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IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP No. 337/2009

Reserved on: December 08, 2009

Pronounced on: December 22, 2009

M/s. MMS STEEL & POWER PRIVATE LIMITED ...Petitioner
Through: Mr. Kodhanda Ram, Sr. Advocate with
Mr. Sunil Mathews, Advocate.

VERSUS

M/s. OIL AND NATURAL GAS CORPORATION LIMITED Respondent
Through: Mr. Subhash Oberoi , Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT

VALMIKI J.MEHTA, J

1. By this petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner in effect, irrespective of the language of the prayer clauses, seeks an extension of the contract of supply of "Sour Gas" (a variant of natural gas) for another period of five years and which expires either on 31.3.2009 as per the respondent or 31st December, 2009 as per the petitioner.

2. A relief of injunction, seeking the relief of stay of stoppage of supplies in fact is in the nature of specific performance of a contract of continuing to supply the gas. The basic issue to be addressed while disposing of this petition is as to

whether the petitioner has an automatic right of extension of the contract for another period of five years as asked for by it vide its the letter dated 10.12.2008 to the respondent or putting it differently is the respondent justified in stating that the petitioner cannot force the respondent to enter into a contract which it does not want to.

3. The facts of the case are that a contract dated 11.2.2005 was entered into between the respondent and one M/s. S&S Power Limited for the supply of Sour Gas for a period of five years and which company was engaged in generation and sale of power from its power plants. The present petitioner is the assignee of M/s. S&S Power Limited as the contract was assigned in its favour and for which a Letter of Assignment dated 2.8.2005 was issued by the respondent, therefore, a reference to the present petitioner will include a reference to M/s. S&S. Power Limited or vice-versa.

4. It is not in dispute that the initial contract for the supply of Sour Gas was for a period of five years. It is for this reason that in the letter dated 10.12.2008 which was written by the petitioner to the respondent, it was requested by the petitioner to “extend” the contract for a period of five more years. This period of five years as per the contention of the petitioner only comes to an end on 31.12.2009 and as per the respondent came to an end on 31.3.2009. Before proceeding ahead I must state that an earlier petition being OMP 147/2009 was filed by the present petitioner against the present respondent and which was disposed of vide order dated 26.3.2009 and reliefs prayed for by the present

petitioner were declined. Though I will advert to this petition and this order dated 26.3.2009 at a subsequent stage for the present I am referring to it for the purpose that one of the contentions in that petition (OMP 147/2009) was that the contract expired only on 31.12.2009 and an injunction was sought preventing the dis-continuation of the supply of gas by the respondent at least till 31.12.2009 and which relief was declined by this Court by its order dated 26.3.2009.

5. The counsel for the petitioner has urged the following contentions before this Court:

- (i) A reference to the brochures issued by the respondent and the correspondence exchanged before the contract was entered into as also the fact that the petitioner had made huge investments of crores of rupees, entitles the petitioner to an automatic renewal of the contract for a period of five years each till the gas reserves last at the Kovilkallapal field in the State of Tamil Nadu, although the contract is for a period of five years and was stated to be renewable by “mutual consent”;
- (ii) The petitioner was entitled to supply the Sour Gas at least till 31.12.2009 on the basis of definitions as per clauses 1.07 and 1.08 of the contract dated 11.2.2005;
- (iii) The decision dated 26.3.2009 in OMP 147/2009 does not operate to bar the present petition and for seeking reliefs in the present petition inasmuch as after the order dated 26.3.2009, subsequent events have

taken place viz. of the issuance of tender by the respondents for a new buyer on 2.5.2009 and the letter dated 6.3.2009 was not considered while deciding the OMP 147/2009.

6. In response to the above arguments, the counsel for the respondent urged the following contentions:

- (i) There is no law which can force the respondent to necessarily enter into a contract of the supply of Sour Gas to the petitioner and there is no automatic right of renewal as contended by the counsel for the petitioner;
- (ii) The injunction which is prayed for by the petitioner is barred as per Section 41(e) read with Sections 14 (a), (b)& (d) of the Specific Relief Act, 1963;
- (iii) The decision in OMP 147/2009 dated 26.3.2009 operates as *res judicata* or as an estoppel in filing the present petition because a reference to the earlier petition and the present petition shows that not only most of the paras are same, the relief as prayed for in effect is also the same though the same may be worded differently and that it makes no difference if certain other paras were added because in substance, according to the counsel for the respondent, the present petition is “old wine in new bottle”;
- (iv) Since third party rights have come into existence inasmuch as a tender has already been placed, this Court should not pass any discretionary orders as prayed for by the petitioner. The petitioner himself is responsible for

bringing the issue to the present position because it deliberately failed to negotiate for the price of gas in spite of the respondent asking the petitioner to do so, and;

- (v) Pricing of the Sour Gas is fixed by the Government of India as per its policy and in case the respondent is forced to supply the Sour Gas to the petitioner, there will be loss of public revenue because Sour Gas is a scarce and precious national asset.

