

IN THE HIGH COURT OF DELHI AT NEW DELHI
F-12
+ OMP No. 91/2005 (Reportable)

DEGREMONT LIMITED Petitioner
Through Mr. Anil K. Kher, Senior Advocate with
Mr. D.R. Bhatia, Mr. Ankur Bansal and
Mr. Siddhartha Jain, Advocates.

versus

YAMUNA GASES & CHEMICALS LIMITED
& ORS Respondents
Through Mr. Yakesh Anand with Mr. Nimit Mathur
and Mr. Prateek Kumar, Advocates.

And
F-13+ OMP No. 228/2005

YAMUNA GASES & CHEMICALS LIMITED Petitioner
Through Mr. Yakesh Anand with Mr. Nimit Mathur
and Mr. Prateek Kumar, Advocates.

Versus

ONDEO DEGREMONT LIMITED Respondent
Through Mr. Anil K. Kher, Senior Advocate with
Mr. D.R. Bhatia, Mr. Ankur Bansal and
Mr. Siddhartha Jain, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **4.01.2012**
IA No. 18185/2011 (for restoration) in OMP No. 91/2005

1. For the reasons stated therein, this application is allowed. The petition is restored to its file.
2. The application is disposed of.

OMP No. 91/2005 & OMP No. 228/2005

3. The challenge in OMP No. 91 of 2005 under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') filed by Degremont Limited (formerly known as Ondeo Degremont Limited) is to the impugned Award dated 10th December 2004 of the Arbitral Tribunal ('Tribunal') allowing Claim No. 1 of Respondent No. 1 Yamuna Gases & Chemicals Limited and holding that the Petitioner should pay Respondent No. 1 a sum of Rs. 46,24,568/- together with interest @ 10% per annum from 16th June 2001 till payment. The Tribunal dismissed all other claims of Respondent No. 1 and counter claims of the Petitioner. The Respondent No. 1 was also held to be entitled to pay costs of Rs. 50,000/-.

4. OMP No. 228 of 2005 is by Yamuna Gases & Chemicals Limited challenging the same impugned Award to the extent that most of its claims were rejected by the Tribunal.

5. For the sake of convenience in this judgment hereinafter Degremont Limited would be referred to as the Petitioner and Yamuna Gases & Chemicals Limited as Respondent No. 1.

Background facts

6. The background facts are that the State Government of Haryana was required, in terms of the order dated 1st September 1995 of the Supreme

Court, to instal Sewage Treatment Plants ('STPs') in Haryana under the Yamuna Action Plan ('YAP'). The Public Health Department ('PHED'), Government of Haryana invited tenders in 1996 for construction, erection and commissioning of STPs under the YAP. On 13th May 1996, the PHED awarded the main contract to the Petitioner for construction, erection and commissioning of 50 MLD STPs at Faridabad. The Petitioner entered into a sub-contract with Respondent No. 1 on 30th November 1995 and awarded to Respondent No. 1 part of the work of supply and erection of FRP/PVC/SDP works relating to UASB reactors at a lump sum price of Rs. 380 lakhs through a letter of intent dated 6th November 1996.

7. Article 18.1 of the sub-contract agreement contained an arbitration clause, which reads as under:

“18 Disputes

18.1 Failing amicable settlement of any disputes or differences within 30 days of the written notice in writing sent by any of the parties, the disputes and differences shall be finally settled under the rules of conciliation and arbitration of the Indian Council of Arbitration by one or more arbitrators preferably retired Supreme Court Judges appointed in accordance with the said rules. The language of the arbitration shall be English. The parties hereby submit to such arbitration and to the enforcement of any award resulting therefrom by any Court of competent jurisdiction. The place of arbitration unless otherwise mutually agreed between the parties shall be in Delhi.”

