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

***Reserved on: 15th May, 2020***

***Date of Decision: 29thMay, 2020***

\+ **O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020**

M/S HALLIBURTON OFFSHORE SERVICES INC. ..... Petitioner

Through: Mr. Gopal Subramanium, Mr. Sandeep Sethi & Mr. Sacchin Puri, Sr. Advs. with Mr. Piyush Sharma, Mr. Dhritiman Bhattacharyya, Ms. Deeti Ojha, Ms. Ujwala, Mr. Pavan Bhushan, Mr. Aditya Prasad and Mr. Dhananjay Grover. (M:9810222509) Advocates

Mr. Sanjeev Verma (VP, South East Asia and India), Ms. Tejinder Kaur Oberoi (Counsel) and Larry (Chief Counsel)

versus

VEDANTA LIMITED & ANR. ..... Respondents

Through: Mr. Harish Salve, Sr. Adv. with Ms. Anuradha Dutt, Mr. Anish Kapur, Ms. Nikhita Suri and Mr. Kunal Dutt, Advs. for-R-1.

Ms. Pooja Yadava (Deputy General Counsel, Cairn Oil and Gas), Mr. Rahul Bhattacharjee (Chief Counsel, Cairn Oil and Gas), Mr. Ajay Dixit, CEO, (Cairn Oil and Gas) and Mr. Rajesh Mohata, (Director- Procurement and Supply Chain Management, Cairn Oil and Gas)

**CORAM:**
**JUSTICE PRATHIBA M. SINGH**

**JUDGMENT**

1. A production sharing contract dated 15th May, 1995 was executed

between Vedanta Limited *(hereinafter, "Company")* and Cairn Energy (Cairn), ONGC and the Government of India in respect of exploration of the Rajasthan Block RJ-ON-90/1, which produces a substantial portion of petroleum in India.

2. In order to operationalize the production, a global tender was floated by the Company for fast-tracking the development of "end-to-end integrated Oil Well Construction (including drilling, completion and associated Well Services), development of surface facilities (well-pad, intra-field network and evacuation facilities/ pipelines specific to EOR development) and application of Enhanced Oil Recovery Technologies for enhancing the ultimate recovery**"** (*hereinafter, "Project"*) from three fields called `Mangala', `Bhagyam' and `Aishwarya' *(hereinafter collectively referred to as the "MBA fields" or by their individual names).*

3. Pursuant to the global tender, competitive bidding took place and the Petitioner - Halliburton Offshore Services Inc. *(hereinafter, "Contractor")*- a group company of Halliburton Company, USA which runs one of the world's largest oil fields services was selected for the execution of the Project. Contract dated 25th April, 2018 was accordingly executed between the parties. The total value of the contract is USD 197 Million.

4. The contract is quite detailed and runs into almost 1000 pages along with Exhibits and Annexures. Both the parties had filed extracts of the contract with their pleadings and after judgment was reserved, the complete contract has been placed on record. The clauses of the contract, as have been relied upon in oral and written submissions are only being considered for the present purposes.

Due to the bulky nature of the Contract, the relevant clauses relied upon in this judgment are appended to the judgment as **APPENDIX A**.

5. The broad agreement between the parties was that the Contractor would carry out two sets of works as part of the Project viz., *`Drilling & Completion'* (including drilling, completion and associated Well Services) as also *`Surface Facility'* operations for development of surface facilities. The Project had a `commencement date' and a `completion date'. Various consequences were provided in case of delays in execution of the Project. For reasons, which are discussed in detail below, the work was not completed as per the stipulated timelines. The Company served repeated notices upon the Contractor. Various communications were exchanged and the same were also discussed as part of the `Project Management Committee' which was a joint platform. Projected competition dates were thereafter proposed by the Contractor for completion of the Project. The Company, repeatedly insisted that work on all three fields ought to stand concluded by 31st January 2020. Finally, however, as per the agreement between parties, the deadline for conclusion of the entire work was agreed as 31st March 2020.

6. However, on 18th March 2020, the Contractor invoked the *Force Majeure* clause and sought further time to complete the Project. This was however not acceptable to the Company, which on 31st March 2020 and again on 7th April 2020 invoked Clause 11 proposing termination of the contract and threatened consequential action including invocation of the Bank Guarantees. At that stage, the present petition was filed on 13th April 2020. The reliefs sought in the petition are:

*"a) restrain the Respondent No.1 from invoking and/ or encashing and /or receiving any payment from Respondent No. 2 under said Bank Guarantee as described in para 3.4 above in favour of Respondent No. 1 including all coercive actions and consequential follow up action taken pursuant to the same till the present Petition and / or disputes arising under the Agreement between the Petitioner and the Respondent No. 1are decided and adjudicated by the Arbitral Tribunal to be constituted in due course;*

*b) in the alternative the Respondent No. 1 be directed to strictly act in terms of the Agreement including recovering whatever amounts that can be actually deducted and not the entire bank guarantee amounts till the present proceedings and / or the disputes between the Petitioner and the Respondent No. 1 are settled either by way of reconciliation of the accounts or through the adjudication by the Arbitrator ; and / or*

*c) direct the payment of the outstanding invoiced amount (as of date) of USD 6.6 million, unreasonably held by the Respondent No.1;*

*d) pass any order to secure the amount recoverable in arbitration including the unbilled amounts of the variations carried out by the Petitioner company ;*

*e) pass interim/ ad interim ex parte orders in respect of prayers (a) to (e) above;*

*f) pass any other order (s) which this Hon'ble Court may deem fit proper, just and convenient in the facts and circumstances of the present case"*

On the same day, i.e., 13th April, 2020 the Company terminated the contract. On 15th April 2020, arguments were heard and judgment was reserved on the issue of ad-interim relief sought by the Contractor. Status quo was also directed by the Ld. Single Judge on 15th April 2020.

7. Vide a detailed order dated 20th April 2020, an ad-interim order was passed restraining invocation and encashment of the Bank Guarantees tabulated in paragraph 3.4 of the Petition. The operative portion of the order reads as under:

> *"27. The petition, and the rival submissions advanced by learned Senior Counsel for me, unquestionably throw up issues of some factual and legal complexity, which may necessitate a proper affidavit, by way of response, from the respondent, and detailed consideration of all these aspects, so as to arrive at a firm conclusion as to whether, till the normalisation of activities of the petitioner, consequent to lifting, or relaxation, of the restrictions imposed by the executive administration as a result of the n-COVID-2019 pandemic, the petitioner would be entitled to an injunction, against the respondent, from invocation of the eight bank guarantees forming subject matter of the present petition. For the present, I am convinced, prima facie, that, in view of the submission, of the petitioner, that it was actually working on the project till the imposition of lockdown on 22nd March, 2020, or at least shortly prior thereto, and in view of the sudden and emergent imposition of lockdown, the interests of justice would justify an ad interim injunction, restraining invocation or encashment of the*

*aforesaid eight bank guarantees, till the expiry of exactly one week from 3rd May, 2020, till which date the lockdown stands presently extended. As to whether this interim injunction merits continuance, thereafter, or not, would be examined on the next date of hearing, consequent to pleadings being completed and all requisite material, including all relevant Governmental instructions, being placed on record. The injunction presently being granted, it is reiterated, is purely ad interim in nature, and is being granted only in view of the completely unpredictable nature of the lockdown, and its sudden imposition on 22nd March, 2020, of which the petitioner could not legitimately be treated as having been aware in advance. I am also persuaded, in this regard, by the fact that the government itself has, after imposition of the lockdown, being issuing instructions, from time to time, seeking to mitigate the rigours and difficulties that have resulted, unavoidably, as a result of the imposition of the lockdown. There is no reason, therefore, by the petitioner ought not to be given limited protection, till the next date of hearing, subject to orders which may be passed in these proceedings thereafter.*

*28. In the circumstances, let notice issue on the present petition, returnable on 11th May, 2020. Notice is accepted, on behalf of the respondents, by Ms. Anuradha Dutt, and is permitted to be served on Respondent No. 2 by e-mail. It shall be the responsibility of the petitioner to obtain the e-mail id of Respondent No. 2, for effecting service. Affidavit of service on Respondent No. 2, with proof thereof, be filed by the petitioner prior to the next date of hearing. Counter-affidavit, if any, may*

*be filed by the respondents within two weeks, with advance copy to the petitioner, who may file rejoinder thereto, if any, within one week thereof. List before the appropriate bench, as per roster.*

*29. There shall be an ad interim stay on invocation and encashment of the eight Bank guarantees, tabulated in para 3.4 of the petition, tillthe next date of hearing. The aspect of continuance of this interim order shall be taken up on the next date of hearing.*

*30. Needless to say, the petitioner is directed to ensure that the bank guarantees remain alive during the pendency of the present proceedings."*

8. Post the passing of the above order, pleadings have been completed by the parties. Detailed submissions have been heard on various dates on behalf of both sides, during the COVID-19 lockdown period. Some Counsels joined the video conferencing hearings from outside India as well. Parties have also filed case law they rely upon in support of their respective stands along with some documents including a copy of the contract.

**Submissions of Mr. Gopal K. Subramanium Ld. Senior Counsel on behalf of the Petitioner:**

9. It is submitted by Mr. Subramanium that there is no compelling reason to dissolve the injunction already granted by the ld. Single Judge. The contract already stands terminated and the arbitration clause has also been invoked. The Contractor has also sought waiver of the liquidated damages owing to the various defaults by the Company. According to the Contractor, a substantial part of the Project stands executed and only 3-5% of the Project work remains

outstanding. Thus, there are no justified reasons for invoking the Bank Guarantees. He further relies upon the letter dated 6th May, 2020 to argue that a final proposal was given by the Company clearly seeking timelines for execution. This itself showed that the contract was still alive between the parties and the Contractor wanted to resolve the matter. It is further submitted that *Force Majeure* squarely applies in view of the outbreak of COVID-19 globally. It is well within the knowledge of the Company that the kind of equipment that is to be installed requires personnel to travel from various foreign countries which is not possible due to lockdown. Thus, the Contractor is entitled to an injunction.

10. Reference is made to the contract dated 25th April, 2018 to submit that as per clause 2.1 the contract was to remain in effect for two years from the effective date. The terminologies i.e. the effective date and commencement date would show that it is when the last, out of the three fields, is commenced that the two years' period is kicked off. The commencement date is 17th January, 2018 concluding only on 16th January, 2020. As per clause 2.1(b) the Company had an option to extend the term of the contract for a further period upto one year. Thus, he submits that the Company had agreed to extend the contract initially till 31st March, 2020 and thereafter till 30th June, 2020.

11. Emphasis is laid by the Ld. Sr. Counsel on the variation order no.3 dated 16th January, 2020. According to Mr. Subramanium, the said variation order no.3 changed the contract expiry date to 30th June, 2020. This was meant to facilitate completing of unfinished work by the Contractor. Since the contract itself stands extended as per the variation order and time has been granted to

the Contractor to complete the unfinished work, the Bank Guarantees cannot be invoked.

12. It is argued that the Contractor had been giving the continuous progress reports or the work carried out in the three fields. Reliance is placed on three progress reports that gave complete statistics of progress of work and showed the extensions till 30th April, 2020.

13. Ld. Sr. Counsel submits that in view of the unfinished work, which required personnel to travel from foreign countries and the outbreak of corona virus, the Contractor notified the Company on 18th March, 2020 that the milestone adjustment would be required to be made. According to the Company, the issuance of the said letter clearly established the *bonafides* of the Contractor, which notified the Company well in advance, of the difficulties it was facing and the impact of the *Force Majeure* event as per clause 15.4 of the contract. Events or situations which are beyond the reasonable control of a party would include an epidemic. In case of an event occurring, the Contractor was entitled to compensation as per clause 15.4. It is then submitted that as per letter dated 31st March, 2020 the Company had clearly communicated to the Contractor that it fully understood the situation and the impact of the outbreak of the epidemic. It is submitted that the Contractor had agreed to complete all the outstanding work by 31st March, 2020, however, vide letter dated 31st March, 2020 the Company chose to put the Contractor on notice that it will terminate the contract and use alternative sources for completing the outstanding work.