7. Before I proceed I must state that this case had come up for the first time in the summer vacations of this year when this Court ordered that the tender process regards the fresh contract which was to be opened on 30.6.2009, can continue however the matter shall not be finalized. The present order will therefore dispose of the present petition and whether the said order dated 22.6.2009 has to be continued or vacated.

8. Section 92 of the Evidence Act, 1872 states that once a contract is entered into in writing, no evidence to contradict or vary the terms of the written contract is permissible. In *Svenska Handelsbanken vs. M/s. Indian Charge Chrome and Ors.*, (1994) 1 SCC 502, the Supreme Court has by reference to Section 92 held that after a written contract has been executed, the Court is prevented from looking into documents prior to the written contract in the form of proposals, drafts etc. Once therefore there is a written contract, it is the terms of the said written contract which will bind the parties. The contract in question in the present case was for a period of five years and it is only for that reason

that the petitioner asked for an extension vide its letter dated 10.12.2008. Therefore, it is not permissible for the petitioner to contend that by virtue of various brochures and other documents as also issues regarding the investments made by it to contend that the contract is not for five years but can be perpetually renewed every five years till the gas reserves last at Kovilkallapal field. This argument of the petitioner based on documents of the date prior to the contract that there is an entitlement of a perpetual renewal is violative of Section 92 of the Evidence Act and is rejected. This argument of the petitioner is also not sustainable because of Clause 2.02 of the contract which reads as under:-

“2.02 The CONTRACT shall continue for both Narimanam and Kovilkalappal fields as indicated in Clause 5.01 from the date of commencement of supplies. The period will be renewable with **mutual consent** with respect to availability of sour gas.”

It is quite clear that this clause uses the expression “mutual consent”. This expression therefore makes it more than abundantly clear that it is not the unilateral desire of one party which can necessarily result in a contract, which in law is a bilateral act. There is no valid basis that the expression “mutual consent” should be interpreted to mean an automatic extension of lease for continuing periods of five years. Such an interpretation will do violence to the categorical language of Clause 2.02 of the Agreement. It also legally makes no difference that the petitioner has made huge investments. Accordingly, I am of

the opinion that the petition is wholly misconceived in that it seeks perpetual renewal every five years till the Sour Gas reserves last.

9. There is another reason why I am inclined to reject the argument of an automatic fresh renewal as argued by the petitioner. This is because in the facts of the present case, it is quite clear that the petitioner failed to come for negotiations with regard to the price of the future supplies of Sour Gas after the expiry of the first period of supply. I must at this stage refer to a portion of para 25 of the reply filed by the respondent and which is as under:

“It is emphatically denied that the petitioner has accepted all the conditions of the respondent’s letter dated 6.3.2009. It is submitted that the petitioner has disputed the validity of Gas Supply Agreement and its readiness to pay the gas price settled through the tendering process w.e.f. 1.4.2009. It is further categorically denied that irrespective of whether or not the petitioner agreed to the terms and conditions of the respondent, the subject sour gas would be sold only to a new entity after the finalization of the tender as alleged. It is stated that the ONGC vide letter dated 31.3.2009 informed the petitioner that the Gas supply agreement for Kovilkallapal field is valid till 31.3.2009 and the submission of the petitioner’s letter no. MMS/ONGC/2008-09 dated 10.12.2008 requesting extension of contract implies that the petitioner’s interpretation regarding expiry of the agreement is also same i.e. 31.3.2009. Further, the petitioner was called upon to attend the meeting on 6.4.2009 for finalization of gas price for the period from 1.4.2009 till finalization of the tender as the petitioner has conditionally accepted the conditions of the gas supply of the respondent stated vide letter dated 6.3.2009. It is stated that during the said meeting, the petitioner’s representative was requested to offer the new gas price applicable from 1.4.2009, however, the petitioner’s representative had shown its unwillingness to discuss the matter concerning the gas price with a plea that it would not be possible for him to discuss and offer any gas price, meaning thereby that the petitioner is not coming forward to discuss the terms and conditions of the fresh agreement as are to be executed. It would not be out of place to mention here that the respondent is following the guidelines laid down by the Govt. of India with regard to the allocation and pricing of natural gas in order to settle the new price of the sour gas.”