8. Against Respondent No. 1 furnishing a corporate guarantee to the Petitioner on 10th December 1996 in the sum of Rs. 38 lakhs, which guarantee was valid up to 9th June 1997, the Petitioner released the said sum to Respondent No. 1 as mobilization advance. According to Respondent No. 1 it completed the sub-contracted work to the satisfaction of both the Petitioner and the PHED in May 1999. It is claimed that the entire payment was received by the Petitioner but it failed to pay Respondent No. 1 a balance sum of Rs. 38 lakhs for which Respondent No. 1 issued a legal notice dated 12th March 2002 to the Petitioner. Thereafter on 5th September 2002, Respondent No. 1 submitted an application before the Indian Council of Arbitration ('ICA') (Respondent No. 2 in OMP No. 91 of 2005) seeking the appointment of an Arbitrator.

9. Counsel for Respondent No. 1 wrote to ICA on 5th August 2002 enclosing details of the 12 claims it was making against the Petitioner. On 9th September 2002 ICA wrote to the Petitioner informing it of the filing of the application by Respondent No. 1 through its counsel invoking the arbitration clause. A copy of the statement of claims filed by Respondent No. 1 was enclosed with the said letter. The Petitioner was called upon to file its claims. ICA further informed the Petitioner as under:

“As the amount involved in the dispute is stated to be Rs. 3,28,13,000/-, under the Rules of Arbitration of the Council, it has to be heard and determined by the Arbitral Tribunal of

three arbitrators, unless the parties to the dispute agree to refer the dispute to sole arbitrator (Rule 21 (b)). One each to be nominated by the parties and the third will be appointed by the Council, under its Rules. You are hereby required to forward the name of your nominee arbitrator from the Panel of Arbitrators (copy enclosed) of the Council on or before 9th October 2002.”

10. ICA further required the Petitioner to deposit a tentative amount of Rs. 1,15,250/- towards the costs and expenses of the arbitration on or before 9th October 2002. At the request of the Petitioner, time for making payment of the costs and expenses was extended by ICA till 30th November 2002. Further, the Petitioner was asked to make a deposit of Rs. 24,850/- towards the costs and expenses of arbitration and “forward the name of sole arbitrator in consultation with the claimant by 5th November 2002”. By a letter dated 26th November 2002 counsel for the Petitioner wrote to ICA nominating one Mr. Shibani Dudha, Chartered Accountant to “act as a Sole Arbitrator to adjudicate upon the disputes that have arisen between the parties.” Counsel for the Petitioner also filed an interim reply to the statement of claim of Respondent No. 1 and 11 counter-claims.

11. On 4th January 2003 counsel for Respondent No. 1 wrote to ICA with copy to learned advocate for the Petitioner, *inter alia*, stating as under:

“As per agreement between the parties preferably a retired

Judge of the Hon'ble Supreme Court has to be appointed as Arbitrator, in accordance with the rules of Indian Council of Arbitrator. However, as per letter dated 23rd October 2002 written by the council to the counsel of claimant and copy to Mr. Anil Kher, Advocate, counsel for the Respondent stating that the Claimant and the Respondent should in consultation decide the name of the Sole Arbitrator and forwarded to them. No consultation took place between the parties or between the counsel and/or between counsel and the parties for agreeing to the name of the Sole Arbitrator. Therefore, the counsel has to nominate the name of a retired Supreme Court Judge or in the alternative a retired High Court Judge to act as Sole Arbitrator to adjudicate upon the disputes between the parties. The Respondent cannot be allowed to nominate Mr. Shibani Dhuda, Chartered Accountant as Sole Arbitrator. It is denied that the Claimant YGCL has failed to nominate any Arbitrator as alleged or as stated in the letter of Mr. Anil Kher dated 26th November 2002.

I, therefore, on behalf of Claimant request you to please

- (a) grant four weeks' time for filing of the detailed statement of claim with documents;
- (b) grant four weeks' time for filing rejoinder to the reply filed by the Respondent;
- (c) grant four weeks' time to file reply to the counter claim raised by the Respondent;
- (d) to nominate and appoint a retired Hon'ble Supreme Court Judge and/or in the alternative retired Judge of the Hon'ble High Court as Sole Arbitrator to adjudicate upon the disputes between the parties in the present case."