14. Mr. Subramanium then urged that the Contractor made enormous efforts to amicably sort out the issues which, unfortunately did not fructify. He disputed that the letter of the Director General (Hydro Carbons) gave any exemption to the Project of the Contractor. According to him the said letter merely permitted the continuance of oil and gas production, which are public utilities, to continue their work. However, the MBA Fields which are yet to be commissioned would not get any exemption under the said letter.

15. It is also submitted that as per the `callout order' issued under clause 2.2 substantial portion of the work is completed and only a small portion of the work is left to be completed. The various progress reports according to him showed that the work was continuously being conducted. As per clause 6 of the contract, milestones were specified in Exhibit-J, which clearly provided that maximum 10% of the call out value can only be charged towards liquidated damages.

16. It is further submitted that there are three types of Bank Guarantees i.e. (i) Bank Guarantee to secure advance payment (ii) Bank Guarantee for performance and for (iii) Bank Guarantees to secure liquidated damages. Until and unless the amount of liquidated damages is adjudicated, the question of encashing the guarantee to the liquidated damages does not arise. Further the Bank Guarantees are alive till 2021 i.e. the defect liability period and thus, the Company is fully secured.

17. Vehement reliance is placed on the variation order no.3 under which as per the Contractor, the Company had agreed for extended time period of contract dated 30th June, 2020. It is claimed that the variation order was issued

by the Company and was duly counter signed by the Contractor. After placing of the variation order, meetings of the Project Management Committee were held in terms of clause 3.3(a). The progress reports have also been submitted.

18. It is also submitted that when the Company called for a `cure plan', the same was submitted on 5th December, 2019. There are two components of the work. (a) Drilling and completion and (b) surface activity. Insofar (a) is concerned, the entire work has been completed. Insofar (b) is concerned, very little work is outstanding. At best, if the work is to be carried out beyond the milestones, the liquidated damages can be enforced, however, there is no occasion invoking the Bank Guarantees as the Contractor has to recover more than 100 million dollars towards unpaid amount, which after adjustment would be approximately 91 million dollars.

19. According to the Contractor, the deadline of 31st January, 2020 is completely farcical which is demonstrated from the fact that even as even as on 20th February, 2020 the Company has been asking for a plan for completion of balance activity. In fact, on 24th February, 2020, the Company's officers have commended the work done by the Contractor vide the email dated 24th February, 2020. It is also submitted that the minutes of Project Management Committee dated 21st January, 2020 showed that there was a planned shutdown.

20. In conclusion, it is submitted that the Court exercises discretionary power under Section 9. Though an injunction against the invocation of Bank Guarantees has been sought, the Court is not prevented from passing any other interim protection orders to safeguard the Contractor's interest. The manner in

which the termination of the contract took place after the filing of the petition, shows that the same was *malafide*. The petition was filed on 13th April, 2018 and the advance copy of the same was served during the day on the Company and letter of termination was issued at 10:46 pm in the night. This itself shows that the letter dated 31st March, 2020 which showed that the threat of invoking the Bank Guarantees became a reality when the Bank Guarantees were invoked and the contract was terminated. The Contractor has been permitted to work beyond 31st March, 2020. Since outbreak took place during which period event occurred, which prevented the progress of the Project, the interest of the Contractor ought to be protected. Reliance is placed on the following judgments:

i. ***Leighton India Contractors P Ltd v. DLF Ltd. & Ors, [OMP (I) COMM 109/2020, decided on 13th May, 2020];***

ii. ***Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80;***

iii. ***National Agricultural Co-operative Marketing Federation Of India v. Alimenta2020 SCCOnline SC 381 ; and***

iv. ***Nalini Singh Associates v. Prime Time – IP Media Services Ltd. 2008(106) DRJ 734.***

21. Finally, it is submitted that the contract was valid, a substantial portion of the work was completed and the Contractor is to be paid a large sum for works which have already been conducted. Under these circumstances, the Section 9 petition deserves to be allowed and the interim order already granted ought to be confirmed.

**Submissions of Mr. Harish Salve, Ld. Senior Counsel on behalf of the Respondent No.1**

22. Mr. Salve, ld. Senior Counsel appearing for the Company at the outset submits that the law relating to Bank Guarantees is very well settled. The Bank Guarantees are independent contracts which are not subservient to the main contract. The standard that would be applied in such cases is whether the invocation is liable to be stayed on the ground of egregious fraud or special equities. A perusal of the Bank Guarantees shows that the same are completely unconditional and they are not connected in any manner with any dispute in respect of the underlying contract. The Bank Guarantees have been issued in terms of Clause 9 of the Contract in order to secure the advance payments and for effective performance of the contract. Thus, no restraint order ought to be granted.

23. Ld. Sr. Counsel further submits that a perusal of Exhibit-J attached to the contract would show that there were specific milestones fixed for the execution of the work in each of the fields. He submits that the Contractor is guilty of grossly delaying the execution of the Project since inception. The admitted completion dates as per the contract were 12 months, 14 months and 17 months. The Contractor had to give the monthly progress report. The completion dates were 16th June, 2019, 16th March, 2019 and 16th January, 2019 respectively for 'Mangala', 'Bhagyam' and 'Aishwarya'. The completion dates were well-known to the Contractor who for one reason or the other continued to delay the execution of the project. If there was a delay, the company was entitled to levy liquidated damages of 1.25% per month or on a

pro-rata basis up to maximum 10% of call out value. Exhibit-J also contemplated a reward for early completion of the work.

24. He submits that the Contractor had already delayed the Project even as of July, 2018 leading to issuance of notice dated 31st July, 2018 seeking a firm date for operation of the rigs. This position continued for several months. The construction work was to be completed by December, 2018 which was delayed. On 25th November, 2019, since neither of the fields were at the completion stage, the Company called upon the Contractor to give a `cure plan' in terms of Clause11 of the contract. Such a 'cure plan' was to be given within ten days. As per this notice, it was informed to the Contractor that only 89%, 73.5% and 91% of construction for 'Aishwarya', 'Bhagyam' and 'Mangala' fields respectively has been achieved and a substantial amount of work to the tune of 26% is still outstanding. The Contractor was put to the notice that the Project should achieve completion by 31st January, 2020. According to Mr. Salve, giving of the notice to submit a `cure plan' in effect meant, that the Contractor was in serious breach of the contract. As per the reply dated 5th December, 2019 the Contractor on its own agreed to complete the work on the various fields by the following deadlines:

a) Aishwarya - 31st January 2020
b) Bhagyam - 29th February 2020
c) Mangala - 31st March 2020

25. Ld. Sr. Counsel emphasized that this suggested cure plan was not acceptable to the Company which again called upon the Contractor vide repeated letters dated 9th December, 2019 and 16th January, 2020 that the 'cure

plan' is not agreeable. Letter dated 16th January, 2020 was issued invoking Clause 11.3 of the contract and clearly informing the Contractor that if the work on the entire Project does not achieve completion by 31st January, 2020, the Company would be compelled to use alternative sources to complete the Project. In response to this letter the Contractor submitted a 'cure plan' which gave projected completion dates in March and April which were not agreed to by the Company. Thus, notice dated 20th February, 2020 was served seeking a firm plan for completion which was a without prejudice notice.

26. It is submitted that under these circumstances when the Contractor was already in breach, it chose to serve letter dated 18th March, 2020 invoking the clause due to the outbreak of COVID-19. Vide this letter, the Contractor, in fact, failed to provide any concrete schedule for completing the Project. The Company then issued notice dated 31st March, 2020 clearly intimating the Contractor that it would now take recourse under the contract and get the balance activity completed through alternative sources.

27. The present petition was then filed by the Contractor on 13th April, 2020. By letter dated 13th April, 2020, the contract was terminated by the Company. On 23rd April, 2020, the Contractor invoked the arbitration clause. The Bank Guarantees were also invoked on the 13th April, 2020.

28. In the light of the above correspondence, Mr. Salve submits that the Contractor is not entitled to invoke the clause as it was clearly in breach even prior to the outbreak of COVID-19. Since the `cure plan' was called for by the Company way back in November, 2019 and the Company was not agreeable to any extension beyond 31st January, 2020, the outbreak of the pandemic does

not have any impact on the present case and cannot provide any shelter to the Contractor for its serious breach of the contractual deadlines. He submits that even in the final letter, the Contractor is unable to provide any schedule for completion and this shows the lack of any intention on its part to bring the Project to a close. He, thus, submits that this is a plain and simple contractual dispute case. The clause can operate as per its plain language. In the facts of this case, the question whether the clause would even apply, is a dispute which would be arbitrable. As per the Company, clause does not apply. If the clause itself does not apply, there is no ground to injunct the Bank Guarantees. The language of the Bank Guarantees being clear and there being no clause in the same, the clause in the contract cannot be relied upon.

29. He relies upon various judgments of the Supreme Court including on ***Standard Chartered v. Heavy Engineering Corporation Ltd & Ors., 2019 SCC Online SC 1638, UP State Sugar Corporation v. Sumac International Ltd., (1997)1 SCC 568, Svenska Handelsbanken v. Indian Charge Chrome, (1994) 1 SCC 502, Larsen and Toubro v. Experion Developers Pvt. Ltd., [OMP (I)(COMM) 234/2019, decided on 3rd December, 2019], Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544, Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Ltd., (2016) 10 SCC 46, U.P Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd (1998) 1 SCC 174 Dwarikesh Sugar Industries Ltd v. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450, Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd., (1996)5 SCC 450, BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728 and***

***Consortium of Deepak Cable India Ltd. and Abir Infrastructure Private Limited v. Teestavalley Power Transmission Limited, (FAO (OS) 397/2014, decided on 15th September, 2014).*** He submits that egregious fraud is required to be established not in the encashment of the Bank Guarantee but in the underlying contract itself. The contract is not challenged in this case and neither is the termination. COVID-19 according to Mr. Salve is not special equity. Relying upon the above judgments he submitted that the Supreme Court has made it clear that it was only in extreme situations where the Company and its financial standing is itself suspect or where the Company may become untraceable that an injunction on Bank Guarantees can be issued. The Company in the present case is a well-known company doing established businesses in India and if the Contractor wins in the arbitration proceedings, it can easily recover the money from the Company. Thus, there is no ground made out to stay encashment in the Bank Guarantee.

30. Mr. Salve urges that the pleadings are completely defective and do not even make out a case of egregious fraud or irretrievable injustice. The Contractor was conscious of its breaches. The Contractor has accepted the termination and has in fact invoked the arbitration clause. Thus, there is no relationship which survives between the parties. The mere mention of the word fraud in the pleading does not by itself result in egregious fraud. He emphasizes the fact that the Contractor has failed to disclose all the correspondence and the various deficiencies in its work at the time when the ad-interim order was granted by this Court. It is his case that several relevant documents were in fact withheld and thus the petition is liable to be dismissed.

31. The letter dated 26th March, 2020 of the Director General of Hydrocarbons according to the Company clearly shows that Petroleum and other related functions constitute exempted services (being essential services under the exemption list) and thus there is in fact no suspension of work in these areas. He submits that there is a difference between impossibility of performance and a *Force Majeure* clause. Factum of lockdown is not disputed, however, since the Project was delayed prior to the outbreak of the epidemic, the Contractor is not entitled to seek shelter under the *Force Majeure* clause. It is further submitted that the question whether the *Force Majeure* is rightly invoked or not is itself a contractual dispute, which is beyond the scope of a section 9 petition. Reliance is placed on the judgments of the Single Judge and Division Bench of this Court in ***Global Steel Philippines v. STC of India Ltd., ILR 2009 VI Delhi 1*** and ***Global Steel Philippines v. STC of India Ltd., [FAO (OS) No. 186/2009, decided on 12th May, 2009]*** where it was held that the question of *Force Majeure* would have to be decided in terms of the arbitration clause. It was held that the contractual conditions are not part of the letter of credit.

