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

Judgment reserved on: 28.10.2024
Judgment pronounced on: 07.01.2025

\+ **O.M.P.(I) (COMM.) 281/2024 & I.A. 39649/2024**

GAIL (INDIA) LIMITED .....Petitioner
Through: Mr. N. Venkatraman, ASG, Mr. Amitesh Chandra Mishra, Mr. Ankit Chaturvedi, Ms. Sunidhi Singh, Advs.

versus

FOCUS ENERGY LTD. AND ORS. .....Respondents
Through: Mr. Arun Kathpalia, Sr. Adv., Mr. Swapnil Gupta, Mr. Ekansh Mishra, Mr. Abhinav Mishra, Mr. Vaibhav Mendiratha, Advs. for R-1 to 3.
Mr. K.R. Sasiprabhu, Mr. Vishnu Sharma, Mr. Vinayak Maini, Mr. Prakhar Agarwal, Advs. for R-4.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking the following substantial prayers:

"A. Pass an ex-parte ad interim Order directing the Respondents to maintain status quo and continue the supply of gas to the Petitioner in terms of the Gas Sale and Purchase Agreement (GSPA) till the make-up gas is supplied in its entirety

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B. Grant an interim measure extending the Restoration Period from 4 months to such additional period until all the Balance Make-up Gas is supplied by the Respondent No.1; or

C. Pass an Order directing the Respondents to deposit the balance Annual Take or Pay (AToP) amount of Rs. 156.75 Crores with this Hon'ble Court or furnish adequate security in lieu thereof; and

D. Pass an Order directing the Respondents to furnish the details its assets free from encumbrance, sufficient to secure the amount due to the Petitioner towards the make up gas; and

E. Issue an order restraining the Respondents, from alienating, transferring, encumbering or otherwise disposing of their properties and assets until the final disposal of the arbitration proceedings;

…."

2. The parties entered into a Gas Sale and Purchase Agreement dated 07.08.2009 ("**GSPA**") for the supply of gas from SGL fields in Block RJ-ON/6 in Langtala, Jaisalmer to Rajasthan Rajya Vidyut Utpadan Nigam Ltd. ("**RRVUNL**") at Ramgarh, District Jaisalmer. The petitioner is a gas transmission and marketing company and is engaged in the supply of natural gas to various consumers by sourcing it from producers of natural gas. Respondent No. 1 is the Operator of Block RJ-ON/6 ("**the Block**") and is the representative of respondent Nos. 2 to 4 in the GSPA.

3. The respondents are parties to Production Sharing Contract dated 30.06.1998 ("**PSC**") with the Government of India ("**GoI**") in respect of the Block, and a Joint Operating Agreement dated 30.06.1998 is in operation. In terms of the GSPA, all the respondents have agreed to share their respective share of natural gas as per their participating interest specified in Schedule A of the GSPA. As per Clause 10.5 of the GSPA, the PSC remains in effect

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19:25:28

until 20.08.2024 and regulates the exploration and production activities in the Block.

4. The petitioner executed the GSPA with consortium of upstream respondent companies for purchase of gas supplied by the respondents and further sale of gas to downstream customer i.e. RRVUNL. For this, the petitioner entered into a downstream Gas Sales and Transmission Contract dated 07.08.2009 ("**GSTC**") with RRVUNL for supply of natural gas produced from the E&P block RJ-ON/6.

5. The blocks are isolated fields and all the gas produced from these isolated fields is supplied solely to RRVUNL through a dedicated pipeline laid by the petitioner. The GSPA between the parties expired on 30.09.2024.

6. As per the GSPA, the agreed Daily Contract Quantity ("**DCQ**") of natural gas was 0.2 Million Standard Cubic Meters per Day ("**MMSCMD**") for the Initial Period. It was set to increase to between 0.62 to 0.95 MMSCMD from the subsequent start date till the competition of Commissioning Period. After the Commissioning Period, the DCQ was fixed at 0.95 MMSCMD until the GSPA term expires, at the agreed price under the terms of the GSPA.

7. As per Clause 4.1 of the GSPA, the petitioner was obligated to make a Quarterly Minimum Payment ("**QMP**") to the respondents at the contracted rate. This payment was subject to adjustments for the respondents' Shortfall, Force Majeure Volume, Planned Maintenance, and Off-Spec Gas Volume for the quarter. Further, in terms of Clauses 4.2 and 4.3, the petitioner was required to make an Annual Take or Pay ("**AToP**") payment to the respondents, which was also subject to adjustments for the respondents' Shortfall, Force Majeure Volume, Planned Maintenance, Off-Spec Gas

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19:25:28

Volume, Quarterly Deficit Gas, and the Carry Forward Gas volume, limited to 1/3rd of the AToP volume.

8. The petitioner paid a sum of Rs. 197.13 crores to the respondents in terms of AToP and QMP for the period between 2010-2015. It is stated that in terms of Clause 4.4 of the GSPA, the petitioner was entitled to Make Up Gas for the short-fall of the gas supply in the earlier years.

9. It is stated that even though respondent No. 1 was ready to supply gas, the gas was much below the contractual DCQ of 0.95 MMSCMD, as a result of which RRVUNL was unable to operate its gas turbines. Several communications were sent to the respondents in this regard. Respondent No. 1, *vide* letters dated 30.11.2018 and 09.09.2022 claimed that the low supply of gas was due to adverse reservoir behavior and invoked Force Majeure ("**FM**") under Clause 7.2 of the GSPA.