12. On 10th March 2004 ICA informed the Petitioner as well as Respondent No. 1 that the Arbitral Tribunal had been constituted under Rule 22 (b) of the Rules of Arbitration of the ICA ('ICA Rules') comprising of Presiding Arbitrator and two learned Arbitrators and that the first hearing of the Tribunal was to take place on 29th March 2004.

13. On 12th March 2004 counsel for the Petitioner wrote to ICA protesting against the constitution of the Tribunal and requested that reference of the dispute between the parties to the Tribunal constituted by ICA be deferred till ICA passed any directions/orders in respect of the objections of the Petitioner as regards the constitution of the Tribunal.

14. At the first hearing of the Tribunal on 29th March 2004 the Petitioner (who was the Respondent before the Tribunal) raised an objection to the constitution of the Tribunal as one member of the Tribunal was not present. The order sheet noted the objection raised by the Petitioner and deferred the proceedings till 30th April 2004 since the third Member of the Tribunal was not present. At the second hearing on 30th April 2004, counsel for the Petitioner sought time to pay the balance payment towards fees and costs of the arbitration. 15 days' time was granted by the Tribunal for that purpose. Further, the Petitioner was asked to file its written statement and counter claims within 15 days. It was observed that "the objection regarding the

appointment of the Arbitrator raised by the Respondent will be considered after the payment of the said cost of arbitration.” The third hearing was fixed for 25th May 2004.

15. At the third hearing on 25th May 2004 a detailed order was passed by the Tribunal rejecting the objection raised by the Petitioner as to the validity of its constitution. It was held that since the claim was for a sum of over Rs. 3.28 crores, there could not be a sole Arbitrator under ICA Rules. There had to be two arbitrators, one to be appointed by each party apart from the Presiding Arbitrator.

16. At the fourth hearing on 23rd July 2004 counsel for the Petitioner sought a further time of three weeks to file written statement and the counter claims. This was granted by the Tribunal as a last opportunity. It was then ordered that “the claimant will file rejoinder to the written statement and reply to the counter claim, if any counter claim is filed. Both parties will file their documents and written submissions also within this period of five weeks. This order is being passed with the consent of both parties. After receipt of written submissions, the Tribunal will make the Award and inform the parties.” The Tribunal further noticed in its order sheet on 23rd July 2004 as under:

“Mr. Sastry says that on receipt of the claimant’s reply to the

counter claim it may be necessary for him to address oral arguments. Mr. Sastry can make an application after submitting the written arguments. If the Tribunal feels that it is necessary to hear the parties on the points raised by them, the Tribunal may grant liberty to address oral arguments also. Written arguments must cover all the points the parties wise to raise.”

17. On 13th August 2004 counsel for the Petitioner filed before the Tribunal a reply to the statement of claim filed by Respondent No. 1, the statement of its counter-claims along with documents in support thereof. Just prior to the fifth hearing before the Tribunal the Petitioner filed an application praying that issues be framed by the Tribunal and “the parties be directed to file their evidence by way of affidavit with a right to cross-examine the witnesses and a date convenient to this Hon’ble Arbitral Tribunal be fixed during January 2005.”

18. The above application was taken note of by the Tribunal at the fifth hearing on 17th November 2004. The order passed on that date by the Tribunal reads as under:

“Mr. Yakesh Anand, counsel for the claimant has filed written submissions. Copy of the same has been given to the counsel for the Respondent. Counsel for the Respondent prays for 10 days’ time to file written submissions. Time granted.

The Respondent has made an application for grant of time to file rejoinder to the reply to the counter claim. In our opinion there is no need to file rejoinder as the pleadings are quite comprehensive.

If there is anything that the Respondent would like to say, he may as well do it in the written submissions.

