts, as opposed to three sets of accounts, has to be maintained. Thus, according to the submission, the award will affect the cost recovery under the PSC and impact all the parties, particularly Petitioners, equally. In the light of the aforesaid, it was submitted that the *Operator* was, therefore, obliged to raise a dispute on behalf of all the parties/Petitioners. This was also made clear in the A.P. No. 8

22. Lastly it is submitted by Mr. Salve that the Respondent itself has always understood and accepted that the substance of the dispute is related to and has implications for all the parties to PSC. It was also pointed out that the Notice dated 2nd May, 2012 was addressed by the UOI to all the three Petitioners and that the nomination of the Arbitrator by the UOI was with reference to notice dated 2nd May, 2012.

II. Re: Jurisdiction of the Supreme Court:

23. Mr. Salve submitted that the parties cannot confer jurisdiction on the Supreme Court, it flows from the fact that there is an international arbitration. He submits that the stand of the UOI is inconsistent. On the one hand it has accepted that this court has the jurisdiction to entertain the petition, and on the other hand it questions the assertion that this petition concerns an international arbitration. It is further submitted by him that A.P. No. 8 was filed in 2012 on the premise that the arbitration between the Petitioner and the UOI was an international arbitration on account of the fact that Petitioner No.2 is a company incorporated outside India. It was pointed out that no dispute, as to the maintainability of the petition, was raised at that time. A.P. No. 8 was disposed of by this Court on merits and not for the want of jurisdiction. No dispute was raised to the effect that this Court has no jurisdiction to entertain the petition, which was

filed under Section 11(6) of the Arbitration Act, 1996. On the basis of the above, he submits that the objection was raised by the Respondents that Petitioner No.1 is the only party raising disputes in relation to PSC, and claiming reference to arbitration is an afterthought.

24. Mr. Salve further submits that the contention of the UOI that this Court has no jurisdiction to entertain the present petition in view of Section 11(2) of the Arbitration Act, 1996, is misconceived. It is also submitted that Sub-section (2) of Section 11 is subject, expressly, to subsection (6) thereof. Section 11(6) provides that in case the appointment procedure agreed upon by the parties is not complied with, a party may request the Chief Justice to take the necessary measures. The expression "Chief Justice" has been defined under sub-section (12)(a) of Section 11 as the Chief Justice of India, in the case of an international commercial arbitration. In other arbitrations under Section

11(12)(b), it would be the Chief Justice of the High Court. It was then submitted that a procedure agreed to by the parties for appointment of arbitrator(s) is subject to Sub-section (6); it cannot override sub-section (6) and provide that in respect of a domestic arbitration, not-withstanding sub-section(12), the parties would only move the Chief Justice of India, or vice versa in the case of an international arbitration. On the basis of the aforesaid, it was submitted that the contention of the UOI that this Court has no jurisdiction to entertain the petition under Section 11(6) is misconceived.

III. Re: Notice :

25. Further, it was stated that the Joint Operating Agreement entitles the *Operator* to initiate litigation on behalf of all the parties. It was also submitted that it is significant to note that there is inconsistency in the stand taken by the Respondent.

On the one hand, Respondent claims that the arbitral award would bind not merely Petitioner No.1 but also Petitioners No. 2 and 3; however on the other hand, the Respondent insists that the arbitration proceedings are only between Petitioner No. 1 and UOI. This stand of the Respondents has been submitted to be contrary to the established jurisprudence that an arbitral award is binding only on the parties to the arbitration.

IV. Re: Arbitrator of Neutral Nationality

26. Mr. Salve submitted that since the arbitration is an international one, this court, in accordance with the established international practise, should consider appointing an arbitrator of a nationality other than the nationalities of the parties. In this context, it was pointed out that the statute expressly obligates the Court to examine the issue of nationality of the arbitrator vis-à-vis the nationality of the parties. It was asserted that Article

33(5) of the PSC is conclusive on this issue. It provides that if one of the parties fails to appoint its arbitrator, the Court would appoint an arbitrator of a nationality other than that of the defaulting party. It was submitted that this clause indicates the significance that the parties have attached to the neutrality of the arbitrators. *A fortiori,* the chairman/presiding arbitrator should be of a nationality other than Indian. The contention of the UOI that absence of a provision similar to Article 33(5) of the Arbitration Agreement in relation to the appointment of the third arbitrator suggests that the presiding arbitrator could be Indian has been submitted by Mr. Salve to be misconceived.

27. It was also brought to our notice that the UNCITRAL Rules, in force at the time when the PSC was drafted and entered into, recognised that while the appointing authority could appoint an arbitrator of the same nationality as that of the defaulting

party (in the event where a party fails to nominate its arbitrator), but the presiding arbitrator that has to be appointed would be of the nationality other than that of the parties. The Petitioners states that the PSC provides for even a greater degree of neutrality than the UNCITRAL by provisioning that in case one of the parties makes a default in nominating its arbitrator then the arbitrator has to be appointed from a neutral nationality. It was then submitted that there was no need of a similar provision in relation to the presiding arbitrator since the arbitration was to be in accordance with UNCITRAL Rules. In this context, learned senior counsel relied upon the law laid in **Antrix Corporation Limited** Vs. **Devas Multimedia Private Ltd[1],** wherein it was *inter alia* held that the reference to such rules (ICC in that case) would include the process of constitution of a tribunal.