10. Since the respondents failed to supply the contractual quantity of gas beyond 2016, the petitioner did not get the contractual DCQ and also did not get the make-up gas in the subsequent years for the AToP amount of Rs. 197.13 crores paid between 2010 to 2015. It is stated that out of the total amount of Rs. 197.13 crores paid by the petitioner, till 09.04.2024, only an amount of Rs. 40.38 crores has been adjusted, leaving a balance amount of Rs. 156.75 crores.

11. In terms of Clause 4.5.1 of the GSPA, the petitioner can, by sending a written notice at least 60 days prior to the expiration of the contract, avail its rights to the make-up gas accrued but not taken during the contract period. This right can be exercised for up to four months following the expiry of the contract period, known as the "Restoration Period." The Restoration Period ends either when the four months are completed or when the petitioner has

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Signing Date:07.01.2025
19:25:28

taken the accrued Make-up Gas, whichever occurs earlier. Further, as per Clause 4.5.7, all rights of the petitioner pertaining to the Make Up Gas shall automatically expire at the end of the Restoration Period.

12. The case set up in the present petition is that since the petitioner was entitled to Make Up Gas under the GSPA and since the GSPA has expired on 30.09.2024 (excluding Restoration Period of 4 months after expiry of the contract), and since it would not be possible for the respondents to supply the entire quantity of Make Up Gas, the petitioner has prayed for either *status quo* to continue for supply of gas, extension of the Restoration Period, or direction to the respondents to provide security to the tune of Rs. 156.75 crores during pendency of the arbitral proceedings.

13. The urgency in the petition arises from the fact that the PSC was valid only till 20.08.2024 and the petitioner has no information regarding its extension. The GSPA has expired on 30.09.2024 and the Restoration Period is only for 4 months after the expiry of the contract. If the Make Up Gas is not provided to the petitioner, the same would amount to unjust enrichment to the respondents.

14. It is stated that the petitioner has a strong *prima facie* case, as it has fulfilled its AToP obligations and paid Rs. 197.13 crores for the period between 2010-15. Pursuant to Clauses 4.4.1 and 4.5.1 of GSPA, the respondent is to provide Make Up Gas against such AToP amount, out of which a balance of Rs. 156.75 crores is still outstanding.

15. It is submitted that the petitioner will suffer irreparable loss if such relief is not granted as it risks losing the contractual right to receive Make Up Gas after expiry of the GSPA, which cannot be compensated by damages. It is argued that balance of convenience also lies in favor of the

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Signing Date:07.01.2025
19:25:28

petitioner. It is also stated that the respondent Nos. 2 and 3 are companies registered outside India, and even if an arbitral award is passed in favor of the petitioner, the respondents may not have the assets in India to satisfy the award.

Respondents' Submissions

16. Mr. Arun Kathpalia, learned senior counsel appears for respondent Nos. 1 to 3 and makes the following submissions:

Re-Writing of GSPA

17. He states that the petitioner is seeking to re-write the terms of the GSPA. Reliance is placed upon ***Venkataraman Krishnamurthy v. Lodha Crown Buildmart (P) Ltd.,*** (2024) 4 SCC 230 (para 17) and ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin,*** 2021 SCC OnLine SC 508 (para 83).

18. Pursuant to Clause 4 of the GSPA, the petitioner has an obligation to make contractual payment in the failure of taking AToP quantity. In the period between FY 2010-11 and 2014-15, the petitioner did not take AToP gas and paid Rs. 195.49 crores.

19. It is submitted that for claiming Make Up Gas, the criteria that has been envisaged in the contractual scheme is: a) the petitioner must have taken AToP quantity in that contract year (Clause 4.4.1 (iv) of GSPA); b) Make Up Gas not taken could be claimed in the succeeding year or during the Restoration Period (Clause 4.4.3 of GSPA), subject to the availability of gas and the PSC being in effect (Clause 4.5.5 of GSPA); and c) Restoration Period is to expire in 4 months (Clause 4.5.1 of GSPA). The right to Make Up Gas expires automatically at the end of the Restoration Period (Clause 4.5.7 of GSPA).

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Signing Date:07.01.2025
19:25:28

20. PSC came to an end on 20.08.2024. It is stated that the respondents applied for PSC extension and the same is being considered by the GoI. Further, it is submitted that the GSPA does not envisage any return/refund of the AToP payment; or giving security for the balance Make Up Gas; or supply of all accrued Make Up Gas in the Restoration Period; or carry forward of the Make Up Gas at the end of the Restoration Period. Hence, the reliefs prayed for in this petitioner are contrary to the express clauses of the GSPA, more particularly, Clauses 4.5.1, 4.5.5 and 4.5.7. For this, reliance is also placed upon petitioner's own letter dated 18.10.2024 to RRUVNL admitting the contractual scheme.

21. Learned senior counsel states that the respondents are continuing to supply Make Up Gas to the petitioner from 01.20.2024, however, the petitioners are refusing to take the available gas even in the Restoration Period.

