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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 28, 2009
Date of Order: September 17, 2009

+Arb. Appeal 8/2009

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17.09.2009

Indian Oil Corporation Ltd.

...Appellant

Through: Mr. A.M. Singhvi, Sr. Adv. with Mr. Rakesh Sawhney, Ms. Mona Aneja and Mr. Munindra Dvivedi, Advocates

Versus

**Iranian Offshore Engineering &
Construction Company**

...Respondent

Through: Mr. V.P. Singh, Sr. Adv. with Mr. Airi, Mr. Budhiraja and Mr. Seshadri, Advocates.

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996 ("the Act, for short) has been preferred by the appellant against an order dated 20th May, 2009 passed by arbitral tribunal whereby it allowed an application on 15th January, 2009 of Iranian Offshore Engineering & Construction Company (IOECC), respondent herein, under Section 17 of the Act and directed that a joint measurement in respect of work undertaken by contractor after the order of termination, will be in the interest of all concerned and would assist the Tribunal in arriving at a just conclusion. It further ordered that the costs incurred on joint measurement shall be shared by both the parties equally. The joint measurement was ordered to be done by the National Institute of Oceanography.

2. Needless to say that costs of joint measurement was huge and for this reason, the applicant/respondent despite earlier moving an application before the High Court under Section 9 for joint measurement and despite order passed by this Court allowing the applicant (respondent herein) to carry the joint measurement, did not carry out the joint measurement and withdrew the application under Section 9 from this Court and made an application before the Tribunal for sharing of costs on the ground that the joint measurement involved huge costs. The relevant paragraph of the application reads as under:

“k. It is submitted that since the joint inspection and measurement is to be jointly conducted in terms of the Contract with, and in the presence of the representatives of the Claimant and the Respondent and in view of the high costs that are involved in conducting the joint inspection and measurement, such as hiring, purchasing specialized equipment, chartering a diving support vessel, employing divers, amongst other things, it is only fair and in the interests of justice, that the costs of the joint inspection and measurement exercise that is to be conducted by the National Institute of Oceanography be shared equally by the Claimant. In the circumstances, this Application has been filed seeking appropriate orders from this Hon’ble Tribunal directing the Claimant to equally share the costs of the joint measurement and inspection exercise with the Respondent since both the parties agreed to have the joint measurement and inspection exercise conducted by the National Institute of Oceanography.”

3. Prior to making this application for sharing the costs, IOECC had not raised an issue of sharing the costs either before the High Court or before the

Tribunal. Before the High Court also IOECC had only prayed that IOC be directed to participate in the joint measurement. This Court had allowed joint measurement and directed IOC to participate in the joint measurement to be organized by respondent. Initially, before the Tribunal also applications were made for extension of time. In earlier application, it was stated that IOC should be directed to agree to a joint inspection and measurement as the respondent would not be in a position to incur heavy expenses in mobilizing vessel and other equipments to carry out the inspection and measurement exercise unless IOC agrees for joint inspection and measurement. The Tribunal had allowed IOECC's application for enlargement of time to carry the joint measurement in view of technical nature of work vide order dated 10th May, 2008. It is only thereafter that IOECC then made this application for sharing of costs and passing of impugned award by the Tribunal.

4. The Tribunal had gone into the rival arguments in its order as to under the contract it was whose responsibility to do joint measurement and referred to different clauses of the contract. The Tribunal came to conclusion that a combine reading of clauses 7.0.1.03.0 and clause 6.1.1.0 and 6.1.6.0 would indicate that in case where the owner terminates the contract, he has to indicate in the notice of termination the reasons for the same and also time and place for conducting survey and measurement for the work performed under the contract. Thereafter, the Tribunal observed that a joint measurement and inspection of the work undertaken by IOECC after the order of termination would be in the interest of all concerns and would assist the Tribunal in arriving at a just conclusion. It further observed that sub clause 8 of Section 31 of the Act provides that costs of arbitration shall be fixed by the Tribunal. Clause 31(a) (iv) contemplates that any other expenses incurred in

connection with the arbitration proceedings shall be the costs of arbitral proceedings. The Tribunal concluded that the costs incurred in having a joint measurement would come within the purview of Section 31(a) explanation (iv). The Tribunal therefore observed that the costs incurred for the purpose of joint measurement pursuant to the order of Tribunal to be borne equally by the parties and therefore both should bear the costs.

5. I consider that the Tribunal fell in grave error observing that costs of measurement of the work has to be considered as costs of arbitral proceedings. It is not that the Tribunal in this case for the sake of clarification of a claim of party, irrespective of the stand of parties, wanted to hire an expert's services for its assistance and the expenses payable to expert may be considered as costs of arbitral proceedings or that Tribunal wanted to visit the site and see the site itself and the expenses incurred on account of visit were being considered as costs of arbitration proceedings. In the present case, the measurements of the work done is sought by the party as an evidence in support of its claim. In case the party could prove its claim without measurement, the party would not ask for of measurement. IOECC had been all along insisting for measurement only because the measurement would help IOECC in establishing its claim/ counterclaim before the Arbitral Tribunal and the measurements are to be used as evidence. It is not the job of the Tribunal to order for collecting evidence on behalf of a party or to ask the other party to bear the expenses of collecting of evidence by one party because the expenditure involved is heavy expenditure. Neither the expenditure in collection of evidence can be considered as costs of arbitration proceedings. It may be that a party when succeeds in establishing its claim may stake a claim of expenditure incurred on collecting evidence also during

arbitral proceedings and make the expenses of collection of evidence by way of measurement as a part of the expenditure incurred by it. However, the Tribunal cannot, under law ask a party to bear the expenses incurred by other party on collection of evidence by way of measurement of the work done, though it can give directions to IOC to be present at the time of measurement so that measurement becomes as acceptable evidence and objection, if any, about the measurement are realistic objections.

6. The reliance of the arbitral tribunal on the provisions of the contract could have been of no help after termination of the contract. IOC vide its letter dated 5th April 2007 written to IOECC clearly indicated that it should immediately return to IOC, all designated sources, owners, materials in its custody and it also informed IOC that the measurement and survey of the works performed under the contract upto date will be conducted on 10th April, 2007. This date of conducting survey was postponed at the request of IOECC to 16th April, 2007. IOECC vide its letter dated 11th April, 2007 informed that its representative would be visiting site soon. IOECC however did not join the measurement and survey of the work done despite postponement of the date. IOC informed vide letter dated 14th April 2007 that further postponement of the date would not be possible and its representative should be available at site to participate in the joint measurement on 16th April 2007. IOECC sought further postponement vide its letter dated 15th April, 2007. However, IOECC did not join IOC in the measurement. It is under these circumstances that IOECC made application to the High Court for joint measurement and did not do the same at its own costs. In this Court it was not stated that IOC will have to share the costs. While seeking extension of time for joint measurement before the Tribunal no issue of costs was raised. It

is only subsequently that IOECC made an application for sharing of costs.

7. I consider that the Tribunal exceeded its jurisdiction in ordering IOC to share the costs of collection of evidence. This evidence could be the basis of all claims of respondent. It is the responsibility of respondent to produce evidence in support of its claim. It is not the responsibility of IOC to meet the expenses of the evidence of IOECC.

8. I, therefore, allow this appeal. The impugned order passed by the Arbitral Tribunal regarding sharing of costs by IOC or treating the costs as costs of arbitral proceedings is hereby set aside.

9. With above order, the appeal stand disposed of.

September 17, 2009
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SHIV NARAYAN DHINGRA J.