* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
#25 (***Reportable***)
\+ **O.M.P. 801 of 2012**

HLS ASIA LTD. ..... Petitioner
Through: Mr. Amit Gupta, Advocate

versus

M/S. GEOPETROL INTERNATIONAL INC. & ORS.
.....Respondents

Through: Mr. Anuj Berry &
Mr. Kamaljeet Singh,
Advocates for Respondent No.1.

Mr. Anukul Raj, Advocate for Respondent No.2.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
22.11.2012

1. This appeal by HLS Asia Ltd. ('HAL') under Section 37 of the Arbitration & Conciliation Act, 1996 ('Act') challenges the interim Award dated 29th May 2012 passed by the Arbitral Tribunal ('Tribunal') accepting the plea of Respondent No.2/NTPC Ltd. ('NTPC') that it be deleted from the arbitral proceedings.

2. The background to the present appeal is that the contract for Wireline Logging Services ('WLS') was entered into on 14th July 2009 between HAL and Respondent No.1/M/s. Geopetrol International Inc.

('GII'). The said contract clearly stated that GII was acting as an Operator of a block in Changlang District, Arunachal Pradesh for and on behalf of a Consortium comprising GII, NTPC (Respondent No.2), Brownstone Ventures Limited ('BVL')/ Respondent No.3, a company incorporated in Ontario, Canada and Canoro Resources Limited ('CRL')/Respondent No.4, a company having its registered office in Noida, Uttar Pradesh. The preamble clause of the said contract stated as under:-

> "This contract is made on 14th day of July, 2009 between M/s. Geopetrol International Inc., a Company organized and existing under the laws of India, having its registered office at Calle 53, Urbanization Obario, Torre Swiss Bank, Prisa 16, Panama and its India office at The Mira Corporate Suits, Block D-1, 1&2 Ishwar Nagar, Mathura Road, New Delhi-110065, India, hereinafter referred to as "Company", acting as Operator of the Block AA-ONN-2003/2 for and on behalf of consortium presently comprising:
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> Geopetrol International Inc.
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> NTPC Limited
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> Brownstone Ventures Limited
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> Canoro Resources Ltd.
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> each of the participants being liable to the Contractor severally and jointly and only to the extent of their participating interest and represented by Mr. Claude Seiler – Chief Representative India Business."

3. Prior to the above contract, the Respondents, as a Consortium, entered into Production Sharing Contract ('PSC') with the Government of India on 16th December 2005 for the purposes of exploring and developing the aforementioned block in Changlang District, Arunachal Pradesh. While GII had 30% participating interest ('PI') in the block, NTPC had 40% PI, BVL had 15% PI and CRL had 15% PI. A separate Joint Operating Agreement ('JOA') was entered into between NTPC, GII and CRL on 28th March 2006. Under Article 4.2 of JOA, GII was designated as the Operator and the parties were to provide the Operator with such powers of attorney as would be required from time to time by the concerned authorities in order to carry out the operations pursuant to the JOA.

4. Article 4.7 of JOA stipulated the powers and duties of the Operator. Sub-clauses (g) and (r) of Article 4.7 of JOA are relevant and read as under:-

> …
> "(g) Represent the Parties before the Government and any and all courts, administrative departments, bureaus, and agencies whatsoever in India in matters related to the Joint Operations and to the extent applicable, Exclusive Operations, and in doing so prepare and sign, file and receive any affidavits, undertakings, contracts, petitions, requests,

certificates, authorizations, reports or other documents in connection therewith; advise the Parties in a timely manner of any such acts which in the Operator's opinion may significantly affect the Parties; and perform all other acts of a similar nature necessary and proper in connection therewith, except to the extent any Party has indicated its desire to represent itself in connection with any of the foregoing in which case the related costs shall not be chargeable to Joint Account. Non-Operators shall be entitled to attend, for the purposes of observation, meetings between the Operator and Government, and any court appearances of the Operator, where such meetings or appearances pertain to matters relating to the Contract.

….

(r) Subject to Article 23 of the Contract, enter into contracts with others, as appropriate, for the performance of services or supply of facilities, equipment, materials or supplies by such others provided that there is a reasonable basis to believe that such others shall be competent and capable technically and financially, to perform properly their obligations under such contracts, and that the selection of such contactors is to be made on the basis of the procedures for the acquisition of goods and services contained in Appendix F of the Contract. In case of emergency, the Operator may award contracts without following the procedure set out in the procedure for acquisition of goods and services contained in Appendix-F of the Contract subject to however such transactions being reported with written detailed reason for awarding such contracts along with the payments committed therein to the Operating Committee at its first meeting following such award. If required, the Operator shall take out appropriate insurance cover in respect of such contracts. The Approved

Work Programme and Approved Budget shall be amended to reflect the work and expenditures referred to in this Article."

5. On the strength of PSC, GII issued the tender for hiring of WLS for exploratory drilling in the aforesaid block. HAL's bid dated 13th August 2008 was accepted by GII on 6th February 2009 by issuing a firm Letter of Award ('LoA'). Thereafter, on 14th July 2009, the aforementioned contract was entered into between GII and HAL.

6. While it is not necessary to elaborate the events leading to the disputes between the parties, for the purposes of the present appeal, it is noted that according to HAL it raised several invoices on GII towards fixed monthly charges as provided in Annexure-1 to the contract but no payment was received. The notice dated 17th February 2010, sent on behalf of HAL to the Respondents, also did not elicit any response.

7. On 2nd August 2011, HAL invoked the arbitration clause and appointed its Arbitrator. Following this, the Tribunal was constituted. By a letter dated 5th September 2011, NTPC denied its liability under the contract executed between HAL and GII but admitted that GII had

been appointed as the Arbitrator for and on behalf of the Consortium members.

