

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1363 OF 2010

Fugro Survey (India) Private Limited
Add: Fugro House, D-222/30,
TTC Industrial Area, MIDC,
Nerul, Navi Mumbai – 400 706.

...Petitioner

vs.

Oil and Natural Gas Corporation Limited
Off: 11 High, 7th Floor,
Bandra-Sion Link Road, Sion,
Mumbai – 400 017.

...Respondent

Mr. Rajeev Pandey a/w. Sanjiv Punalekar a/w. Mr. Arun Shilvant i/b.
PRS Legal, for the Petitioner.
Mr. Pradeep Sancheti, Senior Advocate a/w. Ms. Hemali Kurne a/w.
Mr. Anirudh Bhalwal i/b. M/s. Vyas & Bhalwal, for the Respondent.

CORAM : R. D. DHANUKA, J.

Date of Reserving the Judgment : 24th April, 2015

Date of Pronouncing the Judgment : **6th May, 2015**

JUDGMENT :-

. By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “*the said Arbitration Act*”) the Petitioner, has impugned the arbitral award dated 8th May, 2010 rendered by the Arbitral Tribunal thereby rejecting all the four claims made by the Petitioner.

2] Some of the relevant facts for deciding this Petition are as under:

The Petitioner was the original claimant whereas the Respondent is the original Respondent in the arbitral proceeding. By an order dated 17th November, 2011, this Court while admitting the aforesaid Petition, had clarified that the Petition was admitted only to the extent of challenging the rejection of claim No. 4 of the Petition by the arbitral Tribunal. Both the parties have accordingly addressed this Court in respect of rejection of claim No. 4 by the arbitral Tribunal.

3] Some time in the year 2003, the Respondent had invited offers for carrying out Current Wind and Wave Observation at 6 locations on the East Coast in India namely KG-KD 8, KG-KD 9, KG-KD 10, KG-KD 11, GD-SW and GD-NW. The Petitioner submitted their offer in pursuance to the said invitation. The offer of the Petitioner was accepted by the Respondent and was awarded the contract for carrying out the work of Current, Wind and Wave Observation. On 29th October, 2003 the Respondent issued a notice of award to the Petitioner. Under the said notice of award, the Petitioner was to mobilize the vessel within 60 days from the date of notice of award. On 23rd December, 2013 the parties signed the contract.

4] It is the case of the Petitioner that prior to execution of the said contract meeting took place between the parties on 12th December, 2003

which was referred to as “Basin Group Meeting” in which a schedule was prepared for the execution of the work under the agreement keeping in mind the dates on which the drilling operations were to be commenced at each of the locations at which the Wind, Wave and Current observations were to be carried out.

5] It is the case of the Petitioner that on 15th December, 2003 the Petitioner proposed to deploy the Indian Flat vessels MT Sonu and MFV Srinivasa from Visakhapatnam for carrying out the said work. It is the case of the Petitioner that the said vessels were standing since 15th December, 2003. On 16th December, 2003 Indian Navy team visited the vessel M.T. Sonu and raised questions related to the basic sanctity of the project. On 17th December, 2003 the representative of the Respondent also arrived at Visakhapatnam and met Navel authorities.

6] By a letter dated 18th December, 2003 the Petitioner recorded the developments which had taken place on 16th and 17th December, 2003 and requested the Respondent to clear the sanctity of the project. On 19th December, 2003 the Respondent submitted clarifications to the Naval authorities regarding the observations of Naval authorities about carrying out current observations within the close proximity of the drilling locations. On 8th January, 2004 the Respondent addressed a letter to the Joint

Secretary (E), Ministry of Petroleum and Natural Gas, Government of India and requested to take up the issue for Naval clearance. On 10th January, 2004 the Naval team inspected the vessel MT Sonu and accorded only partial clearance for carrying out Wave and Wind Observations at 4 locations and restricting the current observations for 2 locations for only 48 hours with interval of 3 hours.

7] On 12th January, 2004 the Respondent addressed a letter to Asstt. Director, Naval Intelligence, New Delhi and informed that partial clearance will not meet the drilling requirement and requested for complete clearance. During the period between 13th January, 2004 and 31st January, 2004 the Petitioner addressed letters alleging that the Petitioner had kept the requisite equipments ready for deployment at minimum 3 locations simultaneously and that idling charges being incurred @ Rs. 5.20 lacs per day. The Respondent by their letter dated 30th January, 2004 informed the Petitioner that as the current moorings were not deployed on the specified locations, the vessel, equipment and personnel could not be treated as mobilized.