Admission of Force Majeure Event

22. Learned senior counsel submits that in terms of Clause 7.2(ii)(b) of the GSPA, any reduction in the availability of sellers' gas deliverable due to adverse reservoir behavior falls within the FM clause. Due to FM, the parties are relieved of their obligations under the GSPA (Clause 7.3). The petitioner has accepted respondents' claim of FM events existing in the Block since 2018 due to adverse reservoir behavior. The acceptance of FM claim is evident from petitioner's letter dated 26.12.2023 to RRVUNL, and RRVUNL's letters dated 13.12.2023, 26.12.2023 and 12.08.2024 to the petitioner. The respondents have relied upon various other correspondences to state that the petitioner has never disputed the FM claim. The respondents offered available gas from the Block to the petitioner, though not the

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Signing Date:07.01.2025
19:25:28

stipulated quantity of 0.95 MMSCM per day. Respondents did not sell the gas from the Block to any other person/entity.

23. He further submits that under Clause 7.4 of GSPA, the petitioner could have terminated the GSPA due to the FM event, however, the same was not done. Under Clause 6.10(e), the petitioner could have disputed the invoices raised by the respondents during the FM event, however, the same was not done either and the petitioner continued to accept the invoices and release payment based thereupon. Since more than 90 days have elapsed since the issuance of the invoices, the petitioner is barred from raising any disputes regarding the same.

24. It is stated that the petitioner cannot belatedly claim that there was no FM event and that gas was not supplied by the respondents, when it had cleared all invoices from 2018-2024 without demur or protest and accepted gas less than 0.95 MMSCM. In terms of Clause 7.3, the respondents' liability stands discharged.

Incorrect Submissions Made by Petitioner

25. As regards the submission of refund of Rs. 40.83 crores between September 2024 and February 2024 against Make Up Gas is concerned, it is stated that the same is a mere adjustment and not a refund. Reliance is placed upon petitioner's letter dated 09.04.2024. It is stated that post-February 2024, no adjustments against Make Up Gas were made as the petitioner started taking gas at 0.06 MMSCM and lower, and AToP became applicable as petitioner refused to off-take the available gas.

26. It is stated that the respondents sent communications regarding the FM event on 30.11.2018 and 31.07.2019. However, the petitioner only sought information regarding this in October 2022, which was followed by

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Signing Date:07.01.2025
19:25:28

visit from the officials of the petitioner. It is submitted that it was due to the FM event that lower quantity of gas was accepted and was paid for by the petitioner.

27. As regards the submission that respondents were required to supply DCQ of 0.95 MMSCMD as per Clause 2.3.1 of GSPA, it is stated that the said clause does not apply for the period covered under the FM event. The petitioner acknowledged existence of FM event since November 2018, and hence, Clause 7.4 of the GSPA is applicable as per which the DCQ can be varied.

28. As regards the submission that the petitioner took less gas for a short period only, it is stated that the same is incorrect, as the aggregate of the petitioner taking less gas amounted to Rs. 362.75 crores.

Respondent/Petitioner's Refusal to Off-Take Gas

29. Learned senior counsel states that the petitioner refused to off take gas to the tune of Rs. 362.75 crores from November 2018 to August 2024. The outstanding amount payable to the respondents on account of the shortfall in AToP for the said period amounted to Rs. 258.68 crores. Clause 7.3 of the GSPA, being relief due to FM clause, is only applicable to the party affected and hence, will not apply to the petitioner for their failure to make the AToP payment.

30. It is stated that while the decision on the extension of PSC is awaited, the respondents are willing to continue to supply gas, however, the petitioner has failed to take gas as is available from the Block. Between the period of 01.10.2024 to 27.10.2024, the petitioner failed to take available Make Up Gas amounting to Rs. 6.81 crores (approx.). Learned senior counsel submits that in the event the petitioner agrees to receive 0.20 MMSCM (without

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Signing Date:07.01.2025
19:25:28

fluctuation) from the respondents, it would receive a substantial value of Make Up Gas during the remaining Restoration Period. Without prejudice to his other submissions, he states that the petitioner cannot make a monetary claim on the respondents while refusing to take the available gas in the Make-Up period.

31. It is submitted that the petitioner itself in its letters dated 25.01.2024 and 07.02.2024 had acknowledged that stoppage of gas supply negatively affects the health of wells and can cause permanent damage. Gas supplies were abruptly changed 2336 times from 2013-14 to September 2024, which at times led to closure of wells and resulted in permanent damage to the reservoir. This caused substantial financial losses to the respondents, for which the respondents have reserved their right to stake monetary claim.

32. It is stated that the petitioner is seeking restitution of the amount paid under AToP. The petitioner has made contractual payment and it is not recoverable under the contract. The obligations of the petitioner are absolute in nature. Reliance is placed upon a judgment by the Federal Court of Australia in ***Esso Australia Resources Pty Ltd. v. The Commissioner of Taxation of the Commonwealth of Australia*** reported in MANU/AUFC/0784/2011.

33. Without prejudice to his other submissions, learned senior counsel states that this Court need not pass an order on security as the assets of the respondent Nos. 1 to 3 as on date suffice for meeting any claims made by the petitioners in the proceedings.

Petitioner's Rebuttal

34. Mr. Venkatraman, learned ASG appears for the petitioner and makes the following submissions in rebuttal:

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Signing Date:07.01.2025
19:25:28

35. He relies upon Clause 2.3(b) of the GSPA to state that DCQ was stipulated to be 0.95 MMSCMD, which has rarely been supplied by the respondents since the commencement. He clarifies the petitioner's stance on interpretation of clauses of the GSPA. It is stated that the twin conditions mentioned in Clause 4.5.5 of the GSPA (being that the buyer's entitlement to Make Up Gas is subject to availability of gas with the seller and the PSC being in force) only applied "during the restoration period". Further, it is stated that as per Clause 4.5.7, it cannot be said that once the restoration period ends, all rights of the buyer terminate. The term used in the said clause is "all rights to the buyer in respect to Make Up Gas", and the same cannot be extended to mean "all rights to the buyer with respect to the contract".