32. Mr. Salve further submitted that once the breach took place, the fact that further time is given to the Contractor to complete the Project, does not mean that the right of liquidated damages is waived or that the Bank Guarantees cannot be invoked for non-performance. Reliance is placed on ***Ansal Engineering Projects Limited (supra)*** to argue that the adjudication of liquidated damages is not required to be made to justify the invocation of the Bank Guarantees. He submits that variation orders can be placed even after the

breach had taken place as the company is entitled to seek performance of the contract. Whenever there is a breach, there are two options given to the other party i.e.

- repudiation leading to arbitration and claim for damages or
- extension for completing the contract along with a claim for damages.

In the latter circumstance, the claim for damages is one which would be proved before the Arbitral Tribunal. The party alleging breach can, argue that the extension was granted without prejudice and the other party can argue that the extension was with prejudice and hence no claim for damages is made out. This is in itself an arbitrable dispute. Either way the dispute is to be resolved by the Arbitral Tribunal and not in a section 9 petition.

33. After the breach took place even if the work has continued, the question as to whether there is a waiver is also an arbitrable dispute. There are various possibilities in a contract of this nature. There can be partial breach. The question as to whether there is *Force Majeure* or not depends on the construct of the contract. The Bank Guarantees being unconditional and irrevocable the encashment thereof, does not depend upon the merits of the matter, thus, the Contractor is not entitled to any relief in this petition.

**Analysis and conclusions**

34. The Project that was awarded to the Contractor was a time-sensitive one. Clause 25.3 provides that time is the essence of the contract. The said clause is extracted below:

> *"**25.3 Time of the Essence***
> *Time shall be of the essence in the performance of this Agreement.''*

35. As per clause 2.1 the agreement was to remain in effect for two years from the commencement date of 'Mangala', 'Bhagyam' and 'Aishwarya', whichever was later amongst the said fields, for executing the *`entire scope of services'*. The term `scope of services', as per Exhibit B of the contract covered Vendor mobilization, Rig+Tangibles mobilization, Well Drilling & completion, and Development of Surface facilities. For e.g., in respect of all the 45 wells of 'Mangala', the Contractor was to hook up and activate all the wells before the end of the 16th month from the date of 'Mangala' call-out order. Thus the `Mangala Project Duration' as per Exhibit B = 17 months. Similar deadlines were fixed for 'Bhagyam' and 'Aishwarya' fields. Thus, the two years' period was the over-all completion deadline for all three fields.

36. As per clause 2.1(b), the Contractor had the *`option'* to extend the term of the contract on the same terms and conditions for a period of one year. The said extension would be by a notice that would have to be served by the Company before the expiry of the term. The commencement of services on the commencement date required the issuance of a `call out order' by the Company for each of the fields. The last `call out order' was admittedly issued on 17th January, 2018 and thus, it is not in dispute between the parties that the `commencement date' is 17th January, 2018.

37. One of the warranties given by the Contractor was that it would achieve the milestones as per the milestone dates contained in the contract. It also

warranted that it had the capability, expertise manpower and the required technical and financial resources to undertake the Project. Under clause 6 the Contractor guaranteed that it would achieve each milestone by the milestone date. Failure to achieve the milestones entailed payment of liquidated damages in terms of clause 6.2.

38. As per clause 6, if there is delay in achieving any milestone as stipulated in Exhibit-J of the contract, for each day of delay, the Contractor had to pay liquidated damages merely on a demand by the Company. If there was any failure to pay the liquidated damages the Company could withdraw the said amounts from the various bonds/Bank Guarantees. Under clause 9, the Contractor was obliged to furnish `advance payment bonds', `performance bonds', `financial bonds' and `Parent Company guarantee' for the various agreed amounts as per the contract.

39. The completion dates for each of the fields was 12 months, 14 months and 17 months from the respective `call-out orders'. The completion dates for each of the fields were as under:

a) Aishwarya -16th January, 2019
b) Bhagyam - 16th March, 2019
c) Mangala - 16th June, 2019

40. The Project Monitoring Committee (PMC) which was constituted from both sides met regularly to supervise the progress of the projects. The Contractor was to give monthly progress reports to show the actual progress in each of the fields.

41. The contract provided for various milestones dates as also liquidated damages in Exhibit – J as referred to in clause 6.2. The compensation schedule was also provided for in Exhibit – C of the contract. As per Exhibit – J, the specific milestones to be achieved in respect of each of the fields was stipulated in detail. The milestones were broken up into various components i.e., construction, drilling and surface facilities. The said exhibit clearly provided in respect of each of the fields that liquidated damages of 1.2% per month would be chargeable if there is any delay. The milestones as compiled from Exhibit–J in respect of each of the fields is set out below:

**Table 1-ExhibitJ- Milestone tabulation**

| **Project** | **Months (from call out order)** | **Milestones** | **Liquidated Damages (Company will raise the invoice for LD and applicable GST, if any applicable)** |
|---|---|---|---|
| **Mangala** | 17 months | 45 Wells and Associated surface facilities as per of Part 1 of Exhibit B- Scope of Services | Liquidated damages of 1.25% per month (or pro rata in respect of a part month) up to a maximum of 10% of the Call Out Value (Mangala) |
| **Bhagyam** | 14 months | 47 Wells and Associated facilities as per Part - 2 of Exhibit B- Scope of Services | Liquidated damages of 1.25% per month (or pro rata in respect of a part month) up to a maximum of 10% of the Call Out Value (Bhagyam) |
| **Aishwarya** | 12 months | 19 Wells and Associated facilities of Part - 3 of Exhibit B- Scope of Services | Liquidated damages of 1.25% per month (or pro rata in respect of a part month) up to a maximum of 10% of the Call Out Value (Aishwarya) |

A perusal of the above milestones as provided in the contract shows that time was of essence in the contract and the liquidated damages recoverable were pre-estimated and prescribed in the contract itself.

42. After the milestones for all the fields had already expired, the Contractor, vide its e-mail dated 10th September 2019, gave a monthly progress report with revised milestones. As per the said report, insofar as 'Mangala' was concerned, the completion was to be achieved with the first injection on 15th September, 2019. It was claimed that the contract closeout date would be 30th November, 2018 *(sic 30th November 2019).* Similarly, vide emails dated 10th September, 2019, the Contractor gave monthly progress reports for 'Bhagyam' and 'Aishwarya' with revised milestones. For 'Bhagyam', the completion was to be achieved with the first injection by the forecast date of 20th September, 2019 and the forecast contract close out date was 25th November, 2019. For 'Aishwarya', the completion was to be achieved with the first injection for AEOR by the forecast date of 25th October, 2019 and the forecast contract close out date was 30th November, 2019.

43. A perusal of the various monthly progress reports would show that the completion date which was initially in January 2019, March 2019 and June 2019 was thereafter moved to November, 2019. When the Company vide its letter dated 25th November, 2019 realised that the deadlines of November, 2019 would also not be fulfilled by the Contractor as there was considerable amount of work which was still pending, it demanded a `cure plan' on 25th November, 2019 in terms of clause 11.3, though it had the option of terminating the contract.

44. Thus, by this time, the Contractor was already in breach of its contractual deadlines. In response to the letter dated 25th November, 2019 seeking a 'cure plan' the Contractor submitted a 'cure plan' on 5th December, 2019 as per which it gave a staggered completion for each of the fields which is clear from entry no.3 in Table 2 below. This 'cure plan' proposed by the Contractor was not acceptable to the Company which was communicated on 9th December, 2019. The Company then called upon the Contractor to submit a modified 'cure plan' with completion dates for all fields on or before 31st January, 2020 and the Company reserved its right to take appropriate recourse. Again, in response to this communication, the Contractor continued to propose different completion dates vide its monthly progress reports submitted on 10th December, 2019 and 6th January, 2020. This was clearly not acceptable to the Company as was made clear vide notice dated 16th January, 2020.

45. In view of this stalemate which occurred in correspondence, a Project Monitoring Committee (PMC) meeting was held on 21st January, 2020 as per which the Company expressed concern over the slow progress of work. The Contractor was asked to augment its resources and complete the work on all three fields as per the following schedule:

a) Aishwarya - January, 2020
b) Bhagyam – February, 2020
c) Mangala – March, 2020

In the minutes of meeting, which are signed by both parties, the Company expressed concern over the consistently slow progress of work. Specific

deadlines of 31st January, 2020 and 28th February, 2020 were also fixed for specific tasks such as pipelines, lowering completion etc.

46. At this stage, it is relevant to point out that vehement reliance has been placed by the Contractor in its Rejoinder on `Variation order no.3' dated 16th January, 2020 which according to the Contractor revised the contract expiry date to 30th June, 2020. However, there is no mention of this variation order no.3 in the jointly signed PMC minutes dated 21st January, 2020. The subsequent correspondence between the parties showed that further monthly progress reports were submitted by the Contractor giving completion dates of 31st March, 2020 and 30th April, 2020 by which time, however, disputes were already brewing between the parties. In none of these Reports, reliance was placed on the Variation order no.3. The letter dated 18th March, 2020 by which the Contractor invoked the *Force Majeure* clause was clearly as a last resort, in response to which the Company notified the Contractor that it was in complete breach as it had failed to complete the Project by 31st March, 2020. The Company then reserved its right to complete the Project on its own using alternative sources. The subsequent letters dated 1st April, 2020 and 7th April, 2020 exchanged between the parties clearly show that while the Contractor relies upon *Force Majeure* as the justification for the non-completion of the Project, the Company's stand was that the timelines were not adhered to and that the Contractor was in breach even prior to the occurrence of the *Force Majeure* event.

47. In view of the letter dated 31st March, 2020 issued by the Company threatening to terminate and to use alternative sources, the Contractor filed the

present Section 9 petition. A perusal of the petition shows that the same simply alleges that the Company is in breach for not providing the work site, not clearing the outstanding amount and other pending invoices which led to the delay in the completion of the Project. It is, then claimed that since the Contractor could not mobilise its resources due to COVID-19 and that there is a threat of termination and invocation of the Bank Guarantees, an interim order restraining the invocation ought to be granted. The ld. Single Judge had passed an ad-interim order prior to completion of pleadings and at that stage restrained the Company from encashing the Bank Guarantees. The basis of the said order was that the Contractor was working on the Project till the lockdown on 22nd March, 2020. In the petition, no ground was taken that the contract stood extended till 30th June 2020.

48. The Company thereafter filed its reply and placed on record the correspondence as captured hereinabove. It is extremely relevant to point out that the documents filed with the reply were extremely relevant and were not filed with the petition. The petition itself, was completely sketchy bereft of any details. The Contractor had not placed on record various relevant facts and documents. A perusal of the list of dates and the petition itself shows that between 25th April, 2018 and 18th March, 2020 i.e., the period between the execution of the contract and the letter dated 18th March, 2020 by which the *Force Majeure* clause was invoked, there is complete silence. None of the relevant letters and the correspondence were pleaded in the petition. In the reply, Exhibit – J, the monthly progress reports and the correspondence leading up to the letters dated 31st March, 2020 and 7thApril, 2020 by the Company

were filed. Post the filing of the petition, late in the evening on 13th April, 2020 the Company terminated the contract in terms of clause 11.3 (b)(a), 11.4 (a) of the contract. The grounds on which the termination notice has been served are:

i) That there have been inordinate delays in the completion of the Project by the Contractor, that no remedial steps were taken by the Contractor despite escalation of issues, that on 25th November, 2019 a 'cure plan' was called for from the Contractor and a deadline of 31st January, 2020 was given to the Contractor.

ii) The 'cure plan' which was submitted was not satisfactory.

iii) Despite repeated Project Monitoring Committee (PMC) meetings the Project was not managed and has gone completely beyond schedule.

iv) The negotiations which took place were without prejudice to the rights of the Company that the linking of the delay and non-performance to non-payment of invoice was completely untenable.

v) The timelines proposed by the Contractor was not at all agreeable to the Company.

vi) Finally, vide the e-mail dated 20th February, 2020 the Contractor was called upon to complete all its obligations by 31st March, 2020, that the Contractor did not admit or agree to this deadline proposed by the Company, that the Contractor was in default of its obligations and has wrongly attributed the same to a *Force Majeure* event.

