

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
28 **(Not reportable)**
+ **O.M.P. 15 of 2007**

OIL & NATURAL GAS CORPORATION LTD Petitioner
Through: Mr. Sunil Malhotra, Advocate

Versus

AMTEK GEOPHYSICAL PVT. LTD Respondent
Through: Mr. Arvind K. Nigam, Senior
Advocate with Mr. Samrat Nigam,
Advocate

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **11.10.2012**

1. The Petitioner, Oil and Natural Gas Corporation Ltd. ('ONGC') has, in this petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act'), challenged the Award dated 4th September 2006 passed by the arbitral Tribunal ('AT') in the disputes between ONGC and the Respondent, AMTEK Geophysical Pvt. Ltd. ('AGPL') arising out of the two separate contracts dated 19th October 1989, whereby the work of acquiring seismic data for the area of upper Assam between the Naga Thrust and Disang Thrust ('Assam Contract') and the area of the Cambay Basin in Gujarat ('Cambay Contract') were awarded by ONGC to AGPL.

2. The work volume in each contract was 600 LKM. As far as the Assam Contract was concerned, it was for a total price of Rs. 7,28,98,000, which included 14 days of experimental work and 14 days of standby charges.

3. According to ONGC, after repeated extensions of the date of mobilization, AGPL finally mobilised its crew and equipment with effect from 30th April 1992 and 16th November 1991 for the Assam Contract and the Cambay Contract respectively. The work for the Assam Contract basin commenced from 2nd May 1992.

4. For the purposes of the present dispute, the relevant facts are that while the work was in progress in Assam on 22nd November 1992, certain terrorists visited the site. On 23rd November 1992, the terrorists addressed a communication to AGPL demanding the handing over of the explosives used by it for the work. A report of events that transpired was prepared and signed by all the parties. On 24th November 1992, AGPL wrote to ONGC narrating the facts and the events. A report of temporary shifting of the explosives from AGPL to ONGC was also prepared on the same date. Although initially by a letter dated 24th November 1992 to ONGC, AGPL invoked the *force majeure* clause, on 1st December 1992 it clarified that the situation was not covered by the

force majeure condition and that AGPL was entitled to the standby charges. Ultimately, it was only around 27th January 1993 that AGPL was assured of the full protection necessary for the work.

5. There were disputes between the parties that arose from both the contracts. On 8th June 1995, a common Deed of Settlement ('DoS') was entered into between the parties for both the contracts. In terms of the DoS, ONGC agreed to release the net amounts of Rs. 31,79,971 for the Assam Contract and Rs. 6,03,641 for the Cambay Contract. With the release of the said amounts, all the disputable claims for both the contracts were to stand automatically withdrawn and treated as fully and finally settled, except those disputes mentioned therein.

6. The disputes that were not covered by the DoS included "the claim of standby charges for 88 days (66 days-suspension of operation due to extremist activities/non-availability of armed guards and 22 Sundays-operation prohibited by militants." This pertained only to the Assam Contract. It was agreed between the parties that the claim for 88 days would be discussed and settled separately after ONGC certified that AGPL had moved camp to the specified areas, as required by ONGC in the DoS. Further, AGPL was allowed to represent against the deductions of the liquidated damages ('LD') of Rs. 5,76,739 against the

Assam Contract and Rs.1,01,498 against the Cambay Contract.

7. Both the contracts contained an arbitration clause. AGPL invoked the said arbitration clause on 19th January 1998 in relation to the Assam Contract and filed its statement of claims before the AT. ONGC filed OMP No. 150 of 1998 in this Court under Sections 5, 8, 11 and 12 of the Arbitration Act, 1940 ('1940 Act'). The said petition was allowed by a learned Single Judge of this Court by an order dated 30th September 1999 holding that it was the 1940 Act which was applicable to the proceedings. The said order was reversed by the Division Bench on 22nd November 2001 in an appeal filed by AGPL. The Division Bench held that it was the Act which would apply. On 7th May 2004, in the SLP filed by ONGC, the Supreme Court directed that the proceedings would go on under the "new Arbitration Act."

8. On 22nd November 2002, a new AT was constituted. On 28th February 2003, issues were framed with the consent of both the parties. On 24th April 2003, the AT framed additional issues pursuant to an application filed by ONGC. The additional issues were:-

- "1. Whether the Claimant is entitled only to the Claim regarding 88 days standby charges?
2. Whether the respondent is estopped from restricting the scope of arbitration?"

9. In the meanwhile, the applications filed by ONGC before the AT under Sections 12, 13 and 16 of the Act were dismissed and ONGC pursued the matter further in the Courts. However, the proceedings before the AT were not stayed at any time by the Court.

10. The impugned Award was passed by the AT on 4th September 2006, holding as under:

(A) The claims that were prior to the DoS could not be reopened before the AT as the DoS was acted upon by both the parties.

(B). The scope of the proceedings before the AT included the claim for standby charges for 88 days. As regards the other claims, only those that pertained to the period prior to 28th October 1996, the date of commencement of arbitration, were time barred.

(C). On a reading of Clauses 8.5, 8.6 and 11.1 of the contract, it was held that AGPL was entitled to standby charges for 65 days (with one day being reduced for Christmas) in the sum of Rs.165.10 lakhs.

(D). The claim for 22 Sundays was disallowed.

(E). As against the claim for experimental work in the sum of Rs. 30.48 lakhs, under claim No.3.2.1, a sum of Rs. 7,62,000 together with simple interest @ 6% from 23rd May 1996 till the date of the Award was allowed.

(F). As against the claim of Rs. 6,52,000 for the work done under

Claim No.3.2.2 a sum of Rs. 3,19,087 together with simple interest @ 6% from 2nd March 1997 till the date of the Award was allowed.