36. As regards the argument on FM, the petitioner draws my attention to Clauses 7.5 and 7.7 which stipulate that any suspension of obligations due to FM event should be promptly intimated not later than 7 days in writing, giving full particulars, estimated duration, obligations affected and reasons for suspension. There is also a burden of proof on the party claiming FM that it has exercised reasonable diligence and efforts to remedy it. It is stated that the letters relied upon by the respondents – 30.11.2018 and 09.09.2022 – do not meet the requirements laid down in Clauses 7.5 and 7.7 of the GSPA.

37. It is stated that the argument of FM has been belatedly raised by the respondents and is in contradiction to their earlier stance. The respondents' letter dated 25.04.2024 (in reply to petitioner's request for payment of balance of Rs. 156.75 crores) admitted that balance amount of Make Up Gas to be nominated in future will be lower than Rs. 153.425 crores. The

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By:MAYANK
Signing Date:07.01.2025
19:25:28

petitioner submits that despite several requests for supply of Make Up Gas against AToP payment, the same was never supplied by the respondents, nor was there any invocation of the FM clause.

38. Learned ASG further draws my attention to documents showing that the respondent No. 1 along with partner companies (respondent Nos. 2 and 3) has refunded amounts pertaining to Make Up Gas against Take or Pay payment by adjusting 20% of the gas sale invoice amount against Make Up Gas. The timeline for the same was between second fortnight of September 2023 to first fortnight of February 2024 and amounted to Rs. 26 crores (approx.). From the above it is clear that there was no invocation of FM.

39. The petitioner has placed on record various letters showing the non-supply of gas at 0.95 MMSCMD or even at 0.65 MMSCMD, the minimum amount which was required for running Turbine 3 of RRVUNL. The petitioner has also expressed the concerns of RRVUNL through various letters. The respondents have relied upon various communications/emails to urge that the petitioner was not accepting the gas, although the respondents were willing to supply the same. However, it is stated that these emails merely indicate the interruptions during the course of supply of gas and its utilization in turbines, which is only temporary. Each email merely referred to a particular day/time. Due to non-supply of contracted quantities, the petitioner's customer had to close down the third turbine.

40. It is stated that the petitioner has already filed monthly and yearly statements showing huge deficiencies in quantity yet to be supplied, which is not denied by the respondents. The respondents cannot, at this stage, rely upon the possibility of extension of the PSC as the same is not yet granted

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Signing Date:07.01.2025
19:25:28

and it is not possible for the respondents to make up for the huge deficit in the supply quantities, and the only way is through refund of balance monies.

Reasonings & Conclusion

41. I have heard learned counsel for the parties.

42. In a nutshell, the petitioner's request for interim relief stems from the respondents' failure to supply the Make-up Gas as required under the GSPA, despite receiving AToP payments from the petitioner. With the PSC having expired on 20.08.2024, and the GSPA also having expired on 30.09.2024, the petitioner states that it is entitled to Make-up Gas valued at Rs. 156.75 crores during the Restoration Period, which extends for four months after the GSPA's expiration, ending on 31.01.2025. However, the respondents' current gas supply has drastically decreased, hindering the respondent's ability to provide the Make-up Gas entitlement within the limited Restoration Period, and despite repeated requests to the respondents to fulfill the requirement, the respondents have failed to do so. Hence, the prayers for interim relief.

43. *Per contra*, the respondents' case is that the reliefs sought by the petitioner are: a) contrary to the terms of the GSPA in that the right of the petitioner to receive Make Up Gas will expire on the completion of the restoration period and there is no provision for refund of balance of AToP amount/giving security for balance Make Up Gas/carry forward of the Make Up Gas/supply of all accrued Make Up Gas at such expiry; b) the petitioner is not taking the available gas in the restoration period even though the respondents are continuing to supply the same; c) FM clause applies to the case, as also admitted/accepted by the petitioner, as per which the respondents' liability is discharged.

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Signing Date:07.01.2025
19:25:28

44. Section 9 of the 1996 Act reads as under:

> *"9. Interim measures, etc., by Court.—1 [(1)]A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*
>
> *....*
>
> *(ii) for an interim measure of protection in respect of any of the following matters, namely:—*
>
> *....*
>
> *(b) securing the amount in dispute in the arbitration;*
>
> *....*
>
> *(e) such other interim measure of protection as may appear to the Court to be just and convenient,*
>
> *and the Court shall have the same power for making orders as it has for the purpose of, and in relation*
>
> *to, any proceedings before it.*
>
> *...."*

45. The scope of Section 9 of the 1996 Act has been well defined. More recently, the Hon'ble Supreme Court in ***Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd.***, 2022 SCC OnLine SC 1219 has held as under.