8] It is the case of the Petitioner that on 9th February, 2004 vessel was again inspected by the Navy and was cleared following which the vessel immediately proceeded to site KG-KD-10 to commence current observations. It is the case of the Petitioner that on 10th February, 2004 the

Petitioner commenced the work at location KG-KD-10. On 11th February, 2004 the Respondent sent a fax to the Petitioner to discontinue the current observation work at KG-KD-10 and the vessel was expected to be in Indian water on 18th February, 2004 and scheduled to be on the said location on 19th February, 2004 morning. The Respondent requested the Petitioner to ensure the current date of job and that the job had to be completed latest by 18th February, 2004. On 18th February, 2004 the Petitioner complied with the directions of Respondent and cleared the site. On 30th March, 2004 the Petitioner raised invoice for 70% of lumpsum payment for site KG-KD-10.

9] It is the case of the Petitioner that on 10th May, 2004 the Petitioner submitted a final report for current/metocean observation for 3 locations including KG-KD-10, KG-KD-9 and GD-NW. On 24th May, 2004 the Petitioner raised invoice for balance 30% of lumpsum payment for sites KG-KD-9 and KG-KD-10. It is the case of the Petitioner that during the period between 24th May, 2004 and 4th June, 2005 pursuance to the communication and discussions held between the parties, the Petitioner reduced the demand of Rs. 58,25,642/- to Rs. 47,21,772.25/-. On 4th June, 2005 the Petitioner addressed a letter to the Respondent regarding payment. On 3rd August, 2005 Respondent addressed a letter to the Petitioner seeking production of various documents with a view to check the claim raised by the Petitioner.

10] On 7th February, 2006 the Respondent informed the Petitioner the issue of referring of the case to A.D.R mechanism i.e. Outside Expert Committee was under consideration of competent authority. On 8th May, 2007 the Petitioner invoked arbitration agreement and applied for appointment of an Arbitrator. Under the said arbitration clause the Arbitral Tribunal came to be constituted comprising of 3 members. Pursuant to the liberty granted by the Arbitral Tribunal, the Petitioner filed a statement of claim on 29th November, 2007 *inter alia* praying for a sum of Rs. 1,64,55,903.04/- with interest at the rate of 12% with effect from 28th December, 2005. The Petitioner had made four claims before the Arbitral Tribunal. The Respondent filed their written statement in respect of those claims.

11] Before the Arbitral Tribunal both the parties led documentary as well as oral evidence. The witnesses examined by both the parties had been extensively cross examined by either side. On 8th May, 2010 the Arbitral Tribunal rendered arbitral award thereby rejects all the 4 claims raised by the Petitioner.

12] Pursuant to the order passed by this Court on dated 17th November, 2011 award in respect of the claim No. 4 for Rs. 47,21,772.25/- is being considered. It is not in dispute that as against the claim of Rs. 58,25,642/- the Respondent has already made payment to the Petitioner an

amount of Rs. 12,36,950/- as full and final payment for 8 days of current observation work that was carried out by the Petitioner.

13] The learned counsel for the Petitioner submits that a lumpsum contract was awarded by the Respondent to the Petitioner for 6 different locations and amount was accordingly fixed for all such locations. The Petitioner had already conducted survey for 5 locations. He submits that so far as 6th location is concerned, the Naval authorities did not allow the survey initially. The Naval, however subsequently granted partial clearance. The Petitioner has mobilized the resources for carrying out the survey on the 6th location. The Respondent asked to vacate the said site. He submitted that since the contract was lumpsum contract and the Petitioner has mobilized all the resources for the entire location, the Respondent could not have made payment only for the 8 days to the Petitioner. He submits that the payment of Rs. 12,36,950/- made by the Respondent to the Petitioner was not in full and final settlement of the claim made by the Petitioner for said lumpsum contract. He submits that it was the obligation of the Respondent to obtain certificate from Naval for clearing the project.

14] The learned counsel invited my attention to clause 3.1 of the contract and submits that under the said clause, the obligation of the Petitioner was only to obtain necessary clearance for equipment of vessel and not to obtain site clearance. He submits that under clause 3.14.1 of the

the contract, the Petitioner was required to obtain permission like clearance from Ministry of Defence to deploy the foreign flag vessel in Indian Waters, DG shipping clearance etc. He submits that under clause 4.1.1(iii) of the contract, the Naval Security did not give site clearance due to drilling operation. The learned counsel placed reliance on the definition of “site” under clause 1.3 of the contract.

15] The learned counsel for the Petitioner submits that in so far as clause 23 of the contract which provided for “*Force Majeure*” did not apply to the 6th location since the Petitioner had already completed the work on other 5 locations. He submits that findings of the Arbitral Tribunal that the obligation was on the Petitioner to obtain site clearance from Naval is perverse and contrary to the contract. He submits that the contract awarded to the Petitioner would have come to an end only on 30th June, 2004 and thus Respondent ought to have allowed the Petitioner to complete the said work of survey on the 6th location and ought not to have directed the Petitioner to clear the site. Since the Respondent was solely responsible for obtaining the site clearance from Naval authorities and directed the Petitioner to vacate the site after 8 days, the Respondent could not have withheld the balance amount of lumpsum contract. He submits that the Respondent thus could not raise a plea of “*force Majeure*” before the Arbitral Tribunal.