The award is reserved. It will be pronounced to the parties in due time.”

19. Thereafter a letter dated 3rd January 2005 was received by the Petitioner from ICA informing it that the Tribunal had made and signed the impugned Award on 10th December 2004. A copy of the said Award was enclosed with the letter.

20. Thereafter, the present petition OMP No. 91 of 2005 was filed by the Petitioner on 3rd March 2005. Respondent No. 5 filed OMP No. 228 of 2005 on 2nd April 2005.

Submissions of counsel

21. Mr. Anil Kher, learned Senior counsel appearing for the Petitioner first submitted that the Tribunal erred in rejecting the Petitioner’s objection as to the validity of its constitution by its order dated 25th May 2004. He submitted that under Rule 22 (b) of the ICA Rules even where the claim

was over Rs. 1 crore, the parties could agree not to have the disputes referred to a three-member Tribunal and instead agree to have them referred to a sole Arbitrator. He further submitted that both the Petitioner as well as Respondent No. 1 had clearly indicated, through their separate letters to ICA, that they were seeking appointment of a sole Arbitrator. Consequently, it was incumbent on ICA to proceed under Rule 23 (a) of the ICA Rules and not Rule 22 (c) which was referred to by the Tribunal in its order dated 25th May 2004. Mr. Kher pointed out that the improper constitution of the Tribunal would vitiate the impugned Award under Section 34 (2) (v) of the Act.

22. Mr. Kher next submitted that the Tribunal erred in rejecting the Petitioner's application for grant of time to file a rejoinder to the reply to the counter claims in its order dated 17th November 2004. He further submitted that the Tribunal did not deal with the Petitioner's request to file affidavits by way of evidence and to grant the parties the right to cross-examine the witnesses. He submitted that since the claim was for a sum of over Rs. 3 crores and a large number of documents had been filed by both the parties in support of the claims and counter claims, it was necessary for the Tribunal to devise a procedure which would grant a full opportunity to both the parties to lead evidence and cross-examine the witnesses. He further submitted that out of the five hearings, four were taken up in

completion of pleadings. Even the order sheet of the fifth hearing only granted time for filing of written submissions. There was no indication of any arguments of learned counsel for the parties having been heard. He submitted that the impugned Award did not refer to the numerous documents filed by both the parties and that the Tribunal acted contrary to the mandate of Section 18 of the Act which required that “each party shall be given full opportunity to present his case.”

23. Mr. Yakesh Anand, learned counsel appearing for Respondent No. 1 submitted that there was no error committed by the Tribunal in rejecting the Petitioner’s objection as to the validity of its constitution. According to him, there was no agreement between the parties that the disputes could be referred to a sole Arbitrator and therefore, the exception carved out under Rule 22 (b) of the ICA Rules would not apply. Consequently, it was only Rule 22 (c) which would apply and therefore, ICA had rightly constituted a three-member Tribunal. As regards the procedure adopted by the Tribunal it is submitted that sufficient opportunities were given to the Petitioner to file its written statement as well as counter-claims. The mere denial of right to file a rejoinder to the reply to the counter claim of the Petitioner could not be termed as unfair or unreasonable. Moreover, the parties were permitted to file their respective written submissions.

Constitution of the Tribunal

24. As regards the validity of the constitution of the Tribunal, it is necessary to refer the Rule 22 and Rule 23 (a) & (b) which read as under:

“Rule 22 - The number of Arbitrators to hear a dispute shall be determined as under:

(a) Where the claim including determination of interest, if any, being claimed upon the date of commencement of arbitration in terms of Rule 15, does not exceed Rs. 1 crore and where the arbitration agreement does not specify three arbitrators, the reference shall be deemed to be to a sole arbitrator, unless the parties to the dispute agree to refer the dispute to three arbitrators within thirty days from the date of notification of request for arbitration.