> *"**41.** Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection inter alia to (i) secure the amount in dispute in the arbitration; or (ii) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*
>
> *.....*
>
> ***48.** Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings,*

during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. ***All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.***

49. *If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.*

50. *Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail."*

(emphasis supplied)

46. Post ***Essar House*** (supra), the Hon'ble Supreme Court rendered the decision in ***Sanghi Industries Ltd. v. Ravin Cables Ltd.***, 2022 SCC OnLine SC 1329. The interplay between the two has been discussed by a coordinate bench of this Court in ***Dr. Vivek Jain v. Prepladder Private Limited***, 2023 SCC OnLine Del 6370:

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Signing Date:07.01.2025
19:25:28

*"**33.** This Court however notes that in the subsequent decision which was rendered by the Supreme Court in Sanghi Industries, the Supreme Court has taken a view which may not be completely in accord with what was expressed by it in Essar House. The Court enters the aforesaid observation in light of the Supreme Court in Sanghi Industries having held that in the absence of specific allegations duly supported by cogent material and the Court being satisfied on the basis of the above that a respondent is likely to defeat the Award, no order akin to attachment before judgment should be passed in exercise of powers under Section 9 of the Act. In Sanghi Industries, the Supreme Court further observed that the Section 9 power is mainly concerned with the grant of interim measures. It further went on to hold that unless and until conditions which inform and guide the exercise of power under Order XXXVIII Rule 5 of the Code are found to be satisfied, no such interim measure should be formulated.*

***34.** It is significant to note that both Essar House as well as Sanghi Industries are judgments rendered by Benches comprising of an equal coram. It would thus be the latter view as enunciated in Sanghi Industries which the Court would be obliged to follow. **Sanghi Industries urges us to bear in mind the classical exposition of an attachment before judgment and that direction being guided and informed by factors such as a clear foundation in the pleadings of parties supported by cogent evidence, the existence of a strong prima facie case and most importantly the court being convinced that a party was actively engaging in activities such as removal or dissipation of assets or where it is found that it is seeking to defeat any judgment or award that may be ultimately rendered.**"*

(emphasis supplied)

47. The aforesaid judgments espouse the following principles: a) the Court at the Section 9 stage is only to see if the petitioner has a strong *prima*

facie case, if the balance of convenience is in favor of the petitioner for an interim relief (i.e. the consequence of grant of relief as opposed to its refusal), if the petitioner has approached the court with reasonable expedition, and if the relief prevents irreparable loss/serious injury which cannot be compensated in terms of money; b) though the Court is not strictly bound by the provisions of CPC, it cannot ignore its underlying principles, and hence, for an interim order akin to attachment before judgment, the Court needs to be satisfied that conditions underlying Order XXXVIII Rule 5 of CPC are satisfied. This includes a clear foundation in the pleadings of parties supported by cogent material, strong *prima facie* case as well as court being convinced that the other party is actively trying to dissipate its assets to defeat outcome of a judgment; c) ultimately, it is an exercise of judicial discretion of the Court in light of the facts and circumstances of each case.

48. Before I address the arguments put forth by the parties, it is relevant to reproduce relevant clauses from the GSPA relied upon by the parties:

> ***"1. <u>GENERAL</u>***
>
> *1.1. This Contract shall be effective from the date it is signed and its duration shall be for a period of 12 Years commencing from the later of the Initial Start Date or the Subsequent Start Date (the "Term" or "Contract Period") unless:*
>
> > *(a) PSC is terminated in accordance with its terms, in which case the Term shall end on the date of such termination*
> >
> > *(b) The Contract is terminated in accordance with its term, in which case the Term shall end on the date of such termination.*
>
> *Provided that Term of this Contract may be extended, as mutually agreed by the Parties.*
>
> *1.2. Provided further and subject to the PSC being in force, if there remains any Make Up Gas outstanding to the Buyer at the*

end of the Term, which includes extensions thereto, Sellers shall provide a Restoration Period to Buyer for the purpose of supply of such Make Up Gas, as per Clause 4.5 of this Contract.

……

2. SALE AND PURCHASE OF GAS

…..

2.3 Quantities

2.3.1 …..

b) From the Subsequent Start Date till the completion of Commissioning Period the DCQ shall vary between 0.62 MMSCMD to 0.95 MMSCMD Including Commissioning Gas, as per requirement of Buyer's Gas Customer; subject to Clause 2.3.5, and the specifications of the Sales Gas being as per ATTATCHMENT-3. From the date immediately following the completion of the Commissioning Period till expiry of Term, the DCQ shall bs 0.95 MMSCMD, with specifications as per ATTACHMENT-3 ("Expansion Quantities").

……

4. MINIMUM PAYMENTS

4.1 Minimum Quarterly Payments

4.1.1 For each Quarter there shall be a Quarterly Contracted Quantity, which shall be the number of Days in that Quarter multiplied by the prevailing DCQ as defined in Clause 2.3.1 less aggregate of the following:

(i) It Shortfall Gas during the relevant Quarter;

(ii) the quantities of Sales Gas for all Days on which the Sellers were prevented from supplying or the Buyer was prevented receiving Sales Gas by Force Majeure during that Quarter;

(iii) the quantities of Sales Gas for all Days on which the Sellers were prevented from supplying or the Buyer was

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Signing Date:07.01.2025
19:25:28

prevented from receiving Sales Gas due to Planned Maintenance during that Quarter;

(iv) the quantities of Sales Gas for all Days on which the Buyer rejects Off-Specification Gas.

…….

4.1.3 The Buyer shall pay to the Sellers the Quarterly Minimum Payment, as computed in Clause 4.1.2, to the Sellers in accordance with Clause 6.