16] Clause 3.1(i) of the contract is extracted as under:

3.1 "The Contractor shall at its own cost and at all time, throughout the contract period, provide:

I) All necessary clearances required for equipments, vessels and personnel are to be obtained by contractor before mobilization, as applicable but not limited to :

i. Custom clearance.

ii. Immigration clearance.

iii. Directorate General of Shipping clearance/approval, Trading License for the vessel(s) etc.

iv. Naval clearance for vessel(s) and equipment,

v. Required licences for communication equipment".

17] In support of the aforesaid submission, the learned counsel for the Petitioner placed reliance on the judgment of the Supreme Court in the case of "*State of J. & K. and another vs. Dev Dutt Pandit*"¹.

18] Mr. Pradeep Sancheti, learned Senior Counsel for the Respondent submits that the Arbitral Tribunal after considering the pleadings, documents and oral evidence has rendered findings of fact and this Court can not re-appreciate the evidence considered by the Arbitral Tribunal under Section 34 of the said Arbitration Act. He submits that Arbitral Tribunal has interpreted the terms of the agreement which is a possible interpretation and thus it cannot be substituted by any other interpretation by this Court.

1. AIR 1999 SUPREME COURT 3196.

19] He submits that there was gross delay on the part of the Petitioner in mobilizing the resources in so far as the 6th location is concerned and thus the Respondent had recovered the liquidated damages from the Petitioner for such delay which was admittedly paid by the Petitioner.

20] The learned counsel invited my attention to clause 3 of the contract which provide for "Duration of the Contract" and schedule for various locations. Clause 3 of the said contract which is relevant for the purpose of deciding this Petition is extracted as under:

"The contractor to ensure mobilization in minimum possible time and commence work so that first of the reports is made available by 31st December, 2003 the subsequent schedule for the balance locations will be as follows:

<i>Observation time at each location</i>	<i>30 days</i>
<i>Submission of draft report</i>	<i>Within 15 days from completion of field work at each location</i>
<i>Comments on draft report (by ONGC)</i>	<i>Within 15 days from submission of draft report</i>
<i>Submission of final report</i>	<i>Within 15 days from date of issue of comments by ONGC on draft report.</i>

All the field operations for six locations should be completed before onset of monsoon 2004. The entire scope of work of the contract should be completed by 30/06/2004."

21] He submits that the observation time granted under the said provision was 30 days. The Petitioner was required to submit a draft report within 15 days from the completion of field work at each location. The Respondent was required to submit their comments to the draft report within 15 days from the receipt of the report. The Petitioner was required to submit final report within 15 days from the date of issue of comments from the Respondent on the draft report. It was made clear under the said provision that all the field operations for the 6th location was to be completed before monsoon of 2004 and the entire scope of work of the contract should be completed by 30th June, 2004.

22] The learned Senior Counsel invited my attention to the special condition of the contract and more particularly clause 1.1 and 1.2 and 2.1 and submits that the payment was required to be made in the sequence mentioned therein. He invited my attention to clause 2.1 of the special condition of contract in which it is provided that a complete job as given in the scope of work was required to be completed as per schedule given in the document annexed which would include mobilization time for the vessel, equipment and personnel.

23] He submits that since the work was only for 8 days and the balance work of the Petitioner could not have been completed in view of the drilling operation proposed by the Respondent, as per the said schedule

and in view of the delay in mobilization on the part of the Petitioner, the Respondent was not bound to pay for the entire work which was not carried out by the Petitioner. He submits that the Petitioner made a claim for idling charges during the period between 15th December, 2003 to 9th January, 2004 and between 10th January, 2004 to 9th February, 2004 before the Arbitral Tribunal. The Arbitral Tribunal has rejected the said claim for idling charges on various grounds. This Court has not admitted the Arbitration Petition in respect of the said claim and that part of award rejecting the other 3 claims has achieved finality.

24] The learned Senior counsel invited my attention to various paragraphs of the award. He submits that drilling operation has to be planned well in advance and could not have been changed in view of several other activities required to be carried out in that sequence. Since the Petitioner was responsible for gross delay and the Petitioner had already paid liquidated damages for such delay, the Petitioner could not have made claim again for the same period. He submits that under the provisions of the contract, it was obligation of the Petitioner to obtain the site clearance from the Naval authorities which the Petitioner failed. The Respondent was only providing assistance to the Petitioner to get the said clearances from Naval authorities. He submits that if the Petitioner would have obtained clearances on time, the work of 30 days could have been easily carried out by the Petitioner before the Respondent was required to

start drilling operation. The learned Senior counsel submits that Arbitral Tribunal has dealt with this issue at length and has rightly rejected the claim No. 4 raised by the Petitioner.