(b) Where the claim including determination of interest, if any, being claimed upto the date of commencement of arbitration in terms of Rule 15 exceeds Rs. one crore the dispute will be heard and determined by three arbitrators, **unless the parties to the dispute agree to refer the dispute to a sole arbitrator within thirty days from the date of the notification of the request for arbitration.**

(c) Where three arbitrators have to be appointed as per the above sub-rule and any of the parties to the dispute fails to make the necessary deposit towards the cost and expenses of arbitration, instead of three arbitrators, the Registrar may appoint a sole arbitrator, where the claim is up to one crore. Where the claim is for more than Rs. 1 crore, the Registrar

may appoint arbitrator/s on behalf of the Respondent as well as the Presiding Arbitrator.” (emphasis supplied)

Rule 23 - The appointment of sole arbitrator or three arbitrators shall be made in the following manner:

(a) In case a Sole Arbitrator has to be appointed, the Registrar shall call upon the parties to the dispute to forward the name of an agreed arbitrator from among the panel of arbitrators by a notice in writing, sent to them. The said notice shall specify the period within which the nomination shall be made which shall not be more than thirty days from the date of the said notice to the respective parties. **If the parties fail to agree on the person to be appointed as sole arbitrator within the time granted by the Registrar, the Registrar in consultation with the Chairman of the Committee and in his absence in consultation with the member of the Governing Body designated by the Chairman shall appoint the sole arbitrator from among the panel of arbitrators.** If one of the parties is a national or resident of a country other than India, the sole arbitrator shall, as far as possible, be chosen or appointed by the Registrar from among the nationals of a country other than that of either of the parties. The sole arbitrator so nominated shall constitute the arbitral tribunal to hear the dispute and shall be appointed as such in writing by the Registrar. The Registrar shall give notice to the parties of the constitution of the arbitral tribunal.

(b) Where the reference is to three arbitrators, the Registrar

shall in the first instance call upon the parties to nominate one arbitrator each from among the panel of arbitrators by a notice in writing, sent to them. The said notice shall specify the period within which the nomination shall be made which shall not be more than thirty days from the date of the said notice to the respective parties. If a party to the dispute refuses or neglects to appoint an arbitrator on his behalf within the period specified or if the requests the Registrar to nominate an arbitrator on behalf of that party, the Registrar in consultation with the Chairman of the Arbitration Committee and in his absence in consultation with the members of the Governing Body designated by the Chairman shall appoint the arbitrator from the panel of arbitrators on behalf of that party. On receipt of the nominations from the respective parties or on the appointment as aforesaid by the Registrar, the Registrar shall appoint another person as the Presiding Arbitrator of the arbitral tribunal in consultation with Chairman of the Committee and in his absence in consultation with members of the Governing Body designated by the Chairman, from among the panel of arbitrators to be additional arbitrator to act as Presiding Arbitrator of the arbitral tribunal.”
(emphasis supplied)

25. As noticed hereinbefore, both the Petitioner as well as Respondent No. 1 in their separate letters to the ICA expressed their desire to have the disputes referred to a sole arbitrator. The extracted portion of the letter dated 4th January 2003 from Respondent No. 1 to ICA clearly asked the

ICA “to nominate the name of a retired Supreme Court Judge or in the alternative a retired High Court Judge to act as a sole Arbitrator to adjudicate upon the disputes between the parties”. This was reiterated in the last paragraph of the said letter. It is thereof not permissible for Respondent No. 1 to now contend that it was not agreeable to have the dispute referred to a sole Arbitrator.

26. For the purposes of Rule 22 (b) of the ICA Rules it is not necessary for the parties to agree on the name of a sole Arbitrator. It is sufficient for both the parties to agree that the disputes be referred to a sole Arbitrator. If the parties, who are desirous to have the disputes being referred to a sole Arbitrator, are unable to agree on the name of the sole Arbitrator, then the procedure under Rule 23 (a) of the ICA Rules would stand attracted. This clearly envisages that the Registrar of the ICA, in consultation with the Chairman of the Committee, shall appoint a sole Arbitrator from the panel of arbitrators. In the present case, the ICA appears to have proceeded on the basis that there was no agreement between the parties that the disputes should be referred to a sole Arbitrator. This was clearly erroneous. The ICA committed the further error of proceeding under Rule 22 (c) read with Rule 23 (b) of the ICA Rules and constituting a three-member Tribunal.