28. Mr. Salve also referred to the submission of the Respondent that the PSC being governed by the

1 2013 (7) SCALE 216 (Para 34)

Indian law or/and that it involves the issues of public policy for India as irrelevant. The fact that a party nominee had to be from a neutral country establishes that the parties did not consider the governing law of the contract to be of any relevance to the nationality of the arbitrator. It was also submitted that the trend of appointing presiding arbitrator from a "neutral nationality" is now universally accepted under various arbitration rules as well as under the Arbitration Act, 1996.

29. Mr. Salve also pointed out that Article 33 (9) of the PSC adopts the UNCITRAL Rules for the arbitration Agreement and that at the time of signing the Arbitration Agreement the UNCITRAL Rules, 1976 were in force. Mr. Salve also referred to Article 6 of UNCITRAL Rules, 1976. He laid particular stress on Article 6 (4).

30. It was further mentioned that the UNCITRAL Rules

of 2010 are now at par with the procedure under Article 33.5, even with respect to appointment of second arbitrator.

31. Relying upon the judgment of this Court in **Northern Railway Administration, Ministry of Railway, New Delhi** Vs. **Patel Engineering Company Limited**[2], it was submitted that the scheme of Section 11 emphasises that the terms of an Arbitration Agreement should be given effect as closely as possible.

32. Lastly, it was submitted that the Respondents had lost their right to nominate the second arbitrator in the earlier round of litigation, i.e. A.P. No. 8 and hence, the Petitioners could have insisted under Article 33.5 that the Tribunal must be constituted of two non-Indian Arbitrators in addition to the arbitrator appointed by the Petitioner. It is, therefore, imperative that the third arbitrator should have a neutral nationality.

2 (2008) 10 SCC 240

Respondent's Submissions

33. Mr. Anil B. Divan and Mr. Dushyant A. Dave, learned senior counsel, appeared for the Respondents. At the outset, it was pointed out that the present arbitration petition has been filed under Sections 11(6) and 11(9) of the Arbitration Act, 1996, read with Article 33.6 of the PSC. It was then submitted that the Article 33.6 of the PSC, unlike Article 33.5, does not require that the arbitrator to be appointed should be a foreign national. The learned senior counsel suggested that the aforesaid omission is both deliberate and significant. It was further submitted that the Petitioners, by choosing not to object to the appointment of Mr. Justice V.N. Khare, have waived of the requirement that a foreign national be appointed as an arbitrator by the parties, under Article 33.5 of the PSC. It was further submitted that this waiver also becomes clear from the letter dated 16th July, 2012, which was sent on

behalf of the Petitioners to the Respondent, wherein the nomination of Mr. Justice Khare was accepted without any reservation. The Petitioners are, therefore, as stated by the learned senior counsel, estopped from insisting upon appointment of a foreign arbitrator.

34. Next, learned senior counsel submitted that that the PSC is one of the most valued, crucial and sensitive contracts for the nation, in as much as it deals with the PSC in offshore areas; and it deals *inter alia* with License and Exploration, Discovery, Development and Production of the most valuable natural resources, viz. petroleum products, including crude oil and/or natural gas. Propounding further, it was submitted that these products are vital to the survival of the nation. UOI entered into the PSC with Petitioners No. 1 and 2, with avowed objective of exploiting the aforesaid natural resources(s) in the most efficient,

productive manner and in a timely fashion. The PSC, therefore, has great significance for the nation. It was also submitted that the entire subject matter of the contract is situated in India and hence, the applicable law is the Indian law for both the substantive contract and the Arbitration Agreement.

35. Placing strong reliance on the factual situation, it was submitted that the PSC, its interpretation, and its execution involve intricate and complex questions of law and facts relating to Indian conditions and Indian laws. It was further submitted that since the parties were aware about the aforesaid nature of PSC, they consciously refrained from having the requirement that the third arbitrator should be a foreign national. Thus, it was submitted by the learned senior counsel, that the issue relating to the appointment of the third arbitrator has been left squarely to the two nominated arbitrators, and that the two arbitrators

are not to be influenced by any requirement that the third arbitrator should be a foreign national.

36. In the support of the aforesaid submission, learned counsel relied upon the letter dated 12th July, 2013 written by the Petitioner to the two arbitrators, wherein a request was made to complete the constitution of the arbitral tribunal. The following excerpt has been relied upon:

> "While it is understood that it is sometimes a time consuming exercise, Your Honour will appreciate that the issues which are subject matter of the arbitration proceedings are of significant importance to the Claimants.
>
> Accordingly, on behalf of our clients we humbly request Your Honour to complete the constitution of the Arbitral Tribunal at your earliest convenience."

37. Learned senior counsel also relied upon the letter dated 1st August, 2013 written by Mr. Justice Bharucha to submit that there is not even a suggestion that the third arbitrator has to be a foreign national.