In the rejoinder the response of the present petitioner was as under:

“ (xviii) As regards para 25, the contentions stated therein by the Respondent are denied and it is false to state that the Contract will expire on 31.3.2009. The submissions in para 25 of the petition are reiterated in this regard. The Petitioner and the Respondent have mutually agreed and entered into the contract. The Respondent is only trying to wriggle out and breach the terms and conditions of the contract. The Respondent is put to strict proof of the so called guidelines it alludes to.”

The stand of the petitioner in para 18 of the rejoinder in fact amounts to admission of the contents of para 25 of the reply filed by the respondent.

10. Therefore, in the facts of the present case, it is quite clear that it is the petitioner who was deliberately dillydallying because it was bound to have paid much higher prices than was paid under the first contract. Of course, pricing of the Sour Gas is not what the respondent fixes but what the respondent follows as per the directives of the Ministry of Petroleum and Natural Gas, Government of India and as stated by it in para 25 reproduced above.

11. Therefore, looking at it from this angle there is no automatic right of renewal nor can there be stated to be any contract for perpetual renewal and also it cannot be said that the petitioner has acted bonafidely or sought renewal of the supply at the fresh rates. I am thus of the opinion that the petitioner is not entitled to the relief as prayed for whereby the respondent can be forced to supply the gas to the petitioner more so because as contended by the respondent that there is another successful tenderer who has offered such higher prices as the respondent is ready and willing to accept.

12. I would at this stage advert to the issue that the present petition is in fact a gross abuse of the process of law because a similar petition claiming effectively

the same reliefs was in fact filed earlier being OMP 147/2009 and admittedly in which no relief whatsoever in this regard of continuous supply was granted to the petitioner. The reliefs which were prayed for in the said petition are as stated below:

“a) Grant an injunction restraining the Respondent from committing breach of Clause 2.02 of the Contract and/or acting in contravention of the Contract by discontinuing the supply of sour gas to the Petitioner at its Kovilkalappal plant in Tiruvarur District, Pondicherry, pending resolution of disputes between the Petitioner and the Respondent; and

b) Grant an injunction restraining the Respondent from giving effect to the impugned Letter dt. 6-3-2009, pending resolution of disputes through arbitration;

c) Grant ex-parte ad interim prayers in terms of prayers (a) and (b) above during the pendency of this petition;

d) Pass such other order or orders as this Hon’ble Court may deem fit and proper in the interest of justice and equity.”

13. I am tempted to reproduce the paras of the earlier petition as also the present petition to show that almost to the extent of 90% or thereabouts the petitions are identical, but, if I would do so the present order, would become far too bulky. Therefore, all that I state is that a cause of action was pleaded and a relief was also asked for in the earlier petition whereby effectively continuous supply was sought of the Sour Gas and automatic renewals of five years each was sought till the gas supplies last, in the earlier petition and which has also been done in the present petition which is being disposed of by the present order. Some relevant portions of the earlier petition are its paras 8,10(e) and prayer clause (a) of the earlier petition which shows that in the earlier petition

also the petitioner had asked for an absolute right of extension on mutually agreed terms and had effectively sought extension of the supply contract for further continuous period as per Clause 2.02 of the contract, that too in perpetuity inasmuch as in the prayer (a) of the earlier petition it is not as if supply is only sought for one extension of five years. Of course, in the earlier petition also the averments with regard to investments having been made by the petitioner entitling it to renewal was also stated in the first petition as has been done in the present petition.

14. The earlier petition OMP 147/2009 was disposed of in terms of the following order:

“This application has been made under section 9 of Arbitration and Conciliation Act seeking an order of restraint against the respondent from committing any breach of Clause 2.02 of the contract or acting in contravention of the contract and restraining respondent on giving effect to the letter dated 6th March, 2009.

A perusal of letter dated 6th March, 2009 would show that as per it, the respondent's term of the contract was expiring on 31st March, 2009 and respondent was in process of inviting open bids for the subsequent period. In the same letter, the respondent had informed the petitioner that respondent would continue to supply gas to the petitioner, subject to acceptance of certain conditions. Conditions have been enumerated in the letter. One condition is that the petitioner shall bear the difference in the gas price as being paid under the present contract and as may be quoted by the new tenderor in the open bid. The second condition is of providing a bank guarantee and third condition is that the new price would be applicable for the period the gas is supplied under this arrangement from 1st April, 2009 onward till the new contract is signed.

Counsel for the petitioner states that petitioner is willing to furnish the bank guarantee. However, petitioner's right would be affected if petitioner agrees to the new price of the gas. Petitioner's contention is that the contract entered with the petitioner was a continuing contract and it was a long term arrangement with ONGC and on the assurance of ONGC that the gas would be continuously, supplied on long term basis, the petitioner had invested money in the power plant and had undertaken this project. Petitioner intends to raise all these issues before the Arbitrator.