4.2 Annual Take or Pay Quantity

4.2.1 Subject to Clause 2.3.1 and 2.3.5, for each Contract Year there shall be an Annual Take or Pay Quantity.

4.2.2 The Annual Take or Pay Quantity ("ATOPQ") shall be 90% of the Adjusted Annual Contracted Quantity ("AACQ"). AACQ shall be

calculated as follows:

…..

4.3 Annual Take or Pay Obligation

4.3.1 Buyers Annual Take or Pay Obligation shall be calculated as under:-

…..

4.3.2 Without prejudice to Clause 4.1, payment by the Buyer pursuant to Clause 4.3.1 shall be the only remedy of the Sellers for failure of the Buyer to take a quantity of Sales Gas in a Contract Year equal to the ATOPQ.

4.4 Make-Up Gas & Carry Forward Gas

4.4.1 If in respect of a Contract Year the Buyer has made the payment for the Annual Deficit Quantity under Clause 4.3.1 or, If in a Contract Year the Buyer has paid for any quantities of Quarterly Deficit Quantity by way of the Quarterly Minimum Payment, but there is no Annual Deficit Quantity at the end of that Contract Year.

i. With respect to that Annual Deficit Quantity, the Buyer subject to Clause 4.4.1(iv), shall be entitled to take a

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19:25:28

quantity of Sales Gas upto a quantity equal in value to that Annual Deficit Quantity at no further cost, subject to necessary taxes and statutory levies, in any subsequent Contract Year(s) or the Restoration Period, subject to the Buyer paying all Buyer's Taxes in respect of such Sales Gas; or

ii. With respect to quantities of Quarterly Deficit Gas not accounted for pursuant to Clause 4.2.2(f), the Buyer subject to Clause 4.4.1(iv) shall be entitled to take a quantity of Sales Gas upto a quantity equal in value to aggregate of that Quarterly Deficit Quantity at no further cost, subject to necessary taxes and statutory levies, in any subsequent Contract Year or the Restoration Period, subject to the Buyer paying all Buyer's Taxes in respect of such Sales Gas; and

iii. The entitlement to take Sales Gas pursuant to Clause 4.4.1(i) and 4,4.1(ii) above shall constitute "Make Up Gas"; and

iv. If the Buyer wishes to exercise its entitlement to Make Up Gas in any subsequent Contract Year(s), it must have first taken delivery of the Annual Take or Pay Quantity in that Contract Year.

4.4.2 The order in which the Buyer shall draw Make Up Gas shall be the same order ln which the Make Up Gas Accrued.

4.4.3 Any Make Up Gas not taken by the Buyer during the Contract Year shall be carried forward to the succeeding Contract Year, or if applicable, the Restoration Period.

4.5 Restoration Period

4.5.1 At least 60 days prior to the expiry of the Term of this Contract, the Buyer may, by giving a written notice to the Sellers, avail itself of rights to Make Up Gas accrued but not taken during the Contract Period, for a maximum period of 4 (Four) Months from the end of the Contract Period, such period to be referred to

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Signing Date:07.01.2025
19:25:28

as the "Restoration Period". Provided that, Restoration Period shall expire on the completion of the 4 (Four) Months or on the day, when the Buyer has taken the accrued Make Up Gas, whichever happens earlier.

4.5.2 There shall be no Restoration Period in the event the Contract is terminated for a Buyer's Event of Default or there is no Make Up Gas outstanding on completion of Term.

4.5.3 Provided further that in respect of Make Up Gas that gets accrued during the last Contract Year, notice as per Clause 4.5.1 shall not be required, however, Buyer's entitlement to such Make Up Gas during the Restoration Period shall remain as per this Clause 4.5.

4.5.4 During the Restoration Period the Buyer may only nominate and take outstanding quantities of Make Up Gas, as per the DCQ applicable immediately before the Restoration Period. If during the Restoration Period the Buyer fails to take quantities of Make Up Gas, properly nominated pursuant to this Contract, for any reason, the Buyer shall lose all rights to Make Up Gas in respect of such quantities not taken.

4.5.5 It is the expressly agreed between the Parties that Buyer's entitlement to Make Up Gas during the Restoration Period is always subject to availability of gas to the Sellers and PSC being in force. Sellers have expressly agreed that supply of gas during the Restoration Period to Buyer under this Contract shall be in priority to any other arrangement of gas supply by the Sellers to gas customer(s) other than the Buyer and such sale of gas to other customer(s) if any, by the Sellers, shall not in anyway affect the supply of Make Up Gas to the Buyer during Restoration Period.

4.5.6 The Sales Gas Price that shall apply during the Restoration Period shall be the Sales Price in effect at the time of accrual.

4.5.7 At the end of the Restoration Period all rights to the Buyer in respect to Make Up Gas, shall expire automatically.

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Signing Date:07.01.2025
19:25:28

7. <u>FORCE MAJEURE</u>

…..

7.2 *……*

(ii) Force Majeure Inclusions

(a) For the avoidance of doubt, it the Government exercises its right to take Gas from the SGL Gas Field in Block RJ-ON/06 in kind, pursuant to the provisions of the PSC, then to the extent that this prevents the Sellers from performing their obligations hereunder this shall constitute Force Majeure for the Sellers.