25] The learned counsel for the Petitioner in rejoinder, submits that since the Respondent has asked the Petitioner to vacate the site, the Respondent have made payment only for 8 days to the Petitioner under lumpsum contract.

REASONS AND CONCLUSION :-

26] A perusal of the contract clearly indicates that the Petitioner was required to obtain various clearances from the authorities including Naval authorities for various activities required to be carried out. A perusal of the award clearly indicates that Arbitral Tribunal has dealt with this issue at length and has rendered a finding that the consideration required to be paid to the Petitioner under the contract was a lumpsum, firm and inclusive price contract. The Petitioner was obliged under the contract to provide the equipment and personnel to the vessel.

27] The Arbitral Tribunal considered the provisions regarding the duration of the contract and the other terms including schedule for balance location and has come to the conclusion that all the heads of expenses which the Petitioner may have to incur i.e. personnel equipment etc. and

must be deemed to have been considered by the Petitioner when the lumpsum price was agreed upon. It is held that there was nothing in the agreement which entitled the Petitioner to make any separate claim under any of those heads. A price fixed under the said agreement was firm and not variable.

28] The Arbitral Tribunal has interpreted the terms of contract and held that the Petitioner has accepted the recovery of liquidated damages by the Respondent levied in view of the failure on the part of the Petitioner in obtaining the necessary security clearances under the agreement resulting in delay in mobilization. It is held by the Arbitral Tribunal that the same was exactly the delay for which the liquidated damages were paid by the Petitioner and which the Petitioner was not contending to be on account of the Respondent. It is held that it was not now opened to the Petitioner to contend that the said delay was caused by breach of obligation on the part of Respondent to seek recovery of compensation from the Respondent.

29] The Arbitral Tribunal has interpreted clause 4.1.1 and other provisions of the contract and has held that the obligation of taking clearances from Naval authorities and other Governmental authorities for the project/work was cast mainly upon the Petitioner though the Respondent was required to help in forwarding the documents to the authorities and help the Petitioner in getting such clearances. The Arbitral

Tribunal has held that all necessary clearances required for vessel, personnel was to be obtained by the Petitioner even before the mobilization of such clearances and were not limited to custom clearances and their licences etc. It is held that the obligation did not merely to obtain security clearances but could be read as obliged the Petitioner to obtain clearances of Ministry of Defence also. In my view, the interpretation of the contract by the Arbitral Tribunal and thereby rendering the finding that it was the obligation of the Petitioner to obtain various clearances including site clearances and it was the obligation of the Respondent only to assist the Petitioner, is a possible interpretation which in my view can not be substituted by another interpretation by this Court.

30] In so far as the payment of only 8 days made by the Respondent is concerned, the Arbitral Tribunal has held that there was no dispute between the parties that after obtaining the clearances, the current observation work was started at KG-KD-10 on 10th February, 2004 and was expected to continue for a period of 30 days for which lumpsum amount of Rs. 58,25,642/- was payable. By a letter dated 11th February, 2004 Respondent requested to stop work at KG-KD 10 for current date collection for drilling scheduled to be on the location KG-KD-10 on 19th February, 2004. The Arbitral Tribunal has held that there was no dispute that work of current observation site location was carried out by the Petitioner only for 8 days and no other amount was due and payable to the Petitioner.

31] In my view the finding of the Arbitral Tribunal are not perverse and no interference is permissible with such finding under Section 34 of the Arbitration Act.

32] In clause (iv) of the said contract it is provided that the schedule prescribed in the foregoing paras for advance submissions of details regarding the vessel/personnel clearance was indicative only as the clearances are to be accorded by the concerned departments of the Government of India. It was made clear that the Respondent would not be liable for any time and cost impact due to any delays on this account or due to change of procedures in that regard. In my view, the learned Senior counsel for the Respondent is right in his submission that even if there was any change of procedure required to be made in view of the delay in clearance by the concerned department of Government of India, the Respondent was not liable to pay any amount arising out of time and cost impact due to any such delay and changes. There is clear bar under the said provision for making any payment on account of such delay or change of procedure.

33] In so far as the judgment of Supreme Court in case of Dev Dutt Pandit (supra) relied by the Petitioner is concerned, the said judgment even remotely does not apply to the facts of this case. The reliance placed thereon is totally misplaced.

34] In my view, there is no merit in any of the submissions made by the learned counsel for the Petitioner.

35] The Petition is devoid of merits. I, therefore, pass the following order:

a) Arbitration Petition No. 1363 of 2010 is dismissed.

b) There shall be no order as to cost.

(R.D. DHANUKA, J.)