In view of the same, the contract stood terminated and the Contractor was called upon to take all steps required to give effect to the termination as per the contractual terms.

49. The Bank Guarantees were also invoked on 13th April, 2020. In reply to the termination notice, on 15th April, 2020, the Contractor claimed as under:

a) That the termination was illegal and was malicious, that there were various delays by the Company including in closure of variation orders etc., that only 2.4% of the work in respect of 'Aishwarya', 5.5% of the work in respect of 'Bhagyam' and 2.1% of the work in respect of 'Mangala' is outstanding, that the Contractor is facing financial difficulties.

b) That the deadline of 31st March, 2020 was agreed to subject to resolution of all the hindrances and other issues.

c) That it is entitled to claim USD 91 Million towards variations, unbilled amounts, billed amounts after adjusting unrecovered advances against BGs, from the Company.

d) That the Contractor is still willing to negotiate the same in good faith.

50. The correspondence between the parties did not abate. Letter dated 23rd April, 2020 was written by the Company reiterating its position. It was claimed by the Company that it has suffered huge losses of 4.3 million barrels of crude oil leading to losses of USD 250 million. The milestone dates were breached by the Contractor which resulted in such losses, as per the Company.

51. On 23th April, 2020 the Contractor invoked the arbitration clause and appointed its nominee Arbitrator. On 4th May, 2020 a proposal was submitted by the Contractor for resolution of the disputes. On 6th May, 2020 a counter proposal was given by the Company, however, in view of letter dated 11th May, 2020 it was clear that the settlement had reached a deadlock.

52. A tabulation of the monthly progress reports and the estimated completion schedules given by the Contractor is set out below:

**Table 2**

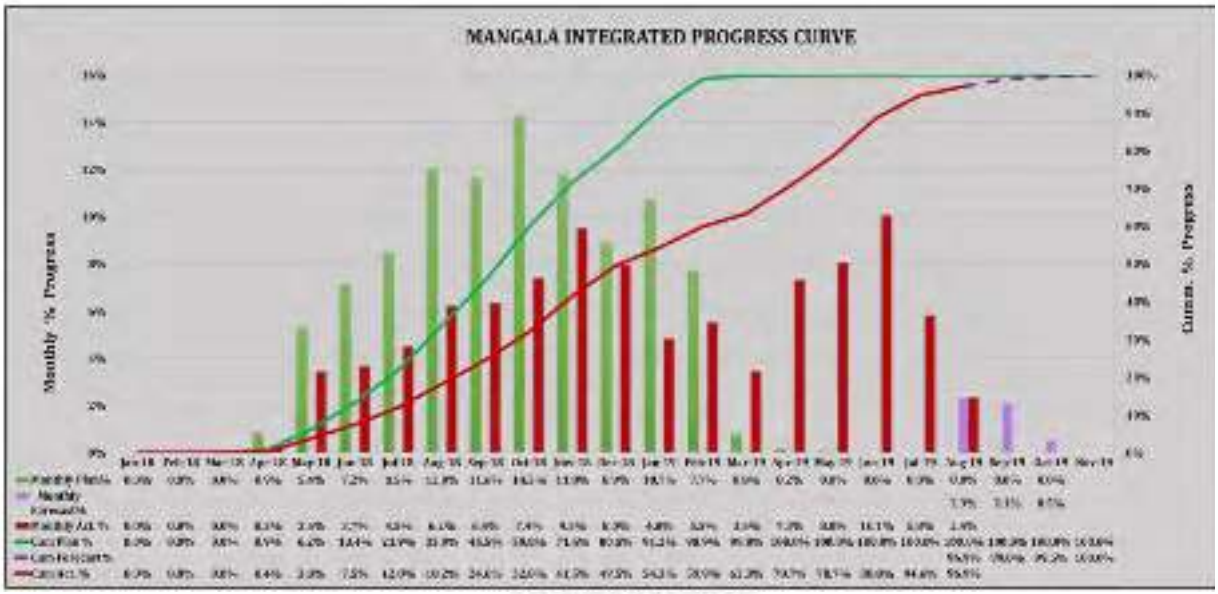
| **Deadlines/ Progress Reports** | **Mangala** | **Bhagyam** | **Aishwarya** |
|---|---|---|---|
| Original completion Date | 16.06.2019 | 16.03.2019 | 16.01.2019 |
| MPR dated 10.09.2019 | 30.11.2018 | 25.11.2019 | 30.11.2019 |
| As per cure plan 05.12.2019 | 31.03.2020 | 29.02.2020 | 31.01.2020 |
| MPR 10.12.2019 | 31.03.2020 | 31.03.2020 | 31.01.2020 |
| MPR 06.01.2020 | 31.03.2020 | 31.03.2020 | 31.03.2020 |
| MPR 06.02.2020 | 31.03.2020 | 31.03.2020 | |
| MPR 11.03.2020 | 30.04.2020 | 30.04.2020 | 31.03.2020 |

The above chart shows that the completion date was being extended from time to time with no real completion being visible.

53. The monthly reports also gave a graphical depiction of the work carried out on a monthly basis. For example, in respect of 'Mangala', the Integrated Progress Curve as furnished in the months of September-2019, December-2019, January-2020 and March, 2020 is as follows:

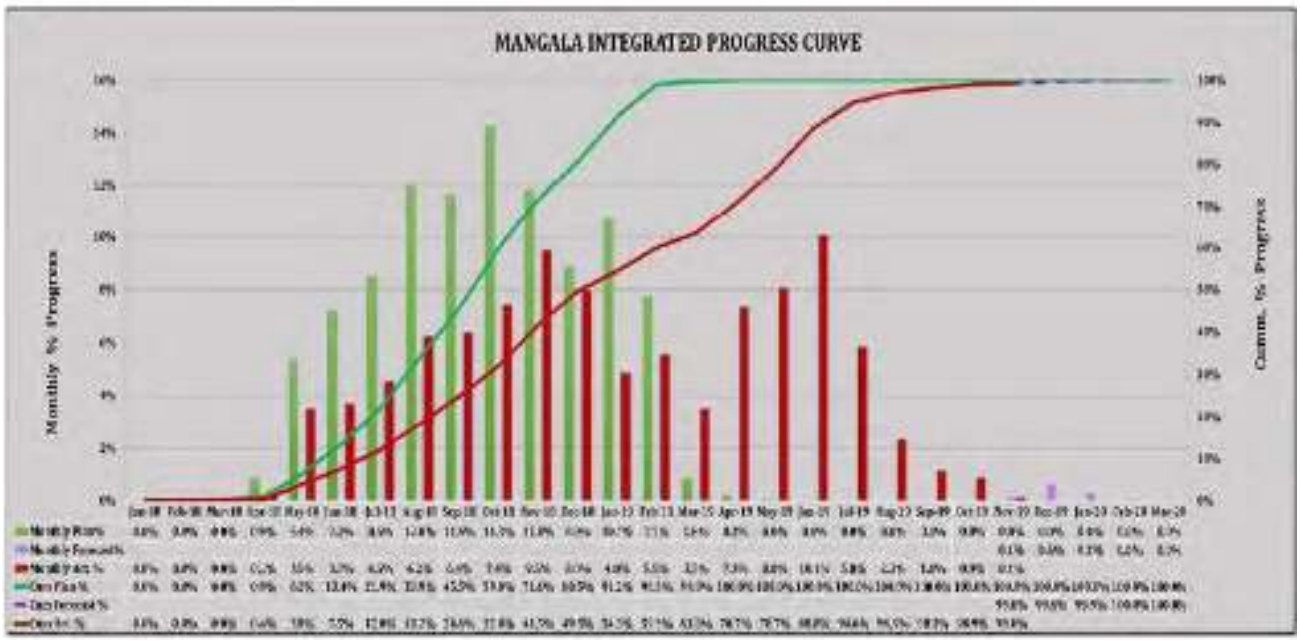
## Monthly Progress Report furnished in September, 2019

ANNEXURE 1: INTEGRATED S CURVE



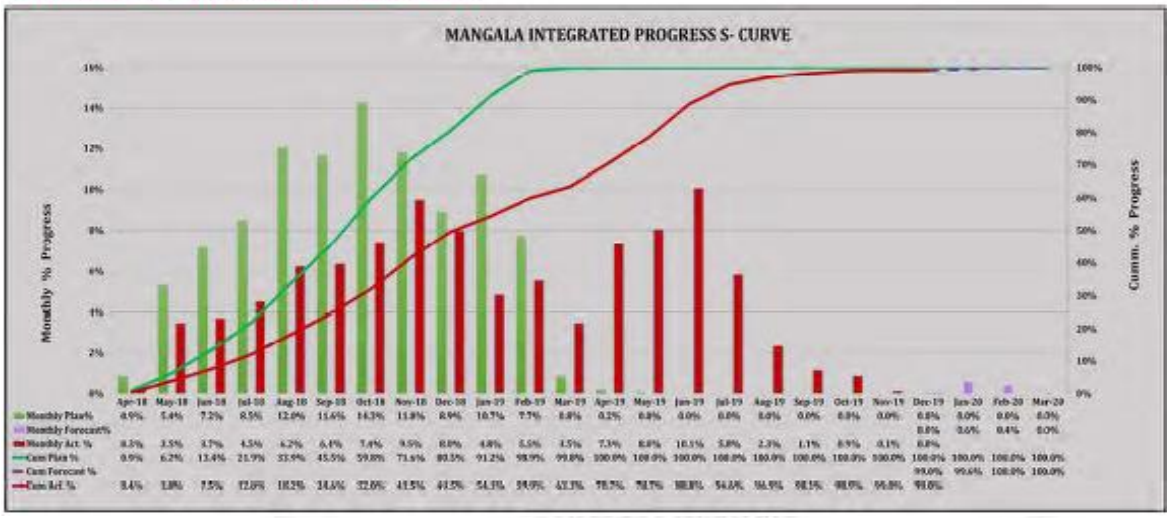

## Monthly Progress Report furnished in December, 2019

ANNEXURE 1: INTEGRATED S CURVE



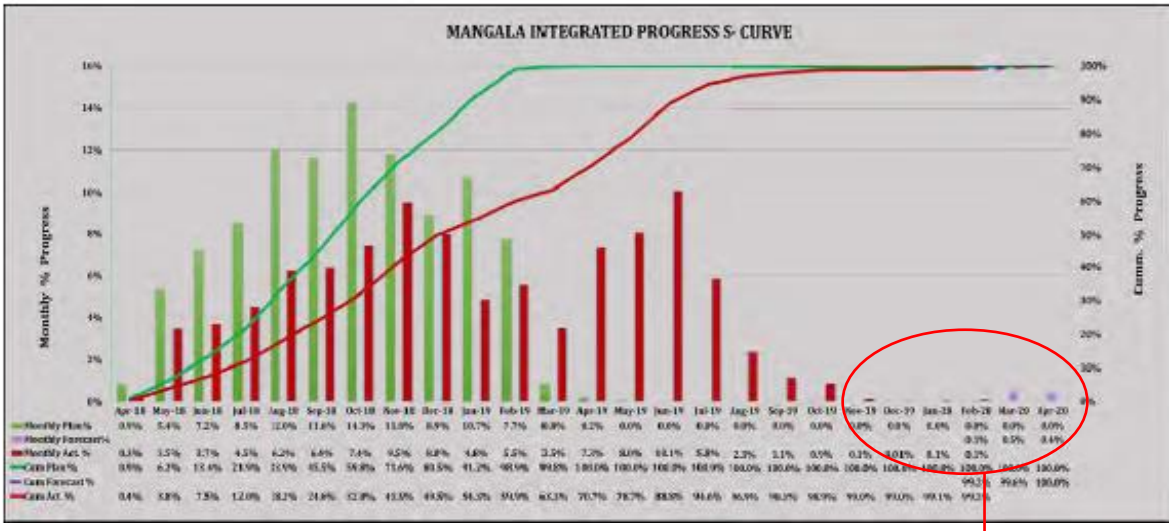
## Monthly Progress Report furnished in January, 2020

ANNEXURE 1: INTEGRATED S CURVE




## Monthly Progress Report furnished in March, 2020

ANNEXURE 1: INTEGRATED S CURVE




Nil or no work between November 2019 – March 2020

The graphs show that there was miniscule work carried out in the months of September-October, 2019 and no work whatsoever since November, 2019. The graphs further show that even as per the 6th January, 2020 report, there was little or no work carried out in all three fields during the months of November-December, 2019. Projections were given to complete the same in January-February, 2020 substantially and thereafter to be concluded by March, 2020 which was not adhered to. A perusal of the Monthly reports submitted on 11th March, 2020 just before the invocation of the *Force Majeure* clause, shows a bleaker picture i.e., that even the miniscule work carried out in November-December, 2019 was absent in January-February, 2020. Vide the said report the Contractor projected that it would complete a substantial portion of the work in March, 2020 and in April, 2020. This report was submitted with an e-mail of 11th March, 2020 and just seven days later, the Contractor invoked the *Force Majeure* clause. The progress graphs for the other two fields are similar in nature. Thus, the work at the fields had stopped long before the outbreak of COVID-19 or the lockdown.