38. The next submission of the Respondent is that Petitioners No 2 and 3 have not raised any dispute under the PSC at any stage. It is only the Petitioner alone that has raised the dispute and come forward as the *Claimant.* To substantiate the submissions, Respondents rely upon the following documents:

(i) Letter dated 23.11.2011;

(ii) Notice of Arbitration dated 23.11.2011;

(iii) Letter dated 02.01.2011 on behalf of Petitioner No. 1 by its solicitors.

(iv) Letter dated 02.02.2011, on behalf of Petitioner No. 1 by its solicitors.

(v) Letter dated 05.07.2012 of the Respondent to the Solicitors of RIL.

(vi) Letter dated 1st August, 2013 of Mr. Justice Bharucha, as per the Respondent shows that the arbitration was between Reliance Industries Limited and the Government of India.

39. It was also emphasised that all the communications annexed with the present petition identify the claimant to be Petitioner

No. 1. It was also highlighted that the contents of the letter dated 2nd May, 2012 written by the Respondents, which *inter-alia* deals with inadmissibility of recovery of costs has not been disputed by Petitioners No. 2 and 3. Learned senior counsel also relies upon the letter dated 12th July, 2013, sent on behalf of Petitioner No.1 by its Solicitors to the Arbitrators. This letter was sent after the order dated 7th August 2012 was passed by this Court in A.P. No. 8 of 2012. According to the Respondents this letter also shows that the dispute is only between RIL and the Respondent.

40. Mr. Divan also submitted that Petitioners No. 2 and 3 have not conformed to Article 33 of the PSC, for the purposes of invoking arbitration. Such non-compliance cannot be considered as merely an omission. In the light of the aforesaid, it was submitted that Petitioner No.1, an Indian Company,

is the only party to the dispute with the Respondents and therefore, there is no need to appoint a foreign arbitrator. Further, it was submitted even if it is assumed that Petitioners No. 2 and 3 have raised the disputes in terms of Article 33.6, there is no question of appointment of a foreign arbitrator as the dispute raised is only between two Indian parties, viz. Petitioner No.1 and the Respondents.

41. The next submission of Mr. Divan is that Section 11(1) of the Arbitration Act, 1996 provides that an arbitrator can be of any nationality, unless otherwise agreed by the parties. It was submitted that since the parties did not choose to have a foreign national to be appointed as the third arbitrator in Article 33.6, the parties did not choose to make Section 11(1) applicable to them. Learned senior counsel also pointed out that the parties instead agreed to proceed under Section 11(2) as

they agreed to appoint an arbitrator without requiring him to be of any foreign nationality.

42. Mr. Divan then points out that Section 11(9) has been authoritatively interpreted in **Malaysian Airlines Systems BHD II** Vs. **STIC Travels (P) Ltd.**[3] and **MSA Nederland B.V.** Vs. **Larsen & Toubro Ltd.**[4] According to the learned senior counsel, UNCITRAL Rules cannot override Sections 11(1) & (2), read with Article 33.6, nor can these Rules aid in interpreting Section 11(9). It was further submitted that the appointment of the third arbitrator under Article 33.6 of PSC has to be made under Arbitration and Conciliation Act, 1996. The UNCITRAL Rules will come into play only after the Arbitral Tribunal has been constituted. According to learned senior counsel, following factors negate the application of UNCITRAL Rules in making the appointment of the arbitrators:

(a) The law governing the arbitration

3 (2001) 1 SCC 509
4 (2005) 13 SCC 719

agreement is Indian Law;

(b) The seat of the arbitration is in India which makes the curial law of the arbitration as Indian law.

(c) The governing law of the contract is the Indian law.

(d) All these factors would show that UNCITRAL Rules would become relevant only after the Arbitral Tribunal has been constituted.

43. Lastly, it was submitted that the appointment of a foreign national as the third arbitrator is not only legally untenable, but also undesirable, in the facts and circumstances of the present case. To substantiate this, it was submitted that both Petitioners No. 2 and 3 are multi-national companies, with Petitioner No. 3 having presence/business connections in about 80 countries. These countries include the countries whose nationals are sought to be nominated by the Petitioners. It was further submitted that unravelling all the countries in which Petitioner No. 3 may have a connection would be difficult, if not impossible.

Thus, the very object of *neutrality, impartiality* and *independence* will be defeated by appointing a foreign national as the third arbitrator. On the contrary, it was submitted, appointment of a former judge of this Court would be the most suitable arrangement.

44. In response, Mr. Salve submitted that: (i) The reliance placed by the Respondents upon the law laid in **Malaysian Airlines Systems BHD II** Vs. **STIC Travels (P) Ltd. (supra)** and **MSA Nederland B.V.** Vs. **Larsen & Toubro Ltd. (supra)** is misplaced as these cases are inapplicable in the present case. (ii) The contention of the UOI that nationals of the 80 countries in which Petitioner No. 3 has operations would become ineligible to be appointed as arbitrators is misconceived. In this context, it was submitted that the Arbitration Act, 1996 and the related international practices takes into account

nationality but not area of operation. This submission of the Respondent, according to Mr. Salve, is not tenable because it confuses the question of *independence* and *impartiality* with *neutrality*. The aspect of neutrality is dealt with in Section 11(8) and Section 12; whereas, nationality is considered in Sections 11(1) & (9) of Arbitration Act, 1996. Further, it was submitted that these two provisions would be rendered otiose if the submission of the UOI is accepted.