(b) Any reduction in the availability of Sellers' Gas deliverable hereunder due to adverse reservoir behavior, which, as a prudent operator was not reasonably forseeable to the Sellers.

7.3 Relief due to Force Majeure

If by reason of Force Majeure, the Sellers or the Buyer are/is rendered unable wholly or in part to carry out their or its obligations under this Contract, then the liability for failure to meet the obligations of the Party concerned. as long as and to the extent that the obligations are affected by such Force Majeure, shall be excused.

7.4 Force Majeure events exceeding 30 Days

Notwithstanding anything in other clauses under this Clause 7, if an event or series of events (alone or in combination), of Force Majeure occur, and continue for a period in excess of thirty (30) consecutive Days, then the Sellers and the Buyer shall meet at the request of any Party to mitigate to the extent possible the impediments caused by the Force Majeure event and vary the Daily Contract Quantity under the terms of this Contract to enable the Sellers to deliver and the Buyer to take Sales Gas during the existence of the Force Majeure event.

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Signing Date:07.01.2025
19:25:28

If such event or series of events of Force Majeure is not remedied or mitigated pursuant to discussions between the Sellers and Buyer within 90 Days of the meeting between the Sellers and the Buyer, then the Contract may be terminated at the discretion of the Party not claiming Force Majeure, following a 90 days notice prior to termination.

7.5 Party to Notify Force Majeure Events

Where a Party is claiming suspension of its obligations on account of Force Majeure, it shall promptly, but in no case later than seven (7) Days after becoming aware of the occurrence of the event of Force Majeure, notify the other Parties in writing giving full particulars of the Force Majeure, the estimated duration of the Force Majeure, the obligations affected and the reasons for its suspension.

7.7 Onus of Proof on Party Claiming Force Majeure

The Party asserting the claim of Force Majeure shall have the burden of proving that the circumstances constitute valid grounds of Force Majeure under this Clause and that such Party has exercised reasonable diligence and efforts to remedy the cause of any alleged Force Majeure.

….

14. <u>DISPUTE RESOLUTION</u>

14.2 Arbitration

a) If any dispute arises between the Parties hereto at any time relating to the construction or interpretation of this Contract or any term or provision hereof or the respective rights, duties or liabilities of either Party hereunder, then the Parties shall use their best endeavours to resolve the same by mutual discussions and agreement. If the dispute or difference cannot be resolved within 60 days, then either Party (the "Claimant") may refer the dispute to arbitration by issuing a request (the "Request for Arbitration") to the other Party (the "Respondent"). The

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Signing Date:07.01.2025
19:25:28

arbitration shall be conducted pursuant to the procedures set out below.

b) Arbitration shall be conducted in Delhi under the rules of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment thereof for the time being in force and the language of the arbitration proceedings shall be English.

….”

49. The dispute in the present case primarily revolves around whether the petitioner is entitled to Make Up Gas or not. The parties are at variance about whether it was the petitioner who failed to take the supply of the gas, or whether it is the respondents who were unable to supply the gas. The petitioner has submitted that the respondents did not have adequate supply of gas and on this account, they were unable to supply the gas. On the other hand, the respondents state that despite being ready and willing to supply the gas, the petitioner refused to take it. The parties are also at variance about the interpretation of the terms of the GSPA, and whether the respondents have been absolved of their liability to provide the remaining Make Up Gas on account of the FM event. As regards the legitimacy of FM event itself, the parties have differing stands on when it was invoked, and how/whether the same applies to the present case. The issue of estoppel (of whether the petitioner can now object to the invoices it has already made payments against), are all issues in controversy between the parties, to be decided by the arbitral tribunal.

50. In a case of this nature where the dispute between the parties is highly reliant upon the interpretation of the terms of the GSPA, which is to be decided by the arbitral tribunal ultimately, this Court will refrain from making any observations on the merits to avoid influencing the proceedings

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By:MAYANK
Signing Date:07.01.2025
19:25:28

before the arbitral tribunal. The Hon'ble Supreme Court in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.***, (2007) 7 SCC 125 held as under:

> *"**17.** In Nepa Ltd. v. Manoj Kumar Agrawal [AIR 1999 MP 57] a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, **the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders.** ....."*
>
> (emphasis supplied)

51. More recently, a coordinate bench of this Court in ***National Highways Authority of India v. Bhubaneswar Expressway Private Limited***, 2021 SCC OnLine Del 2421 has observed as under:

> *"**35. Arbitration Act does not envisage adjudication in two stages i.e. summary adjudication by the Court under Section 9 and final adjudication by the Arbitral Tribunal** under Chapter VI of Part I of the Act.*
>
> *.....*
>
> ***45.** If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. **If this Court, while exercising jurisdiction under Section 9, were to adjudicate***

> ***whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide****, as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned.* ***It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement and of admission****, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal."*
>
> (emphasis supplied)

52. Thus, this Court in Section 9 proceedings is not to delve substantially into merits of the case but is to take a bird's eye view of the controversy in question and how subject matter of the arbitral dispute is to be protected. The Court at this stage is not to interpret clauses of the GSPA or give findings on which party is in failure of its obligations. However, as already reiterated above, the scope of Section 9 requires this Court to assess whether a strong *prima facie* case is made out in favor of the petitioner, which is an exercise I will be undertaking.