54. As the saying goes *`a picture speaks a thousand words'*. As per the monthly progress reports tabulated and extracted above, it is *prima facie* visible that the Contractor did not adhere to the deadlines for completion of the Project and was, thus, in breach. The Contractor seeks to justify the same by laying the blame on the Company and the Company does the exact opposite. However, this Court is clear that the reasons for the delay are not to be gone into at this stage as both parties blame each other. The Contractor for whatever reasons, gave estimated completion dates which it did not adhere to. The Contractor

argues that the outstanding work on the Project in all the three fields is between 2-5%. On the other hand, the Company argues that the outstanding work is 26%. This is a factual dispute which would have to be adjudicated. At this stage, this Court cannot arrive at a finding on this aspect.

55. A perusal of the pleadings and the documents filed by the parties and an analysis of the chronology of events clearly reveals that the original contractually stipulated dates for completion have not been achieved. The parties have negotiated from time to time. The Contractor has admitted that there have been delays but had sought to justify the same by raising allegations against the Company. The Contractor has also submitted various monthly progress reports with repeated projected completion dates. Parties have raised claims and counter claims against each other. The Company claims 250 million USD towards Liquidated damages and losses. The Contractor claims 91 million USD under various heads.

56. It is under this factual backdrop that the ground of *Force Majeure* taken in March, 2020 would have to be adjudged. The grounds taken to invoke the *Force Majeure* clause are that due to outbreak of COVID-19 experts from France who may be required cannot travel to India. Since the *Force Majeure* clause in the contract covers epidemics and pandemics, the Contractor claims that its non-performance is justified and the invocation of Bank Guarantees is liable to be stayed. There is no doubt that COVID-19 is a *Force Majeure* event. But was this event the cause of the non-performance?

57. The law relating to *Force Majeure* has been recently settled by the Supreme Court in the case of ***Energy Watchdog v. Central Electricity***

***Regulatory Commission, (2017) 14 SCC 80***. The principles laid down by the Supreme Court in paragraphs 34-42 are as under:

a) *Force Majeure* would operate as part of a contract as a contingency under section 32 of the Indian Contract Act 1872 *(`ICA')*.

b) Independent of the contract sometimes, the doctrine of frustration could be invoked by a party as per Section 56, ICA.

c) The impossibility of performance under Section 56, ICA would include impracticability or uselessness keeping in mind the object of the contract.

d) If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement it can be said that the promisor finds it impossible to do the act which he had promised to do.

e) Express terms of a contract cannot be ignored on a vague plea of equity.

f) Risks associated with a contract would have to be borne by the parties.

g) Performance is not discharged simply if it becomes onerous between the parties.

h) Alteration of circumstances does not lead to frustration of a contract.

i) Courts cannot generally absolve performance of a contract either because it has become onerous or due to an unforeseen turn of events. Doctrine of frustration has to be applied narrowly.

j) A mere rise in cost or expense does not lead to frustration.

k) If there is an alternative mode of performance, the *Force Majeure* clause will not apply.

l) The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered.

m) If the Contract inherently has risk associated with it, the doctrine of frustration is not to be likely invoked.

n) Unless there was a break in identity between the contract as envisioned originally and its performance in the altered circumstances, doctrine of frustration would not apply.

58. The principles as laid down in ***Energy Watchdog (supra)*** by the Supreme Court have to be applied to the facts of the present case in order to assess as to whether the performance of the Contractor was prevented by the *Force Majeure* condition. Did COVID-19 prevent the Contractor from bringing the work on the three fields to completion and conclusion? If so, is the encashment of Bank Guarantees liable to be injuncted?

59. The contract has a *Force Majeure* clause which reads as under:

> ***"15. FORCE MAJEURE***
>
> ***15.1 Notification***
>
> *If either Party is prevented, hindered or delayed from (or in) performing any of its obligations under this Agreement by an event of Force Majeure, then it will notify the other Party in writing of the occurrence of such event and the circumstances thereof within five Business Days of the Party becoming aware of such event.*

***15.2 Performance Excused***

*(a) A Party whose performance is* ***prevented, hindered or delayedby the occurrence of an event of Force Majeure*** *and given Notice pursuant to Section 15.1 will be excused from the performance or punctual performance of its obligations under this Agreement for so long as the relevant event of Force Majeure continues and to the extent that such Party's performance of such obligations is prevented, hindered or delayed.*

*(b) The Party so affected will give Notice to the other Party of the ending of that event within five (5) Business Days of becoming aware thereof*

***15.3 Mitigation***

*The Party or Parties affected by the event of Force Majeure will use all reasonable efforts to mitigate the affect thereof upon its or their performance of this Agreement and to fulfil its or their obligations under this Agreement.*

***15.4 Force Majeure***

*(a) For the purpose of this Agreement, Force Majeure means the occurrences of any event or circumstances or combination of events or circumstances that is beyond the reasonable control of a Party has a material and adverse effect on the performance by that Party of its obligations under or pursuant to this Agreement and that demonstrably could not have been foreseen by the Partiers provided, however that such materia and adverse effect could not have been prevented overcome or remedied by the affected Party through the exercise of diligence*

*and reasonable care but provided further that the exercise of diligence and reasonable care will not include the obtaining or maintaining of Insurance beyond the requirements of this Agreement. Force Majeure includes the following events and circumstances but only to the extent that each satisfies the above requirements.*

*(i) any act of war (whether declared or undeclared) invasion armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion act of terrorism or sabotage;*

*(ii) strikes go- slows or works to rule that are widespread or nationwide of a political nature unless affecting only or caused by the affected Party or, in the case of Contractor, any of its Subcontractors; and*

*(iii) significant archaeological discoveries in the Block officially recognised by a relevant Governmental Authority, and*

*(iv)* ***natural events, including****:*
*(A) acts of God, including earthquake, volcanic activity, hurricane, cyclone, flood or lightning and the consequences arising thereform;*

*(B) explosion or chemical contamination (other than resulting from the act of war); and*

***(C) epidemic or plague***

*(b) Force Majeure will expressly not include the following conditions except and to the extent that they result from an event or circumstance otherwise constituting Force Majeure*

*(i) unavailability late delivery or changes in cost of machinery, equipment, materials, spare parts or consumables;*

*(ii) prevailing weather conditions in the Block, including during monsoon periods;*

*(iii) failure or delay in performance by any Subcontractor and*

*(iv) normal wear and tear or flaw in materials and equipment or breakdowns in equipment*

***(c) Compensation during Force Majeure***

*If an event of Force Majeure prevents Contractor from performing Services under a Callout Order that require the use of a Drilling Unit for a period of 7 consecutive Days or longer, Company will pay to Contractor the Holding Rate for each Day that the period during which Contractor's performance is so prevented extends beyond 7 consecutive Days. For the avoidance of doubt. Company will not be obligated to pay the Holding Rate for the first 7 consecutive Days of an event of Force Majeure or for any occurrence before Mobilisation at Site."*

60. As per the above clause, the performance by the Contractor would be excused if it is *"prevented or hindered or delayed by any natural event including a pandemic or plague".* The question is whether the Contractor, in this case, was prevented, hindered or delayed by COVID-19 in the punctual performance of its obligations. Admittedly, the *Force Majeure* clause was invoked by Contractor only on 18th March, 2020 and not before that. Thus, the

Contractor did not itself feel that COVID-19 had, previously, hindered the performance of its contract.

61. In the above factual matrix, the questions that arise are –

- *Whether COVID-19 can provide succour to a party in breach of contractual obligations? and*

- *Whether the invocation of the Bank Guarantees is liable to be injuncted on the ground of occurrence of a force majeure event i.e., COVID-19, if the breach occurred prior to the said outbreak?*

62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a *Force Majeure* condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

63. It is the settled position in law that a *Force Majeure* clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in ***Energy Watchdog (supra)*** it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the

Court would consider in order to invoke a *Force Majeure* clause.

64. It is not in dispute between the parties that the two years' term commenced on 17th January, 2018 which is hereinafter referred to as the commencement date. As per clause 2.1(b), the Contractor had the option to extend the term on the same terms and conditions for a period of one year. The said extension would be by a notice which would be served by the Company before the expiry of the term.

65. In response to the *Force Majeure* argument of the Contractor, the Company's stand is that activity related to petroleum projects were exempted as per the letter of DGH Hydrocarbon dated 26th March, 2020. The Contractor's stand is that only petroleum production is exempted and not other construction/ project completion activity. However, there is nothing on record to show as to what steps the Contractor took toward mitigation, which was necessary as per the *Force Majeure* clause.

66. The Contractor in this case was in breach in September, 2019 itself. The Company had issued notice dated 25th November, 2019 calling for a 'cure plan'. The Company had the option of terminating the agreement at that stage itself. However, it called for a 'cure plan' while reserving its rights. As a 'cure plan' the Contractor gave repeated deadlines for completion of the project– the last of them being a staggered completion by 31st March, 2019. Even by this plan it was submitted on 5th December, 2019 that two of the projects were to be competed i.e., 'Aishwarya' by 31st January, 2020, 'Bhagyam' by 29th February, 2020 and 'Mangala' by 31st March, 2020. However, the Contractor did not adhere to even these deadlines. At that time i.e. by 29th February, 2020, there

was no lockdown in India. The graphs and the tabulated chart clearly show that there was no progress in the Project.

67. Finally, as a last resort, parties arrived at 31st March, 2020 as the date of completion. The lockdown came into effect on 23th March, 2020. Even going by the 31st March, 2020 agreed deadline, the works of all the three oil fields ought to have been almost complete as the invocation of the *Force Majeure* clause was merely 12 days before the deadline, on 18th March, 2020.

68. The Contractor in the present case was cautioned repeatedly since September, 2019 by the Company that it was in breach. There was hardly any work done in the months of November 2019, December 2019, January 2020, February 2020 and March 2020. There was clear non-performance and lack of alacrity in completing the work on the various fields forming part of the Project. The reasons for the same are not to be gone into in this petition.

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.

70. As held in ***Global Steel (supra)*** the question as to whether the *Force Majeure* clause itself would apply or justify non-performance in these facts would have to be finally determined finally in the arbitral proceedings. The observations of the Ld. Division Bench are as under:

"*9. It is not in dispute that the LC is an independent contractual document. The disputes between the contracting parties are to be settled by arbitration in London but the banks are not party to that contract. Thus, what is sought to be restrained by filing the suit is payments to be made under the LC.*

*....*

*14. There is no doubt that clause 21 does provide for force majeure clause and the manner of its invocation and as to how it would come into force. That is, however, a dispute between the parties to the contract as to whether the force majeure clause stood properly invoked and whether respondent No. 3 should have still proceeded to load the goods for shipment. Such disputes have to be settled in terms of clause 22 of the contract, which is the arbitration clause. We may once again note that the arbitration clause providing for the proceedings to be conducted in accordance with the London Maritime Arbitrators Association stand already invoked by respondent No. 3 and it is in those proceedings that this aspect would be settled.*

*... 18. In the end, we may note that the Supreme Court itself has extended caution on various occasions through authoritative pronouncements of interfering with such international commercial transactions supported by LC contrary to UCPs has an adverse impact on international trade. If the appellant is ultimately able to establish its case against respondent No. 3 in the arbitral proceedings based on the force majeure clause, the claim for the amount paid under the LC can also be adjudicated at that time and the appellant is not*

*without the remedy of seeking recovery of such amount paid under the LC."*

Thus, the *Force Majeure* clause does not afford any succour or shelter to the Contractor, at this stage, to seek restraint against encashment of the Bank Guarantees.