45. Before parting with submissions made on behalf of the parties, it must also be noticed that the learned senior counsel for the parties have submitted a list each of proposed/suggested arbitrators; which according to them would satisfy the requirements of the arbitration agreement contained in PSC.

46. I have considered the submissions made by the

learned senior counsel for the parties.

47. I am not inclined to accept the submissions made by Mr. Anil B. Divan, learned senior counsel appearing on behalf of the UOI. Initially, Arbitration Petition No.8 was filed by Reliance Industries Limited– RIL (Petitioner No.1) and Niko (Petitioner No.2). In paragraph 6 of the arbitration petition, it was specifically averred as follows:-

> "The Respondent by its letter dated 8th August, 2011, granted its approval to Petitioner No.1 to assign 30% of its Participating Interest under the PSC to BP, thereby also making BP a partner in the Block KG-D6. ....."

Therefore, it is apparent that reference to arbitration was sought on behalf of the three partners to the PSC.

48. The Arbitration Petition was disposed of as both the parties had no objection to the arbitrator nominated by each other. Therefore, the matter was left to the two arbitrators to nominate the third

arbitrator who shall be the Chairman of the Arbitral Tribunal. However, by letter dated 1st August, 2013, Mr. Justice Bharucha pointed out that the two arbitrators have not been able to agree on the third arbitrator. Therefore, the Petitioners had to approach this court for appointment of a third arbitrator. In these circumstances, the present Petition came to be filed under Section 11(6).

49. There is an additional reason for not accepting the submission made by Mr. Anil Divan, learned senior counsel, that the Petitioner is not acting on behalf of all the three Contractors. The notice was served by RIL in the capacity of *Operator,* which included all the three Contractors, i.e., RIL, Niko and British Petroleum (BP).

50. A perusal of some of the correspondence reproduced earlier clearly indicates that the Respondent recognised that the Petitioner No.1 is

the *Operator* on behalf of all the Contractors, namely, Reliance, Niko and BP.

51. I find much substance in the submission of Mr. Salve that the contentions raised in the counter affidavit reflect a misunderstanding of:-

(i) the terms of the PSC;

(ii) reality of the Parties' commercial relationship;

(iii) application of the Arbitration and Conciliation Act, 1996; and

(iv) UNCITRAL Arbitration Rules and the practise of large scale arbitrations involving foreign parties.

52. It is also not possible to accept the submission of Mr. Anil Divan that Niko and BP are not *operators* under the PSC and, therefore, have forfeited any right to operations under the PSC. It is also not possible to accept the submission that Niko and BP are not the parties to the dispute with the Respondent. I am of the considered opinion that the provisions of the PSC clearly identified the

parties to the PSC. The disputes that have arisen between the parties are also clearly identified in the correspondence exchanged between the parties. The three named *contractors* are, in fact, frequently mentioned in the correspondence between the parties. It has been correctly highlighted by Mr. Salve that the terms of the PSC have to be considered in the light of the fact that the Respondent expressly consented, after detailed inquiry, to the assignment of participation interests in the PSC to BP. It is a matter of record that Niko has been a party to the PSC from the beginning. Therefore, at-least at this stage, it would not be possible to accept the submission of Mr. Divan that BP and Niko are not "*operating*" under the PSC.

53. I am also unable to accept the submission of Mr. Divan that given the nature of operations under the PSC, the issues involved thereunder are of public law and public policy. Mr. Divan, on the basis of

the aforesaid submission, has insisted that the third arbitrator ought to be from India. It was pointed out by Mr. Divan that even if it is accepted that the disputes raised by the Petitioner would also include the disputes of Petitioner Nos. 2 and 3, the arbitration still essentially remains an Indian arbitration. Such a submission cannot be accepted as the Respondents have not at any stage earlier raised an objection that the disputes had been raised by Petitioner No.1 only on its own behalf and did not relate to the disputes of Petitioner No.2 and 3 also.

54. In my opinion, the submission is misconceived and proceeds on a misunderstanding of the PSC, RIL, Niko and BP are all parties to the PSC. They are all *contractors* under the PSC. The PSC recognizes that the *operator* would act on behalf of the *contractor*. All investments are funded by not just the Petitioner No.1 but also by the other parties,

and they are equally entitled to the costs recovered and the profits earned. For the sake of operational efficiency, the *Operator* acts for and on behalf of the other parties. Therefore, I find substance in the submission of Mr. Salve that the disputes have been raised in the correspondence addressed by Petitioner No.1 not just on its own behalf but on behalf of all the parties. During the course of his submissions, Mr. Anil Divan had, in fact, submitted that Niko and BP will be affected by the arbitral award and it would be binding upon them too. Therefore, if the Petitioner No.1 was to succeed in the arbitration, the award would enure not only to the benefit of Petitioner No.1 but to all the parties to the PSC. Conversely, if the Government of India were to succeed before the tribunal, again the award would have to be enforced against all the parties. In other words, each of the *Contractors* would have to perform the obligations cast upon them. In that view of the matter, it is not possible to

accept the submission of Mr. Divan that the arbitration in the present case is not an international arbitration.