27. In its order dated 25th May 2004 the Tribunal does not refer to the

correspondence exchanged between the parties and the ICA or even to Rule 22 (b) of the ICA Rules which was squarely attracted in the present case. This Court holds that the order dated 25th May 2004 of the Tribunal is erroneous in law. The said order is hereby set aside.

28. Since there was an error in the constitution of the Tribunal, in terms of Section 34 (2) (v) of the Act, this by itself is sufficient to set aside the impugned Award. However, since the parties have made submissions on the aspect of the procedure adopted by the Tribunal, this is also considered hereinafter.

Procedure adopted by the Tribunal

29. Only five hearings took place before the Tribunal. Four hearings were taken up for completion of pleadings. In the third hearing, the Tribunal also dealt with the question of validity of the constitution of the Tribunal. In other words, there appears to be no substantive hearing on merits. Even the order passed at the fifth hearing does not indicate that the counsel for the parties made any submissions on the merits of the claims and counter claims.

30. The reply by Respondent No. 1 to the counter claims of the Petitioner was over 300 pages. It was but necessary for the Tribunal to have permitted

the Petitioner to file a rejoinder to the said reply. Moreover, considering that a large number of documents had been filed by both the parties and the claim was for a sum of over Rs. 3.5 crores involving disputed questions of fact, it was necessary for the Tribunal to have devised a procedure consistent with Section 18 of the Act to ensure that full opportunity was given to both the parties to support their respective claims and counter claims. It was also necessary, in the facts and circumstances of the present case, to permit the parties to file affidavits by way of examination in chief and also in a time-bound manner complete the cross-examination of witnesses. On the other hand, the Tribunal appears to have adopted summary procedure of going by the written submissions of both the parties. While a Tribunal is not bound by the strict rules of evidence and the rules of procedure that govern the proceedings before a civil court, it must ensure that adequate opportunity is given to the parties before it to present their respective cases and establish the veracity of the documents relied upon by them. As far as the present case is concerned, it was not correct for the Tribunal to have adopted a summary procedure of going only by the written submissions of the parties. The Tribunal also does not appear to have referred to the numerous documents filed by the parties in the impugned Award.

31. This Court holds that the procedure adopted by the Tribunal in the

present case was far from satisfactory and was not consistent with the requirement of Section 18 of the Act. This is another ground on which the impugned Award is unsustainable in law and is hereby set aside.

Directions

32. Consequent upon the setting aside of the impugned Award, this Court directs the ICA, in exercise of its power under Rule 23 (a) of the ICA Rules, to nominate a Sole Arbitrator to adjudicate upon the disputes between the parties. This will be done by the ICA within two weeks of the receipt of a certified copy of this order, which will be delivered to it by the Registry of this Court within the next five days.

33. The Sole Arbitrator nominated by ICA will permit, in the first instance, the Petitioner to file a rejoinder to the reply filed by Respondent No. 1 to its counter claims within a prescribed time. Further, within the a strict time schedule the Sole Arbitrator will permit the parties to file their respective affidavits of evidence by way of examinations in chief and also permit them to cross-examine the deponents of those affidavits. Considering that the disputes between the parties have been pending resolution for many years, the learned sole Arbitrator is requested to pronounce the fresh reasoned award within a period of six months from the date of commencement of proceedings before the sole Arbitrator.

34. The petitions are disposed of in the above terms. A certified copy of this order be delivered to the ICA within five days.

S. MURALIDHAR, J

JANUARY 04, 2012

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