(G). As against the sum of Rs. 14.58 lakhs, the claim as damages for wrongful invocation of the bank guarantee ('BG') under Claim No. 3.4.2, the AT awarded AGPL Rs. 10,00,000 together with simple interest @ 6% from 28th October 1996 till the date of the Award.

11. In respect of each of the above amounts, the AT directed that the interest @ 18% per annum would be paid as post-Award interest from 4th September 2006 till the date of payment. All the other claims of AGPL were rejected.

12. This Court has heard the submissions of Mr. Sunil Malhotra, learned counsel for ONGC and Mr. Arvind K. Nigam, learned Senior counsel and Mr. Samrat Nigam, counsel for AGPL.

13. The central dispute involves the claim for standby charges under Claims 3.1.1 and 3.1.2. It was contended by Mr. Malhotra that these claims ought to have been barred by limitation, as they pertained to a period three years prior to 28th October 1996. Secondly, it was submitted that the AT erred in applying Clause 8.6, since what was

invoked by AGPL itself was the *force majeure* Clause 11.1. Thirdly, it was contended that there was no authenticity to the claim itself, as the threats received by AGPL could not be strictly classified as threats from militants. Fourthly, it was submitted that 65 days, for which the claim was allowed, included 26th January and nine Sundays.

14. The chronology of events set out in the impugned Award clearly shows that when the DoS was drawn up, it was understood that the claims for standby charges of 88 days was not covered by the DoS and was required to be settled separately. This included 66 days between 23rd November 1992 up to 27th January 1993. Thus, both the parties agreed that this claim would be settled separately before the arbitration. Therefore, it is not open to ONGC to contend that claim for stand by charges was barred by limitation. When the AT held that the claims for a period three years prior to 28th October 1996 would be barred by limitation, it was referring to the claims other than the claim for standby charges.

15. As regards the applicability of the clauses, the AT correctly interpreted both Clauses 8.6 and 11.1 of the contract. Under Clause 8.6, standby charges were payable “in the event Contractor is prevented from carrying out the work for reasons ‘beyond his control’ including

inclement weather conditions during the field season. Duration of each stoppage of work shall be reckoned on the basis of full days and part thereof and payment shall be made on *pro rata* basis at rate stipulated in Attachment 'C'. No standby charges will be paid for national holidays, monsoon break, force majeure, failure of Contractor's equipment and appurtenances, labour unrest in Contractor's crew, non availability of shot holes or surveyed pickets and work stoppage due to clearance of line and for not following explosive rules and any other law of land etc." This has to be read along with Clause 8.5, which reads as under:

"8.5 Commission shall render to Contractor and its personnel all feasible assistance and protection in cases of natural disasters, civil disturbances or epidemics, riots, strikes, war, insurgency, threat from militants."

16. Under Clause 8.6, ONGC had to render all possible assistance to AGPL "in getting armed personnel from local authorities for explosive transportation/storage/use." On the other hand, the *force majeure* has been defined under Clause 11.1 to mean "acts of god, war, civil riots, fire, directly affecting the performance of the contract, flood and acts and regulations of respective government of the two parties, namely the Commission and the Contractor."

17. The AT correctly determined that Clause 11.1 did not apply in the facts and circumstances of the case. The terrorist threats as a result of

which the work stopped for 66 days were clearly covered by Clauses 8.5 and 8.6. Further, Clause 8.6 also made it clear that only national holidays would stand exempted for payment of standby charges. Sundays were not exempted.

18. Consequently, the computation of the number of days for which standby charges had to be paid, apart from the day of Christmas and 26th January, being the Republic Day and a national holiday, had also to be excluded. Therefore, the number of days for which standby charges were payable was 65 days minus the Republic Day, i.e., 64 days. To this limited extent, the amount payable as standby charges has to be recalculated *pro rata* for 64 days and not 65 days.

19. Subject to the above, none of the objections raised by ONGC to the impugned Award in respect of standby charges are tenable in law. They are hereby rejected.

20. Claim No.3.2.1 was for the experimental work. The impugned Award states that an invoice raised by AGPL for the experimental work done in Mashimpur Anticline area between 15th and 26th April 1996 was returned by ONGC on the ground that only 3 days were given for the experimental work. On that basis, a revised bill only for 3 days in the

sum of Rs. 7,62,000 was submitted by AGPL. It is only this amount that has been allowed by the AT. This Court finds no illegality as far as the said decision is concerned.

21. The third item of the claim which was allowed in part was Claim No.3.2.2, which was for the work done. The admitted work actually done upto 28th February 1997 was for a sum of Rs. 3,19,087, as evidenced by the invoice of February 1997. This was not even denied by ONGC in its counter statement. Consequently, there is no error in the impugned Award as regards Claim No.3.2.2.

22. Claim No.3.4.2 was towards the wrongful encashment of the BG. AGPL had furnished BG No.12/95 for a sum of Rs.10,00,000 to ONGC as performance guarantee for the work to be awarded under the DoS. The decision of the AT in this regard is that without any work being allotted, ONGC could not have invoked the BG and encashed it. The said decision of the AT cannot be faulted.

23. For the aforementioned reasons, this Court does not find any merit in any of the objections raised by ONGC to the impugned Award. The only clarification is that as regards Claim No.3.1.1., the amount allowed by the AT will be reduced *pro rata* by calculating standby charges for a

period of 64 days instead of 65 days. In all other respects, the impugned Award is upheld.

24. The petition is, accordingly, disposed of, with no order as to costs.

S. MURALIDHAR, J

OCTOBER 11, 2012
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