55. It is equally not possible to accept the contention of Mr. Divan that Niko and BP have not raised any arbitrable dispute with Union of India. A perusal of some of the provisions of PSC would make it clear that all three entities are parties to the PSC. All three entities have rights and obligations under the PSC [see Article 28.1(a)], including with respect to the Cost Petroleum, Profit Petroleum and Contract Costs (see Article 2.2), all of which are fundamental issues in the underlying dispute. Where RIL acts under the PSC, including by commencing arbitration, it does so not only on behalf of itself, but also "on behalf of all constituents of the contractors" including Niko and BP. I am inclined to accept the submission of Mr. Salve that there is a significant and broad ranging dispute between RIL,

Niko and BP on the one hand and the UOI on the other hand, that goes to the heart of the main contractual rights and obligations under the PSC. Furthermore, it is a matter of record that in the correspondence leading to the filing of the earlier petition being A.P.No.8 of 2012, no such objection about Niko and BP not being a party to the dispute had been taken. In fact, the petition was disposed of on a joint request made by the parties that two arbitrators having been nominated, no further orders were required. Therefore, there seems to be substance in the submission of Mr. Salve that all these objections about Niko and BP not being the parties are an afterthought. Such objections, at this stage, can not be countenanced as the commencement of arbitration has already been much delayed.

56. Both the parties had brought to the attention of the Court the correspondence from their own

perspective. Having considered the aforesaid correspondence, relevant extract of which have been noticed earlier, it is not possible to hold that the correspondence is only on behalf of the RIL. I, therefore, do not accept the submission of Mr. Anil Divan that this is an arbitration between the two Indian parties only.

57. Further more the accounting procedure (Appendix C to PSC) clearly provides that RIL shall keep the accounts for the purposes of cost recovery statement. Therefore, it cannot be said that the claims made by the Petitioner are only on behalf of RIL. The joint operating agreement expressly provides that the operator "to initiate litigation on behalf of all the parties." The fallacy of the stand taken by UOI is *patent*. On the one hand, the Respondent claims that the arbitral award would bind not only Petitioner No.1 but also Petitioner Nos. 2 and 3, but on the other hand, is insisting that the

arbitration proceedings are only between Petitioner No.1 and UOI.

58. This now brings me to the major divergence of views between Mr. Salve and Mr. Divan on the interpretation to be placed on Articles 33.5 and 33.6 of the PSC. Both the learned senior counsel accept that when exercising power under Section 11(6) of the Arbitration Act, the 'Chief Justice of India or the person or the institution designated by him' (hereinafter referred to as "CJI" for convenience) is required to appoint the 2nd Arbitrator from amongst persons who are not nationals of the country of any of the parties to the arbitration proceedings. Thereafter, both the learned senior counsel have expressed divergent views. According to Mr. Salve, the provisions contained in Article 33.5 indicates the significance that the parties have attached to the *neutrality* of the arbitrators. Therefore, *necessarily* the Chairman/Presiding Arbitrator would have to be

of a *nationality* other than India. According to him, appointment of an Indian Arbitrator under Article 33.6 would not be an option open to the CJI. On the other hand, Mr. Divan emphasised that there is no requirement in Article 33.6 for appointment of a foreign arbitrator, identical or similar to the provision in Article 33.5. His view is that the absence of such a requirement is deliberate and significant. According to him, it clearly signifies that *only* an Indian National can be appointed as the third arbitrator. I am of the opinion that both the learned senior counsel are only partially correct. Both sides have adopted extreme positions on the pendulum. I accept the interpretation of both the learned senior counsel with regard to Article 33.5 as the request will go to the Chief Justice of India for appointment of an arbitrator, "from amongst persons who are not nationals of the country of any of the parties to the arbitration proceedings". In exercise of the jurisdiction under Section 11(6), the

CJI would usually appoint the third arbitrator in accordance with the request. I have no hesitation in accepting the submission of Mr. Divan that even the third arbitrator is an Indian National, it would not be contrary to Article 33.6. But it would not be possible for me to accept the extreme views expressed by Mr. Divan that *only* an Indian National can be appointed, as there is an absence of a requirement of appointing a foreign national as the third arbitrator. In my opinion, Article 33.6 virtually leaves it to the Chief Justice of India to appoint the third arbitrator who would be *neutral, impartial* and *independent* from anywhere in the world *including India*. Just as India cannot be excluded, similarly, the countries where British Petroleum and Niko are domiciled, as an *option* from where the third arbitrator could be appointed, cannot be ruled out. Having said this, it must be pointed out that this is the *purely legal position*. This would be a very *pedantic* view to take whereas international

arbitration problems necessarily have to be viewed *pragmatically*. Fortunately, Arbitration Act, 1996 has made express provision for adopting a *pragmatic approach*. When the CJI exercises his jurisdiction under Section 11(6) he is to be guided by the provisions contained in the Arbitration Act, 1996 and *generally accepted practices* in the other international jurisdictions. CJI would also be anxious to ensure that no doubts are cast on the *neutrality, impartially* and *independence* of the Arbitral Tribunal. In international arbitration, the surest method of ensuring *atleast the appearance of neutrality* would be to appoint the sole or the third arbitrator from nationality other than the parties to the arbitration. This view of mine will find support from numerous internationally renowned commentators on the practice of international arbitration as well as judicial precedents.