**Variation Order**

71. The Contractor has, in its rejoinder, relied upon variation order no.3 to argue that the contract has been extended till 30th June, 2020. This case of the Contractor is a wholly new case alien to the pleadings of the parties. The said variation order has not been pleaded either by the Contractor in the petition or by the Company in the reply. The same also does not find any mention in the correspondence between the parties. In the reply to the letter of termination, issued as on 15th April 2020, when the parties are already in litigation, the Contractor does not take the stand that the contract had stood extended till 30th June, 2020.

72. The scheme of execution of a binding variation order as per the contract is set out in clause 10 of the contract. The clause relating to variation i.e., clause 10 contemplates the issuance of a variation order request for the services to be rendered by the Contractor. Such a variation order request would require the Contractor to submit a proposal. The acceptance of a variation order request would not entitle adjustment to the milestone dates, unless the same is an approved variation in terms of the contract. Under clause 10 the Contractor would not be entitled to any adjustment in the milestone dates if steps are not taken to minimise the delay. The procedure for a variation to come into effect is

specified in clause 10.2 which requires the following chronology to be adhered to:

a) Company makes a request for variation under clause 10.1 (a) or 10.1 (b). Contractor shall submit a variation order request along with its proposal for adjustment to the milestone dates and compensation payable i.e., the Exhibit J and C within 14 days. After within 14 days such a proposal is not received the same shall constitute a waiver of any entitlement to a change in the milestone dates or the compensation payable.
b) Upon receiving the Contractor's proposal, the Company shall as soon as practicable respond to the said proposal.
c) If there is consensus between the parties, the milestone dates i.e., Exhibit J and C would be suitably amended.
d) If there is a dispute as to the amendment to be carried out in the Exhibit J and C for compensation the same would be determined in terms of the clause 10.2.
e) If both parties have agreed it then it is an "approved variation".
f) Any variation or variation order request, in order to be effective has to be in terms of clause 10.

The variation orders, if any, between the parties had to have specific timelines, milestones, milestone dates which are agreed upon. A counter signed copy of the alleged Variation order no.3, letter has been filed on record along with some e-mails of January, 2020. The annexures to these e-mails have not been placed on record. The variation order no.3 is claimed to have been counter

signed on 3rd February, 2020. The subsequent letters, e-mails, project monitoring committee's (PMC) minutes do not refer to this variation order. The exact effect of the variation order no.3 and as to what were its terms and whether it was binding between the parties would be adjudicated in the arbitral proceedings. At this stage, it is just a document which appears to have been used as a last move by the Contractor to claim that there was an agreement between the parties for extension of the contract till 30th June, 2020. The correspondence, the conduct of the parties and the pleadings do not bear out this agreement. Thus, at best the interpretation, effect and the consequences and the validity of the variation order no.3 and its consequences would be an arbitrable dispute. At this stage, this Court refrains from commenting on the interpretation of the said documents as there are no pleadings on record.

73. Moreover, even in the present petition seeking interim relief, the Contractor did not claim that the contract is valid till 30th June, 2020 or that there was *consensus ad-idem* on the extension till 30th June, 2020. *Prime facie,* it appears to this Court that the variation order no.3 was under contemplation, however, the overall breakdown and stalemate which took place between the parties completely overshadowed this variation order no.3. It is highly improbable to believe that if the parties had *consensus ad-idem* on the extension of such a contract till 30th June, 2020 an agreement in writing would not have been executed. In fact, the e-mails filed along with the counter signed variation order no.3, after judgment was reserved, seem to suggest that the said Variation order was merely a discussion point and nothing more. As per clause 2.1(b) the Company had the *`option'* to extend the Term of the contract on the

same terms and conditions. However, though such an option appears to have been contemplated between the parties, there was no final decision to extend, as per the correspondence. Such an extension contemplated revised Milestone Dates etc., which were never agreed upon. Thus, this Court holds that there is no novation in the present case.

74. There are three sets of Bank Guarantees – Advance guarantees, Financial guarantees and Performance Guarantees. The details of the same are as under:

| **Field Name** | **BG Type** | **Amount in USD** | **Issuing Bank** | **BG Ref No.** | **Expiry Date** |
|---|---|---|---|---|---|
| Aishwarya | ABG | 2,728,728.59 | ICICI | 0021BG00012818 | 30 June'20 |
| Bhagyam | ABG | 7,754,095.74 | ICICI | 0021BG00012918 | 30 June'20 |
| Mangala | ABG | 3,695,607.42 | ICICI | 0021BG00013018 | 30 June'20 |
| Aishwarya | FBG | 4,086,363.00 | ICICI | 0544BG00013219 | 30 June'20 |
| Bhagyam | FBG | 7,261,744.00 | ICICI | 0544BG00013119 | 30 June'20 |
| Mangala | FBG | 7,607,873.00 | ICICI | 0544BG00012519 | 30 June'20 |
| Aishwarya | PBG | 4,086,363.00 | ICICI | 0544BG00012919 | 24 Nov'21 |
| Bhagyam | PBG | 7,261,744.00 | ICICI | 0544BG00012619 | 24 Nov'21 |
| Mangala | PBG | 7,607,873.00 | ICICI | 0544BG00013019 | 24 Nov'21 |

75. The advance guarantees were to secure the advance payments which were made by the Company to the Contractor. The performance bond was for

the purpose of securing the efficient performance of the contract and was to remain valid and enforceable throughout the performance of the contract including the defects liability period and 180 days thereafter. The financial bond was to secure any claim for liquidated damages by the Company. All these three bonds/ guarantees were to remain valid and enforceable as stipulated under clause 9.2 of the contract. If there was any breach by the Contractor, the Company could invoke the performance bond and apply the proceeds of the said bond for remedying any breach. For recovering liquidated damages, the Company could invoke the financial bond.

76. The Advance Bank Guarantees are meant to secure the Company in respect of the advances paid to the Contractor. Under clause 8.9 the Company was to make an advance payment to the Contractor to enable the Contractor to commence the works. However, from the said advance payment amounts could be adjusted by the Company, against the invoices raised, as the Project progresses. The same was adjustable in a phased manner depending upon the completion achieved as per Clause 9.2 (f). The Company was entitled to draw upon the Financial and Performance Bonds/Guarantees in terms of Clause 9.2 (g). The said two clauses read:

> *"9.2 Requirements:*
> *(a) to (e) ……*
> *(f) If Company terminates this Agreement pursuant to Section 11.4 prior to Company's recover of the Advance Payment, Company will be entitled to draw upon the Advance Payment Bond* ***in the amount of the unrecovered portion of the***

***Advance Payment and to retain the amounts so drawn***.

*(g) In addition to the other circumstances specified in this Agreement, Company has the right to draw down and, at Company's discretion, apply the proceeds in remedying any breach by Contractor of this Agreement, all or part of the value of the Performance Bond. Such recourse against the Performance Bond shall be without limitation to any other right or remedy of the Company in relation to the relevant Contractor breach. Further, in addition to the other circumstances specified in this Agreement, Company has the right to drawdown and, at Company's discretion, apply the proceeds for recovering any Liquidated Damages or any payments due to the Company under this Agreement, all or part of the value of the Financial Bond. Such recourse against the Financial Bond shall be without limitation to any other right or remedy of the Company in relation to the relevant Contractor breach."*

Thus, as far as the Advance Bank Guarantees are concerned, a perusal of Clause 9.2(f) shows that upon termination, the Company would be entitled to draw upon the advance payment bond in the amount of the unrecovered portion of the advance payment. The `unrecovered portion' is not yet determined. The invocation letters simply state that the amounts of the advance Bank Guarantees are unrecovered. A perusal of the petition shows that as per paragraph 3.23, it is the case of the contractor that approximately 6.6 million dollars has already been invoiced and is yet to be paid by the company. It is also claimed that the Contractor could not raise its final invoices. Further, a

perusal of the 'Advance Bond' as per Exhibit-N pursuant to which the Advance Bank Guarantees have been furnished has a clause to the following effect:

> *"... The Contract has been executed between the Contractor and the Company with one of the terms of the Contract requiring that the Contractor furnishes to the Company a bank guarantee to [INR/]_____ (in figures & words) an amount equal to the advance being given by Company to the Contractor at the start of the execution of the Contract, which shall be adjusted against the running Invoices of the Contractor as per terms of the Contract."*

77. The Contractor has clearly defaulted in performance despite repeated opportunities by the Company. The Bank Guarantees are unconditional and irrevocable. All the Bank Guarantees are valid. The language of the financial and performance Bank Guarantees makes it clear that simply on demand, the bank would have to make payment. Relevant extract of the text of the Bank Guarantees is as under:

> *"ICICI (I) do hereby guarantee and undertake to pay the company (or if the bank has accepted the assignment of the benefit of this bank guarantee to any third party pursuant to clause 3 of this bank guarantee then to that third party) immediately on the same day after receipt by the bank of a demand complying with the requirements of this bank guarantee on first demand in writing any/all moneys to the extent of USD..... without any demur, reservation, recourse, contest or protest and without any reference to the contractor. Any such demand made by the company on the bank by serving a written notice shall be conclusive and*

*binding., without any proof whatsoever, as regards to the amount due and payable, notwithstanding any dispute(s) pending before any court, tribunal, arbitrator or any other authority and/or any other matter or thing whatsoever, as the bank's liability under these presents being absolute and unequivocal. For the purpose of this clause "2 business day" means a day on which commercial/scheduled banks are open for business in (mention city of the bank branch).The bank hereby agree and acknowledge that this bank guarantee is irrevocable and continues to be enforceable until it is fully and finally discharged by company in writing or ..... whichever is earlier. This bank guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the contractor and shall remain valid, binding and operative against the bank.*

*The bank also agrees that the company at its option shall be entitled to enforce this bank guarantee against the bank as principal debtor, in the first instance, without proceeding against the contractor and notwithstanding any security of other guarantee that company may have in relation to the contractor's liability."*

78. The law relating to Bank Guarantees is extremely clear and has been repeatedly settled by the Supreme Court including in ***Standard Chartered v. Heavy Engineering Corporation Ltd &Ors. (supra).*** Relevant extracts from the judgment are:

*"... 23. The settled position in law that emerges from the precedents of this Court is that the bank*

*guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence.There are however, exceptions to this Rule when there is a clear case of fraud , irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.*

*...*

*26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the Appellant bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. In absence thereof , it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."*

The remaining authorities cited by the Company are on the same lines and are not repeated for the sake of brevity.

79. In ***Ansal Engineering Projects (supra)*** the Supreme Court categorically observed that the adjudication of the quantum of loss and damages is not a pre-condition for invoking Bank Guarantees which are meant to secure the loss or damage caused due to breach. On the basis of the terms of the Bank Guarantee the amount would be payable on a mere demand by the beneficiary.

80. The judgment in ***Leighton (supra)*** is relied upon by the contractor to argue that in Section 9 proceedings, the Court has the power to pass interim measures of protection. There is no dispute to the legal proposition that the powers under Section 9 are broad and interim measures of protection can be granted.

81. At the time when the ad-interim order was passed by the ld. Single Judge the pleadings between the parties were not complete. In fact, most of the relevant correspondence was not filed by the Contractor and has now come on record by way of the reply and the rejoinder and further submissions filed by the parties. Thus, the submission on behalf of the Contractor that the ad-interim order ought to be continued is not tenable. The said order being *ad-interim* in nature, was prior to pleadings between the parties and does not deserve to be continued in favour of the Contractor, for the reasons stated above.