This Court while dealing with this application under Section 9 cannot pronounce whether the contract would come to an end on 31st March, 2009

or it is a continuing contract since that would preempt any decision by the arbitration. The petitioner may agree to the terms and conditions as mentioned in letter dated 6th March, 2009 without prejudice to its rights to assail the contention of the respondent regarding contract coming to an end on 31st March, 2009. The petitioner can challenge this assertion of the respondent before the Arbitrator. The petitioner can raise the issue of the price of gas before the Arbitrator despite agreeing for the time being for paying the price difference without prejudice to his rights.

The application is disposed of observing that the petitioner is at liberty to agree to the conditions as mentioned in the letter dated 6th March, 2009 without prejudice to his rights to enable it to raise the issues before the Arbitrator, Beyond that no relief can be given.

The petitioner is also at liberty to assert his rights vis-a-vis contract before other appropriate forums as well.

The application/petition stands disposed of. ”

15. It is, therefore, quite clear that the present petition which was filed in the summer vacations i.e June of this year, is clearly an abuse of the process of law and whereby the fresh tendering process has been stalled for approximately six months causing huge losses to the respondent and that too for a valuable national asset. The present petition is barred by general principles of res-judicata and estoppel and no new material facts of a fresh cause of action can be have arisen so as to entitle the petitioner to file the present petition.

16. Section 14(1)(a) (b) and (d) of the Specific Relief Act and Section 41(e) thereof are as under:

“14. Contracts not specifically enforceable—(1) The following contracts cannot be specifically enforced, namely:-

(a) a contract for the non-performance of which compensation is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

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(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.”

“41. Injunction when refused—An injunction cannot be granted—

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(e) to prevent the breach of a contract the performance of which would not be specifically enforced: '

17. It is not the contention of the petitioner that no other source of supply of gas is available or that there is no other alternative source of supply which will result in closure of the factory. The petitioner therefore can surely purchase gas or the alternative thereof to run the factory. If the petitioner ultimately succeeds he can be then compensated in terms of money. Consequently, by virtue of Section 14(1)(a) of the Specific Relief Act no specific performance can be granted and since no specific purpose can be granted therefore no injunction can be granted by virtue of Section 41(e). Looking at the subject contract, also shows that the contract runs into great and minute details and its nature requires performance of various reciprocal aspects besides the same being continuous in nature. There are provisions with respect to delivery and pressure of gas, quantity of gas, the provision of shut down and stoppage of gas, a minimum guarantee offtake, measurement and calibration and so on, each of which obligation would require continuous supervision of the Court if the injunction is granted because by the grant of injunction the contract is being specifically performed. Therefore, by virtue of Section 14(1)(b) & (d) read with Section 41(e) no injunction can be granted as this Court cannot supervise the continuous duty with its minute or numerous details and keep on resolving day to day issues which one bound to crop up from the myriad clauses of the contract.

I may state that this, conclusion of the declining to grant injunction on the basis of the provisions of the Specific Relief Act is independent and additional to the above grounds given before of disentitlement of the petitioner to force the respondent to enter into a contract and also that the present petition is barred by virtue of the decision dated 26.3.2009 in OMP 147/2009.

18. I therefore do not find any *prima facie* case in favour of the petitioner. The balance of convenience is in favour of the respondent who will be caused grave and irreparable injury if the interim orders as prayed for in this petition are granted. In fact the provisions of law bar the grant of relief as prayed for in this petition and as already dilated upon earlier.

19. For the sake of completeness, I must add that the counsel for the petitioner referred to judgments on the point of res-judicata and grant of injunction, however in view of what I have discussed above none of these judgments apply to the facts of the present case and nor can the ratio of these judgments in any manner alter the aforesaid conclusions of this judgment. The judgments cited were *Pawan Kumar Gupta Vs. Rochiram Nagdeo (1999) 4 SCC 243*, *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd. (2007) 7SCC 125*, *Transmission Corporation of A.P Ltd. Vs. Lanco Kondapalli Power (P) Ltd. (2006)1SCC 540*, *Sajjadanashin Sayed Vs. Musa Dadabhai Ummer (2000)3SCC 350* and *Inacio Martins Vs. Narayan Hari Naik and Ors. (1993)3SCC 123*.

20. In view of the aforesaid, the present petition is wholly misconceived and is an abuse of the process of law. The same is therefore dismissed with costs of Rs. 1 lakh. The interim orders dated 22.6.2009 are vacated.

DECEMBER 22, 2009
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VALMIKI J.MEHTA, J