59. At this stage, it would be appropriate to take

notice of the observations made by two such commentators.

60. Redfern and Hunter on International Arbitration, Fifth Edition (2009) Para 4.59 expresses similar views with regard to the importance of the nationality of the sole or the third arbitrator being from a country different from that of the parties to the arbitration. The opinion of the learned authors is as follows:-

> "In an ideal world, the country in which the arbitrator was born, or the passport carried, should be irrelevant. The qualifications, experience, and integrity of the arbitrator should be the essential criteria. It ought to be possible to proceed in the spirit of the Model Law which, addressing this question, provides simply: 'No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.' Nevertheless, as stated above, the usual practice in international commercial arbitration is to appoint a sole arbitrator (or a presiding arbitrator) of a different nationality from that of the parties to the dispute."

61. Gary B. Born in International Commercial Arbitration, Volume I (2009) has an elaborate

discussion on the impact of the UNCITRAL Model Laws as well as UNCITRAL Rules on the appointment of the sole or the third arbitrator. He points out that some arbitration legislations contain different nationality provisions, similar to those applicable under leading institutional rules, which apply when a *national court* acts in its *default capacity* to select an arbitrator (in limited circumstances).

62. Article 11(5) of the UNCITRAL Model Law reads as under:-

> "A decision on a matter entrusted by paragraph (3) or (4) of this Article to the court or other authority specified in Article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."

63. Article 6(4) of UNCITRAL Rules, 1976 in almost identical terms reads as under :-

"In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

64. Taking note of the aforesaid two Articles, it is observed by the learned author as follows :

"Article 11(5) does not restrict the parties' autonomy to select arbitrators of whatever nationality they wish. It merely affects the actions of national courts, when acting in their default roles of appointing arbitrators after the parties' efforts to do so have failed. Article 11(5) does not forbid the appointment of foreign nationals as arbitrators, but on the contrary encourages the selection of an internationally-neutral tribunal.

Far from resembling national law prohibitions against foreign arbitrators, Article 11(5) aims at exactly the opposite result. Indeed, Article 11(1) of the UNCITRAL Model Law also provides, like the European and Inter-American Conventions, that "no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. That properly reflects the international consensus, embraced by the European, Inter-American and New York Conventions, that mandatory nationality prohibitions are incompatible with the basic premises of international arbitration."

65. Earlier in the same volume at page 1431, while discussing the "Criteria for Judicial Selection of the Arbitrator", he re-states the *general practice* adopted in appointment of an *independent* and *impartial* arbitrator. The opinion of the learned author is as follows :

> "National arbitration legislation provides only limited guidance for courts actually to make the selection of arbitrators in international arbitrations. Article 11(5) of the UNCITRAL Model Law provides that "in appointing an arbitrator, [the court] shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator," the same provision requires the court to "take into account as well as the advisability of appointing an arbitrator of a nationality other than those of the parties." This language requires courts to have "due regard" to the parties' contractually specified requirements for arbitrators-which very arguably accords such requirements inadequate weight, given the importance of party autonomy in the arbitrator selection process. Similarly, it is doubtful that it is sufficient for courts merely to "take [the arbitrator's nationality] into account", rather it should generally be essential that the presiding arbitrator have a neutral nationality."

66. Redfern and Hunter on International Arbitration,

Fifth Edition (2009) at Page 263, expresses a similar opinion, after taking into consideration the UNCITRAL Rules; ICC Rules; LCIA Rules and ICDR Rules, which is as follows :-

> "The fact that the arbitrator is of a neutral nationality is no guarantee of independence or impartiality. However, the *appearance* is better and thus it is a practice that is generally followed".

67. Section 11 of the Arbitration Act, 1996 uses similar phraseology as Article 11 of the UNCITRAL Model Law. Therefore, it would not be possible to accept the submission of Mr. Divan that the Court cannot look to Model Laws or the UNCITRAL Laws as legitimate aids in giving the appropriate interpretation to the provisions of Section 11, including Section 11(6).

68. In any event, the neutrality of an arbitrator is assured by Section 11(1) of the Arbitration Act, 1996, which provides that a person of any nationality may be an arbitrator, unless otherwise

agreed by the parties. There is no agreement between the parties in this case that even a third arbitrator must necessarily be an Indian national. In fact, Section 11(9) of the Arbitration Act, 1996 specifically empowers the CJI to appoint an arbitrator of a nationality other than the nationality of the parties involved in the litigation. Therefore, I am unable to accept the submission of Mr. Anil Divan that it would not be permissible under the Arbitration Act, 1996 to appoint the third arbitrator of any nationality other than Indian. Merely because the two arbitrators nominated by the parties are Indian would not *ipso facto* lead to the conclusion that the parties had ruled out the appointment of the third arbitrator from a neutral nationality. In this case, both the arbitrators had been appointed by the parties, therefore, the condition precedent for appointing an arbitrator, from amongst persons, who are not nationals of the country of any of the parties to the arbitration proceedings, had not even

arisen.