8. HAL filed its claim before the Tribunal on 21st October 2011. On 27th September 2011, GII stated that all the Consortium members were required to be impleaded and notices had to be sent to all of them. By a letter dated 10th December 2011, the Tribunal decided to implead all the Consortium members. It was noted that HAL had already served a copy of the statement of claims on the Respondents.

9. By a letter dated 24th February 2012, addressed to the Tribunal, NTPC's counsel submitted that NTPC had been wrongly arrayed as a Respondent in the proceedings and that it could not be compelled to participate. It was, therefore, prayed that NTPC may be deleted from the array of Respondents.

10. In its reply to the claim petition filed on 28th April 2012, GII stated that it had entered into the contract with HAL as an Operator of the block on behalf of the Consortium members. GII also specified the PI of each Consortium member in terms of JOA.

11. On 29th May 2012, the Tribunal passed the impugned order in which it, *inter alia*, held as under:-

> (i) HAL had not produced any documents to establish that the members of the consortium had authorised GII to enter into the contract on behalf of the members of the consortium.
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> (ii) In the absence of such authority, the members of the consortium could not be held liable under a contract to which they were not a party and which contract had not been signed by them.
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> (iii) The decisions in ***Mohan Aluminium Orchards Pvt. Ltd. v. M.P.E.B. 2002 (5) MPHT 429*** and ***Austbulk Shipping SDN BHD v. P.E.C. Limited 2005 (2) Arb.LR 6 (Delhi)*** relied upon by HAL were distinguishable on facts.
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> (iv) Since no arbitration agreement existed between HAL and NTPC, NTPC was liable to be deleted from the array of parties.

12. Subsequent to the passing of the above order, GII filed an application before the Tribunal on 26th June 2012 seeking amendment of its preliminary reply. GII proposed the addition of para 12(d), which reads as under:-

> "That this Hon'ble Tribunal does not have the jurisdiction to adjudicate the present dispute as the present claim is against

all the Respondents and under the Contract each Respondent is liable only to the extent of their participating interest. The prayer made by the Claimant is beyond the terms of the Contract and therefore can be maintained only in a proceeding where all the Respondents can be parties legally and validly. Admittedly only the Applicant is signatory to the present arbitration agreement. Hence even of Respondent No.1 is held to be liable, it can only be to the extent of their participating interest i.e. 30% and therefore cannot be made liable to pay the entire amount claimed by the Claimant."

13. Notice was issued by this Court in the present appeal on 4th September 2012. HAL filed its affidavit of service dated 5th November 2012, stating that the copy of the petition was dispatched through courier and received by Respondent Nos.2 and 3 on 19th and 23rd October 2012 respectively. As regards Respondent No.4, the tracking report indicated that the company had shifted. However, the proof of service through e-mail on Respondent No.4 has been enclosed with the affidavit of service. In response to the present appeal, NTPC filed its reply on 19th November 2012.

14. This Court has heard the submissions of Mr. Amit Gupta, learned counsel for the Petitioner, Mr. Anuj Berry, learned counsel for GII

and Mr. Anukul Raj, learned counsel for NTPC. None appeared for Respondent Nos.3 and 4.

15. A collective reading of PSC and JOA, and in particular Article 4.7 (g) and (r) of JOA, clearly shows that the Consortium was jointly awarded the PSC, pursuant to which their respective PIs in the block were specified in JOA. The respective liabilities of the members of the Consortium were also clearly spelt out. Importantly, the members of the Consortium appointed GII as the Operator for the block and authorized GII to act on their behalf. These two documents, i.e., the PSC and the JOA, clearly demonstrate the authorisation by the members of the Consortium of GII as an Operator to enter into contracts. It was pursuant to the said authorization that the contract with HAL was entered into by GII.

16. Inasmuch as the PSC and JOA were not available before the Tribunal, as they were produced by GII subsequent to the passing of the impugned Award, the principal ground on which the Tribunal deleted NTPC from the array of parties, has been rendered untenable. As long as the PSC and JOA continue, it is not open to NTPC to

wriggle out of its liabilities as a member of the Consortium. The contract entered into by GII with HAL may not have been signed by NTPC. However, it was entred into by GII not only for itself, but as an Operator for and on behalf of the members of the Consortium. It is clear from the stand of GII in the amended reply that it does not deny the existence of the Consortium, but admits its liability only to the extent of its PI. This in fact underscores that GII had entered into the contract with HAL as an Operator acting on behalf of the Consortium. It was necessary for each member of the Consortium to be made a party to the arbitral proceedings. This would obviate any subsequent plea that may be taken by any of the members that they are not bound by the Award that may be passed by the Tribunal, since they were not made parties.

17. In a recent decision in ***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. 2012 (9) SCALE 595***, the Supreme Court has, in the context of Section 45 of the Act, explained the relevant provisions of the New York Convention and observed that "reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or

judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be refereed to arbitration." It has been further explained in the same judgment as under:-

> "The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main party to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful, by execution of various agreements, like in the present case."

18. Consequently, in the present case, although the individual

members of the Consortium may not have been party to the contract between HAL and GII, which contains the arbitration clause, they would be necessary parties to the arbitral proceedings in light of the inter relationship between the Respondents as the members of the Consortium in terms of PSC and JOA.

19. For the aforementioned reasons, this Court sets aside the impugned interim Award dated 29th May 2012 passed by the Tribunal. Consequently, NTPC will continue to be a party to the arbitral proceedings before the Tribunal. The appeal is allowed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

NOVEMBER 22, 2012
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