82. Thus, insofar as the invocation of three sets of Bank Guarantees are concerned, no case is made out for passing of any interim order staying the invocation or encashment thereof.

83. However, reconciliation of accounts would be required to determine as to what would be the component of the Advance Bank Guarantees recoverable by the Company. There are no pleadings as to what exactly is the amount

recoverable. Accordingly, insofar as the Advance Bank Guarantees are concerned, this Court is of the opinion that the amount recoverable by the Company ought to be ascertained. Accordingly, it is directed that the amount of only the Advance Bank Guarantees which have been invoked, upon being encashed, shall be placed in a separate *`Joint Account'* which shall be jointly held by the Contractor and the Company. The parties are directed to reconcile the accounts, including payment of any invoices already raised and upon reconciliation as to the unrecovered portion of the advance amount which the Company is entitled to retain, in terms of the clauses in the contract, they may instruct the bank to release the said amounts in favour of the Company. The remaining amounts be released to the Contractor. If the parties are unable to reconcile the same, they are free to approach the Arbitral Tribunal under Section 17 of the Act. The `Joint Account' as directed, shall be opened within three days and the amounts of the Advance Bank Guarantees shall be directly deposited in the said account. The reconciliation process shall be completed in two weeks.

84. Accordingly, the ad-interim order dated 20th April, 2020 (*as modified on 24th April 2020*), stands vacated in the above terms. The present petition and all pending applications are disposed of in the above terms. Copy of this judgment be communicated to Respondent No. 2 - ICICI Bank Ltd., MIDC Branch, 1st Floor, CIBD, Near Floral Deck Plaza and Seepz, MIDC, Andheri (East), Mumbai, Maharashtra-400093 by the High Court Registry as also by the parties, to ensure compliance. The same may be transmitted by the Registry via email at corporatecare@icicibank.com.

85. Needless to add that the opinion rendered herein is *prima facie* in nature and shall not bind the arbitral proceedings in any manner whatsoever. The respective claims and counterclaims would be liable to be adjudicated by the duly constituted Arbitral Tribunal, on their own merits, in accordance with law.

**PRATHIBA M. SINGH**
**JUDGE**

**MAY 29, 2020**
*DJ/DK/Rahul/R*

## APPENDIX A – Relevant clauses of the Contract dated 25th April 2018.

### CLAUSE 2

"***2. TERM, COMMENCEMENT AND PROGRESS***

***2.1 Term***

*(a) Term*

*This Agreement will come into effect on the Effective Date and, unless sooner terminated or extended in accordance with the terms of this Agreement or agreement of the Parties, will remain in effect for 2 (two) years from the Commencement date for Mangala, Bhagyam and Aishwariya, whichever is later amongst the said fields. (the "**Term**")., for executing entire scope of Services.*

*(b) Extension*

*Company will have the option to extend the Term on the same terms and conditions as specified in this Agreement (including the prices and charges specified in Exhibit C- Compensation) for a period of up to One (1) year, (as elected by Company) through the delivery of Notice to Contractor no later than 30 days before the expiry of the Term. For the avoidance of doubt, any such extension shall be in direct continuation of the original Term.*

*The Term may be further extended to the extent required for Contractor to complete any Services being carried out during the expiry of the Term.*

***2.2 Call out Order***

*(a) Contractor shall commence the Services on the Commencement Date as notified by the Company to the Contractor pursuant to the respective Call Out*

*Order ("**Commencement Date**") issued for Mangala, Bhagyam and Aishwariya.*

*(b) Until Company issues a Call Out Order, Contractor shall not become entitled to any payment under this Agreement.*

*(c) At any time prior to the issuance of a Call Out Order, the Company may terminate this Agreement for convenience and, in the event of such termination will have no liability whatsoever to Contractor whether direct or indirect, in contract, tort or otherwise in relation to or arising out of or in connection with any transactions contemplated under or in connection with this Agreement of otherwise. In this regard, Contractor acknowledges that Company's issuance of a Call Out Order will be subject to the satisfaction of certain conditions, including an extension of the term of the PSC, JOA and the receipt of certain third party approvals.*

### *2.3 Novation of Certain Agreements*

*(a) Within 10 Business Days following the Effective Date or such other date as the Parties may agree, Company and Contractor may mutually agree to novate certain agreements to the Contractor and the Contractor will accept the novation of such agreements ("**Novation Agreements**").*

*(b) Contractor represents and warrants that it has satisfied itself in relation to the Novation Agreements, including that the goods, equipment, materials and services specified in the Novation Agreements are sufficient for the performance of the Services in accordance with the Agreement. Contractor will not be entitled to a Variation or for any other relief hereunder as a result of any failure or delay in*

*performance under the Novation Agreements or for any failure of the goods, equipment, materials and services specified in the Novation Agreements to satisfy the requirements of this Agreement.*

### *2.4 Commencement and Progress*

*Contractor shall, on the Effective Date, commence and expeditiously and diligently perform the Services in accordance with this Agreement.*

### *2.5 Conditions Precedent*

*(a) The Parties' obligations under this Agreement are subject to the satisfaction (or waiver by Company in its sole discretion) of the following conditions:*

*(i) the receipt of all other necessary approvals (including of the terms and conditions of this Agreement) required under the PSC and JOA; and*

*(ii) the receipt of all necessary approvals from Government Authorities to Company's satisfaction, including, without limitation, the Ministry of Defence, the Ministry of Petroleum and Natural Gas, and the Ministry of Environment, Forests and Climate Change.*

*(b) Notwithstanding Section 2.5(a), Articles 21,22 and 24 will be binding on the Parties as from the date of this Agreement.*"

## CLAUSE 6

*"6. SCHEDULE GUARANTEE AND DELAY LIQUIDATED DAMAGES*

### *6.1 Schedule Guarantee*

*Contractor guarantees that it will achieve each Milestone by the relevant milestone Date.*

### *6.2 Delay Liquidated Damages*

*(a) Contractor shall within 10 Business Days following receipt of Notice from Company demanding payment, pay to Company the amounts specified in* ***Exhibit J- Milestones, Milestone Dates and Liquidated Damages,*** *together with any applicable Goods and Services Tax ("****GST****")" on such amounts, for each Day of delay (or part thereof) in achieving any Milestone, subject to the limits (if any) specified in* ***Exhibit J – Milestones, Milestone Dates and Liquidated Damages*** *or agreed by the Parties in writing (as applicable).*

*(b) The Parties acknowledge that the liquidated damages set forth in* ***Exhibit J- Milestones, Milestone Dates and Liquidated Damages*** *reflect a genuine pre-estimate of the losses that Company may suffer or incur as a result of Contractor's failure to achieve a Milestone by the relevant Milestone Date or otherwise for the matters addressed therein and are not in the nature of a penalty.*

(c) *If Contractor fails to pay any liquidated damages when due and owing under Section 6.2(a), Company will be entitled to withdraw the amount owing (together with any applicable **GST** on such amount) from the Performance Bond, Financial Bond or deduct such amounts from any and all amounts otherwise owing to Contractor under this Agreement."*

## CLAUSE 9

Relevant extracts of Clause 9 are hereinbelow:

> ***"9. ADVANCE PAYMENT BOND, PERFORMANCE BOND, FINANCIAL BOND AND PARENT COMPANY GUARANTEE***
>
> ***9.1 Obligation to Provide***
>
> *Contractor shall provide to Company:*
>
> *(a) within 14 Days following the Call Out Order, an advance payment bond in an amount equal to [o][1] and in the form set out in **Exhibit N- Advance Payment Bond**, issued by an Acceptable Bank (the "**Advance Payment Bond**");*
>
> *(b) within 14 Days following Effective Date, a performance bond in an amount equal to the then effective Required Performance Bond Amount and in the form set out in **Exhibit E – Performance Bond**, issued by an Acceptable Bank (the "**performance Bond**"); a Financial Bond in an amount equal to the Required Financial Bond and in the form as set out in Exhibit E - Financial Bond, issued by an Acceptable Bank (the "**Financial Bond**")[2]*
>
> *(c) on the Effective Date, a Comfort Letter as per Exhibit F.*

[1]This amount will be 20% of the Call out value.
[2]Performance Bond for recovery of LD means a bond provided by the Contractor to the Company which can be invoked only for non payment of LD. This shall be for a value of 10% of the Call Out value.

### *9.2 Requirements*

*(a) Contractor shall ensure that:*

*(i) the Advance Payment Bond remains valid and enforceable until the Advance Payment is recovered in accordance with Section 8.9 (b); and*

*(ii) the Performance Bond remains valid and enforceable throughout the performance of the Services and while any Defects Liability Period is in place and for a further 180 Days following the expiry of the last Defects Liability Period.*

*(iii) the Bank Guarantee for security against Liquidated Damages shall be valid for the duration of contract*

*(b) If the Advance Payment Bond or the Performance Bond or the Financial Bond in force at any time will, according to its terms, expire before the applicable date specified in Section 9.2(a), then at any time within the 30 Days prior to such expiry Company may draw down the full value of the Advance Payment Bond or the Performance Bond (as applicable) and retain the proceeds so drawn until the earlier to occur of (i) 10 Business Days following the provision of a replacement Advance Payment Bond or Performance Bond in accordance with this Article 9 and (ii) the expiration of the applicable period specified in Section 9.2(a), and may apply all or part of the proceeds so retained in any circumstances where it would otherwise have been entitled to draw*

*upon the Advance Payment Bond or the Performance Bond under this Agreement.*

*(c) If at any time prior to the expiration of the period specified in Section 9.2(a) the bank or financial institution issuing the Advance Payment Bond or the Performance Bond or Financial Bond ceases to have an Acceptable Credit Rating, Contractor shall cause a new Advance Payment Bond or Performance Bond or Financial Bond to be issued to the Company by an Acceptable Bank in accordance with the requirements of this Article 9 within 14 Days following receipt of Notice from Company, and upon delivery of the replacement Advance Payment Bond or Performance Bond or Financial Bind Company shall return the previous Advance Payment Bond Performance Bond or Financial Bond to Contactor.*

*(d) Within 20 Business Days following any increase in the Required Performance Bond Amount or Financial Bond, Contractor shall cause the amount of the Performance Bond or Financial Bond to be increased to the Required Performance Bond Amount or Financial Bond.*

*(e) Within 20 Business Days following any draw on the Performance Bond or the Financial Bond by Company in accordance with this Agreement, Contractor shall cause the amount of the Performance Bond or Financial Bond to be restored to the then-effective Required Performance Bond Amount or the required Financial Bond amount.*

*(f)* *If Company terminates this Agreement pursuant to Section 11.4 prior to Company's recovery of Advance Payment, Company will be entitled to draw upon the Advance Payment Bond in the amount of the unrecovered portion of the Advance Payment and to retain the amounts so drawn.*

*(g)* *In addition to the other circumstances specified in this Agreement, Company has the right to draw down and, at Company's discretion, apply the proceeds in remedying any breach by Contractor of this Agreement, all or part of the value of the Performance Bond. Such recourse against the Performance Bond shall be without limitation to any other right or remedy of the Company in relation to the relevant Contractor breach. Further, in addition to the other circumstances specified in this Agreement, Company has the right to draw down and, at Company's discretion, apply the proceeds for recovering any Liquidated Damages or any payments due to the Company under this Agreement, all or part of the value of the Financial Bond. Such recourse against the Financial Bond shall be without limitation to any other right or remedy of the Company in relation to the relevant Contractor Breach''*

## CLAUSE 10

Relevant extracts from Clause 10 are hereinbelow:

### *10. VARIATION*

### *10.1 Right to Vary*

*(a) Company may, at any time and for any reason, instruct by Notice an addition, deletion, alteration and/or modification to or from the Services or to the timing thereof or to the conditions under which they are to be carried out (a "**Variation**"). Such notice shall be headed or clearly include the word "Variation". If Company instructs a Variation that requires the Contractor to modify its performance of the Services any necessary adjustments to the Milestones, the Milestones Dates, and/or the compensation payable pursuant to Article 8 and **Exhibit C – Compensation** resulting from such Variation shall be made only as an Approved Variation in accordance with this Article 10. If Contractor determines that a requested Variation will require an adjustment to the Milestones, the Milestone Dates, and/or the compensation payable pursuant to Article 8 and **Exhibit C- Compensation,** and submits a Variation Order Request in respect of such Variation within the time specified in Section 10.2 (a), the Contractor will implement such Variation pending agreement or determination of such adjustments in accordance with Section 10.2.*

*(b) Company may, at any time and before instructing a Variation pursuant to Section 10.1(a), instruct Contractor to submit a proposal, which shall include*

*all information as prescribed in Section 10.2(a), in respect of Variation proposed to be instructed, and, in addition, the Contractor shall be entitled to submit a proposal including the same prescribed information of its own initiative in the circumstances and for the reasons set out in Section 10.1(d) in either case, a "**Variation Order Request**". A Variation Order Request shall be headed or clearly include the words "Variation Order Request".*

*(c) Except as provided in Section 5.8(g), the Contractor shall not make any addition, deletion, alteration and/or modification to the Services unless instructed to do so by a Variation and/or in accordance with an Approved Variation.*

*(d) Subject to the terms of this Article 10, Contractor shall be entitled to a Variation in the following circumstances:*

*(i) a delay caused to the Contractor's performance of the Services by Force Majeure (in which case, any Variation will, if granted, only be in respect of any adjustment to the Milestones and/or the Milestone Dates and/or the Required Commercial Operation Dates and will not result in any change to the compensation payable pursuant to Section 8 and **Exhibit C – Compensation**) **except as provided under section 15.4 (c);***

*(ii) a delay caused to Contractor's performance of the Services as a result of an Optional Suspension by the Company; or*

*(iii) a delay caused to Contractor's performance of the Services by Company's failure to perform any of its obligations under this Agreement or any negligent act or omission of Company, except to the extent that such act, omission, breach or default was due to a negligent act or omission of Contractor or any Subcontractor;*

*provided, however, that : (A) the Contractor will not be entitled to such an adjustment to the Milestones or the Milestones Dates and/or the Required Commercial Operation Dates to the extent that the Contractor's achievement of the Milestones or the Milestone Dates would have been delayed notwithstanding the occurrence of the events specified in this Section 10.1(d) and (B) the Contractor will only be entitled to an increase in the compensation payable pursuant to Article 8 and* ***Exhibit C – Compensation*** *in the circumstances described in Sections 10.1(d)(ii) or 10.1(d)(iii) and will not be entitled to an increase in compensation in the circumstances described in Section 10.1(d)(i).*

*(e) Notwithstanding that Contractor is not entitled to any adjustment to the Milestone Dates in respect of any act of prevention by Company, Company may assess and decide the delay that Company considers has been suffered by Contractor as a result of such act of prevention, in which case Company shall grant and Notify Contractor of the extension to any Milestone Dates upon which the Company decides.*

*(f) Contractor shall keep such contemporary records as may be necessary to justify any matter described in Section 10.1(d), at such location as may be*

*acceptable to Company and such other records as may reasonably be requested by the Company. Contractor shall permit Company and its representatives to inspect all such records and shall provide Company with copies as requested by Company.*

*(g) When Contractor becomes aware of an event giving rise to a delay of its performance of the Services, it shall forthwith take all reasonable measures to avoid or minimize such delay, shall provide Notice to Company of such measures, and shall supply Company with such information as Company may reasonably request. Contractor shall not be entitled to an adjustment to the Milestone Dates to the extent that Contractor has failed to take such reasonable measures to avoid or minimise the delay suffered.*

*(h) Subject to the terms of this Article 10, the Contractor shall be entitled to a Variation of time in the following circumstances:*

*(i) delay caused to Contractor's performance by a restriction on access to the Block that may be imposed by a Government Authority provided Contractor is not under default for any of the obligation in the Contract. The time to be considered in Variation shall be equivalent to the period during which such restriction is in force.*

*(ii) delay caused to Contractor's performance due to local strike/unrest which results in cease of operation for a consecutive **7 days** provided Contractor is not under default for any of the*

*obligation under the Contract. The time to be considered in Variation shall be equivalent to the period during which such local strike/unrest is in force*

*The Contractor shall immediately inform the Company, in writing, about commencement and discontinuance of any of the above condition and shall furnish the Company such information in respect of such condition as the Company may reasonably require.*

***10.2 Variation Procedure***

*(a) Contractor shall either: (A) within fourteen (14) Days of receipt of the Company's request for a Variation pursuant to Section 10.1(a) or a Variation Order Request pursuant to Section 10.1(b); or (B) if the Contractor is requesting the instruction of a Variation in accordance with Section 10.1(d), within fourteen (14) Days of the start of event(s) described in such Section, submit a Variation Order Request which shall include:*

*(i) a description of the work to be performed in order to carry out the addition, deletion, alteration or modification to or from the Services described in the Variation or the Variation Order Request;*

*(ii) Contractor's proposal for any necessary adjustments to the Milestone Dates, together with appropriate supporting evidence including an analysis of the effect of the Variation on the critical path of the Services; and*

(iii) *the Contractor's proposal for adjustment to the compensation payable pursuant to Article 8 and* ***Exhibit C – Compensation.***

*The Contractor' failure to give a Variation Order Request within the time prescribed under this Section 10.2(a) shall constitute a waiver of any entitlement to a change in the Milestone Dates or the compensation payable pursuant to Article 8 and Section 10.1(a)* ***Exhibit C – Compensation.***

*(b) Company shall, as soon as practicable after receipt of a Variation Order Request, respond with the issue of a Variation or the Company's rejection of or comments in relation to, the Variation Order Request.*

*(c) If the Parties agree on all changes to the Milestone Date or the compensation payable pursuant to Article 8 and* ***Exhibit C – Compensation*** *required by a Variation and/or a Variation Order Request, the Variation and/or the Variation Order Request shall be effected in accordance with the terms as so agreed and set out in writing.*

*(d) If parties do not agree do on all changes to the Milestone Dates or the compensation payable pursuant to Article 8 and* ***Exhibit C – Compensation*** *required by a Variation or Variation order Request, the disputed changes to the Milestone Dates or the compensation payable pursuant to Article 8 and* ***Exhibit C – Compensation*** *shall be determined in accordance with Section 20.2 and the Contractor shall continue performing its obligations under this Agreement pending such determination.*

*(e) A Variation and/or a Variation Order Request in relation to which changes to the Milestone Dates or the compensation payable pursuant to Article 8 and **Exhibit C – Compensation** have been agreed between the Parties under Section 10.2(c) or have been finally determined in accordance with Section 20.2, shall become an "**Approved Variation**" and from the date of agreement under Section 10.2(c) or from the date of resolution under Section 20.2 (as the case may be) this Agreement shall be deemed to be amended in accordance with, and shall be construed in light of, such Approved Variation.*

*(f) A Variation and/or a Variation Order Request is effective only if made in accordance with this Article10. Contractor shall not be or become entitled to additional payment for any addition, deletion, alteration or modification to the Services or to any adjustment of the Milestone Dates and/or the compensation payable pursuant to Article 8 and **Exhibit C – Compensation** unless reflected in an Approved Variation in accordance with this Article 10 or as determined in accordance with Section 20.2."*

## CLAUSE 11

Relevant extracts from clause 11 are herein below:

> ***"11. EARLY TERMINATION AND EVENTS OF DEFAULT***
>
> ***11.1 Early Termination Option***
>
> *(a) Company will have the right to terminate this Agreement or any portion of the Services at any time upon delivery of Notice to Contractor.*
>
> *(b) If Company terminates this Agreement or any portion of the Services pursuant to Section 11.1(a), Company will pay to Contractor (without double counting):*
>
> *(i) the amounts owing under **Exhibit C- Compensation** for any Services that have been duly completed in accordance with this Agreement as of the date of termination to the satisfaction of Company (which, in the case of any well(s), will occur when Company Contractor has accepted a Well Handover From in respect of such Well(s)) and to the extent not already paid; plus*
>
> *(ii) any direct and substantiated charges already incurred for cancellation of the procurement of third party goods or services from its Subcontractors which were to have been supplied by the Contractor in connection with the Services, substantiated by way of sufficient documentation to the satisfaction of the Company, provided that the Contractor shall use its best endeavours to minimise such charges provided the charges shall not exceed the Contract Price; minus*
>
> *(iii) 50% of any cumulative Holding Rate payable by Company in respect of any Optional Suspension*

*preceding such termination in accordance with Section 12.3(a)(ii)*

### *11.2 Termination of Extended Force Majeure*

*(a) If one or more events of Force Majeure prevents Contractor from performing all or a substantial portion of the Services for a period of 7 consecutive Days, then Company may terminate this Agreement or any portion of the Services upon Notice to Contractor.*

*(b) If Company terminates this Agreement or any portion of the under Section 11.2(a), the Company will pay to Contractor (without double counting)*

*(i) the amounts owing under **Exhibit C- Compensation** for any Services that have been duly completed in accordance with this Agreement as of the date of termination to the satisfaction of Company (which, in the case of any well(s), will occur when Company Contractor has accepted a Well Handover From in respect of such Well(s)) and to the extent not already paid; plus*

*(ii) any direct and substantiated charges incurred by the Contractor in connection with Demobilisation, substantiated by way of sufficient documentation to the satisfaction of the Company, provided that the Contractor shall use its best endeavours to minimise such charges. Notwithstanding the same such charges shall not exceed the Contract Price.*

### *11.3 Contractor Events of Default*

*Each of the following events will constitute a "**Contractor Default**" under this Agreement:*

*(a) If Contractor is in breach of any of its representations, warranties or obligations under Section 21.2;*

*(b) if:*

*(i) Contractor (A) is in breach or default of any of its obligations under this Agreement (B) is in breach or default of any of its representations and warranties in Section 19.1 (in each case, other than Section 21.2); (C) violates any Applicable Laws; or (E) violates any of its obligations under this Agreement relating to HSSEQ matters; and*

*(ii) Contractor fails to commence to cure such breach and submit cure plan acceptable to Company (which is not withheld unreasonably) within 10 Days following receipt of Notice from Company identifying such breach and demanding cure of the same;*

*(c) if Contractor fails to pay any amount owing to Company under this Agreement 30 days following the due date therefor;*

*(d) If any person comprising Contractor or any person providing a Parent Company Comfort Letter becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against it, compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs that under any Applicable Law has a similar effect to any of these acts or events;*

*(e) if Contractor Abandons the Services or repudiates this Agreement; or*

*(f) if any person providing a Comfort Letter repudiates its obligations there under."*

***11.4 Remedies for Contractor Default***

*(a) Upon the occurrence and during the continuance of a Contractor Default, Company will have the right to terminate this Agreement or any portion of the Services upon delivery of Notice to Contractor.*

*(b) Upon any termination of this Agreement or any portion of the Services pursuant to Section 11.4(a), Company will be entitled to:*

*(i) recover from Contractor:*

*(A) any advance payment made by Company to Contractor that has not yet been recovered by, or repaid to, Company;*

*(B) any Mobilisation Fee paid by Company to Contractor in respect of the Services; and*

*(C) any costs incurred by the Company in having the Services (or the portion thereof terminated by Company) completed by others that are in excess of those costs that Company would have paid to Contractor had this Agreement (or such portion of the Services) not been terminated, together with all other costs reasonably incurred by the Company as a result of such termination (such costs, the "**Additional Costs**"); and*

*(ii) exercise any and all other remedies under this Agreement, at law or inequity.*

*(c) Company shall have the right to recover any amounts owing by Contractor pursuant to Section 11.4(b) either directly from the Contractor or by deducting such amounts from the Performance Bond or from any monies due or that become due to Contractor under this Agreement or any*

*other contract or agreement between Company and Contractor.*