69. I also do not find merit in the submission made by Mr. Anil Divan on the basis of Articles 33.5 of the PSC. A bare perusal of Article 33.5, PSC would show that it deals only with the situation where the other party fails to appoint an arbitrator and a request is made to the Chief Justice of India or a person authorised by him to appoint the second arbitrator. In such a situation, the Chief Justice is required to choose the second arbitrator from amongst the persons who are not nationals of a country of any of the parties to the arbitrator proceedings. Article 33.6 is invoked when the two arbitrators appointed by the parties fail to nominate the third arbitrator. In such circumstances, the Chief Justice or the nominees of the Chief Justice is required to appoint the third arbitrator in accordance with the Arbitration and Conciliation Act, 1996. At that stage, Section 11(9) of the Arbitration Act, 1996 would

become relevant. It would be necessary for the Chief Justice of India to take into consideration the will of the Indian Parliament expressed in Section 11(9). It appears to me that the submission made by the Petitioners cannot be said to be without any merit. I am unable to read into Article 33.6, an embargo on the appointment of a foreign national as the third arbitrator as submitted by Mr. Divan. It is not possible to accept the submission that the parties have specifically decided to exclude the appointment of a foreign arbitrator under Article 33.6, as no specific provision was made *para materia* to Article 33.5. Even in the absence of a specific provision, the appointment of the third arbitrator under Article 33.6 would have to be guided by the provisions contained under Section 11(9) of the Arbitration Act.

70. I am also unable to accept the submission of Mr. Divan that since the provision contained in Section

11(9) of the Arbitration Act, 1996 is not mandatory; the Court ought to appoint the third arbitrator, who is an Indian National. This Court, in the case of **Malaysian Airlines Systems BHD II (supra),** interpreting Section 11(9) after taking into consideration the position in some other countries where the UNCITRAL Model Law is adopted, has come to the following conclusions:-

> **"25.** It is, therefore, clear that in several countries where the UNCITRAL Model is adopted, it has been held that it is not impermissible to appoint an arbitrator of a nationality of one of the parties to arbitration.
>
> **26.** In the light of the above rules in various countries and rulings of the court and also in view of the fact that the 1996 Act is based on UNCITRAL Model Law which in Article 6(4) only speaks of "*taking into account*" the nationality as one of the factors, I am of the view that the word "may" in Section 11(9) of the Act is not intended to be read as "must" or "shall".
>
> **27.** I am, therefore, of the view that while nationality of the arbitrator is a matter to be kept in view, it does not follow from Section 11(9) that the proposed arbitrator is necessarily disqualified because he belongs to the nationality of one of the parties. The word "may" is not used in the sense of "shall". The provision is not mandatory. In case the party who belongs to a nationality other than that of

the proposed arbitrator, has no objection, the Chief Justice of India (or his nominee) can appoint an arbitrator belonging to a nationality of one of the parties. In case, there is objection by one party to the appointment of an arbitrator belonging to the nationality of the opposite party, the Chief Justice of India (or his nominee) can certainly consider the objection and see if an arbitrator not belonging to the nationality of either parties can be appointed. While taking that decision, the Chief Justice of India (or his nominee) can also keep in mind, in cases where the parties have agreed that the law applicable to the case is the law of a country to which one of the parties belong, whether there will be an overriding advantage to both the parties if an arbitrator having knowledge of the applicable law is appointed.

28. In the result, I am of the view that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute."

71. The aforesaid ratio of law in **Malaysian Airlines Systems BHD II (supra)** has been reiterated by this Court in **MSA Nederland B.V. (supra)** in the following words:-

"3. The learned counsel appearing for the petitioner drew my attention to the fact that the petitioner Company is a company incorporated in the Netherlands while the respondent Company is a company incorporated in India. He prayed that in view of

the provisions of Sections 11(9) of the Arbitration and Conciliation Act, an arbitrator having a neutral nationality be appointed, meaning thereby that the sole arbitrator should neither be a Dutch national nor be an Indian national. Section 11(9) is reproduced as under:

> "11. (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

The key word in the above provision is "may" which leaves a discretion in the Chief Justice or his nominee in this behalf and it is not mandatory that the sole arbitrator should be of a nationality other than the nationalities of the parties to the agreement."

72. But the ratio in the aforesaid cases can not be read to mean that in all circumstances, it is not possible to appoint an arbitrator of a nationality other than the parties involved in the litigation. It is a matter of record that Clause 33.5 of the PSC provides that on *failure* of the *second party* to nominate its arbitrator, the Chief Justice of India may be requested to appoint the second arbitrator

from amongst persons who are not nationals of the country of any of the parties to the arbitration proceedings. Therefore, in principle, it becomes apparent that the Respondents have accepted the appointment of the second arbitrator from a neutral country. Merely because, the seat of arbitration is in India, the applicable law is Indian Law; it does not become incumbent on the Court to appoint the third arbitrator, who is an Indian national. The concern of the Court is to ensure *neutrality*, *impartiality* and *independence* of the third arbitrator. Choice of the parties has little, if anything, to do with the choice of the Chief Justice of India or his nominee in appointing the third arbitrator. It is true that even at the stage of exercising its jurisdiction under Section 11(6) at the final stage, the Chief Justice of India or his nominee can informally enquire about the preference of the parties. But it is entirely upto the Chief Justice of India, whether to accept any of the preferences or to appoint the third arbitrator not

mentioned by any of the parties. In making such a choice, the Chief Justice of India will be guided by the relevant provisions contained in the Arbitration Act, UNCITRAL Model Laws and the UNCITRAL Rules, where the parties have included the applicability of the UNCITRAL Model Laws/UNCITRAL Rules by choice.