53. The petitioner has urged that it is entitled to Make Up Gas against a sum of Rs. 156.75 crores. It has derived this right from Clause 4 of the GSPA. The respondents have stated that there is no express stipulation in the

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By:MAYANK
Signing Date:07.01.2025
19:25:28

contractual scheme requiring them to refund the balance AToP amount at the end of the restoration period, in case all Make Up Gas is not provided within the said period. They have pressed on the issue that the Make Up Gas can only be supplied subject to its availability, and subject to the PSC being in force (which has since expired).

54. The respondents have also alleged that it was on account of acts of commission/omission of the petitioner which resulted in water ingress and ceasure of the wells, resulting in adverse condition, a factor exclusively contemplated in Clause 7 of the GSPA. Stand of the respondents is that once FM applies, the respondents are absolved of their obligation to supply the gas. To this, the petitioner has rebutted stating that no proper notice was given to it by the respondents regarding FM as per the requirements in Clause 7.5 and 7.7 of the GSPA.

55. The respondents also state that the petitioner has failed to off take gas for several years and is continuing to do so even in the restoration period, to which the petitioner has rebutted that the same was due to the low DCQ supplied by the respondents. Due to low supply of DCQ, the ultimate consumer i.e. RRVUNL had to shut down its turbines. The respondents have also alleged that they have incurred severe financial losses due to acts of the petitioner of changing gas supplies which causes closure of wells and permanent damage to the reservoir. Various letters are on record substantiating the arguments of either parties. In my view, testing the nitty-gritties of the same is an exercise which will have to be carried out by the arbitral tribunal.

56. These are all triable issues, which require evidence as well as interpretation of terms of the GSPA. Whether the fault is to be attributed to

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By:MAYANK
Signing Date:07.01.2025
19:25:28

the petitioner, or the respondent, or to FM conditions, is an issue which will fall exclusively within the domain of arbitral tribunal.

57. The fact remains that the respondents have not denied that petitioner has a balance of Rs. 156.75 crores against which it has not received the Make Up Gas. The respondents have not claimed a set off of this amount against the alleged outstanding amount payable to the respondents on account of the shortfall in AToP for the period between November 2018 to August 2024, which as per the respondent amounted to Rs. 258.68 crores. Even though the respondents state that there is a shortfall of AToP payment of Rs. 258.68 crores, the same is not an admitted position *vis-a-vis* the petitioner.

58. What is relevant at the present stage of Section 9 is the fact that: a) even though the respondent is in control and occupation of the Block and extracting gas, admittedly the PSC has expired on 20.08.2024 and till the date of hearing the arguments and reserving the matter (i.e. 28.10.2024), there was no formal extension of the PSC; b) the GSPA has consequently expired on 30.09.2024 and the parties are under "restoration period"; c) restoration period is only for 4 months, after which all rights of the petitioner pertaining to Make Up Gas come to an end; d) the petitioner has made payment of Rs. 197.13 crores as AToP amount to the respondents, out of which only Rs. 40.38 crores have been adjusted and the petitioner is yet to receive Make Up Gas of a balance amount, amounting to Rs. 156.75 crores, in terms of Clause 4.4 of the GSPA; e) admittedly, the respondent has been and is continuing to supply a reduced DCQ to the petitioner, due to which the petitioner will not be able to take the remaining gas during the restoration period. For the said reasons, I am of the view that there is a

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Signing Date:07.01.2025
19:25:28

strong *prima facie* case in favor of the petitioner, and balance of convenience lies in favor of the petitioner.

59. The judgment of the Federal Court of Australia in ***Esso Australia Resources Pty Ltd*** (supra) relied upon by the respondents to state that AToP payment is not a payment for sale of gas, but rather compensation to the seller for the market risk it takes i.e. payment in case the buyer fails to take gas, is not relevant at this stage. It will be the arbitral tribunal which is required to delve into the interpretation of the terms of GSPA.

60. As regards the issue of attachment is concerned, even though the respondents have said they have assets, no list of assets (encumbered/unencumbered)/balance sheets have been shown to substantiate the same. The respondents may not be in occupation of the Block in terms of the PSC and may not have any gas to supply to the petitioner, even if an award is passed in favor of petitioner for Make Up Gas. There is nothing on record to show that if an award was to be passed in favor of the petitioner, the respondents would be able to satisfy it. Further, respondent Nos. 2 to 3 are foreign companies, without any assets in India and hence there is a possibility that in case an award is passed in favor of the petitioner, it may become a paper award. Hence, I am of the view that the ingredients of Order XXXVIII Rule 5 of CPC are made out.

61. It cannot be a situation that in case an award is passed in favor of the petitioner, the petitioner is unable to recover the awarded amounts. For the said reasons, the amount in dispute in the arbitration needs to be secured.

62. For the said reasons, the petition is disposed of directing the respondent No. 1 to provide solvent security in the form of bank guarantee or unencumbered immovable assets to the value of Rs. 157.75 crores within

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Signing Date:07.01.2025
19:25:28

2 weeks of passing of this judgment, which shall remain attached till the time the arbitral tribunal enters reference and adjudicates upon the controversy.

63. Needless to say, the observations made herein are solely for the purpose of deciding this petition. They should not be construed as expressing any opinion on the merits of the dispute that may later be referred to the arbitral tribunal or on the merits of any application that either party may bring before the arbitral tribunal.

64. The petition, along with pending applications, if any, is disposed of in the aforesaid terms.

JASMEET SINGH, J

JANUARY 7, 2025
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