73. I must emphasise here that the trend of the third arbitrator/presiding officer of a neutral nationality being appointed is now more or less universally accepted under the Arbitration Acts and Arbitration Rules in different jurisdictions.

74. In the present case, Article 33(9) of the PSC adopts the UNCITRAL Rules for the arbitration agreement under Article 39. The applicable UNCITRAL Rules at the time when the arbitration agreement was signed were the 1976 Rules.

75. The aforesaid Rules have been literally paraphrased in Section 11(9) of the Arbitration Act, 1996. Rule 4 of UNCITRAL states that in making the appointment, the appointing authority shall have regard to such consideration as are likely to secure appointment of an *independent* and *impartial* arbitrator. Superimposed on those two conditions is a provision that the appointing authority shall take into account, as well, the advisability of arbitrator of a nationality other than the nationalities of the parties. These rules in my opinion are almost parallel to Article 33(5) of the PSC.

76. Mr. Anil Divan had, however, raised serious doubts about the impartiality of the third arbitrator due to the omnipresence of British Petroleum all over the world. I am of the considered opinion that the apprehension expressed by the learned senior counsel is imaginary and illusory. Such a proposition cannot possibly be accepted as a general practice

for the appointment of Chairman/Presiding Officer/Third Arbitrator guided by the principle consideration that *there must not only be the neutrality, but appearance of neutrality of the third arbitrator*. In that view of the matter, I have no hesitation in rejecting this submission of Mr. Divan that only an Indian National can be appointed as the third arbitrator.

77. This apart, I must notice here the judgment of this Court in the case of **Northern Railway Administration, Ministry of Railway, New Delhi (supra)**, whilst considering the contingencies under which a party may request the Chief Justice or any person or institution designated by him under Section 11 to take necessary measures held as follows:-

> **"11.** The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him *to take the necessary measure*" (underlined for emphasis*). This expression has to be read along with requirement in sub-section (8) that

the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

13. The expression "due regard" means that proper attention to several circumstances have been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken."

78. Keeping in view the aforesaid principles, I have examined the submissions of Mr. Divan and Mr. Salve on the issue with regard to the *neutrality,*

impartiality and *independence* of the third arbitrator. As held earlier, the apprehension expressed by the Respondent Union of India seems to be imaginary and illusory. Whatever is being said about the influence/presence of British Petroleum in other jurisdictions would apply equally to the Union of India, if the third arbitrator is an Indian national, within the Indian jurisdiction.

79. The apprehension expressed by Mr. Divan that if a foreign national is appointed as a third arbitrator, the Tribunal would be at a disadvantage as all applicable laws are Indian, in my opinion, overlooks the fact that the two arbitrators already appointed are Former Chief Justices of India and can be very safely relied upon to advise the third arbitrator of any legal position, which is peculiar to India.

80. At this stage, normally the matter ought to be remitted back to the two arbitrators appointed by

the parties to choose the third arbitrator on the basis of the observations made in the judgment. However, given the sharp difference of opinion between the two arbitrators, I deem it appropriate to perform the task of appointing the third arbitrator in this Court itself. Therefore, I had requested the learned senior counsel for the parties to supply a list of eminent individuals one of whom could be appointed as the third arbitrator. Although two lists have been duly supplied by the learned counsel for the parties, I am of the opinion, in the peculiar facts and circumstances of this case, it would be appropriate if an individual not named by any of the parties is appointed as the third arbitrator. I have discretely conducted a survey to find a suitable third arbitrator who is not a National of any of the parties involved in the dispute.

81. Upon due consideration, I hereby appoint Honourable James Spigelman AC QC, former Chief

Justice and Lieutenant Governor of New South Wales, Australia as the third Arbitrator who shall act as the Chairman of the Arbitral Tribunal. The E-mail address which has been supplied to this Court is as follows :

spigel@bigpond.net.au

82. In view of the considerable delay, the Arbitral Tribunal is requested to enter upon the reference at the earliest and to render the award as expeditiously as possible.

83. The Arbitration Petition is allowed in the aforesaid terms. No costs.

.....J.
[Surinder Singh Nijjar]

New Delhi;
March 31, 2014.

ITEM NO.1A COURT NO.6 SECTION XVIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

ARBITRATION PETITION NO. 27 OF 2013

RELIANCE INDUSTRIES LTD. & ORS. Petitioner(s)

VERSUS

U.O.I. Respondent(s)

Date: 31/03/2014 This Petition was called on for pronouncement of judgment today.

For Petitioner(s)
M/S. Parekh & Co., Advs.

For Respondent(s)
Mr. Shailendra Swarup, Adv.

Hon'ble Mr. Justice Surinder Singh Nijjar pronounced the judgment.

The petition is allowed in terms of the signed reportable judgment.

[Nidhi Ahuja]
Court Master

[Indu Bala Kapur]
Court Master

[Signed reportable judgment is placed on the file.]