IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.819 OF 2010

M/s Oil & Natural Gas Corporation Ltd. .... Petitioner

Vs.

M/s SEDCO Forex International Drilling INC. .... Respondent

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Mr. Dauris Khambatta, Senior Counsel alongwith Ms. Naira Jejeebhoy alongwith Mr. Fheroze Mehta alongwith Mr. Virendra Pereira alongwith Mr. Aziz Khan alongwith Mr. Yazad Bisni i/by Divya Shah Associates, Advocate for the Petitioner.

Mr. Atul Rajadhyaksha, Senior Counsel alongwith Mr. Shiraz Rustomjee alongwith Mr. Neil Patel alongwith Mr. Vinayak Vengurlekar, alongwith Ms. Meher Minbattiwalla i/by Crawford Bayley & Co. Advocate for the Respondent.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 29th March, 2016

P.C. :

1 This petition challenges the Arbitral Award dtd. 22nd January, 2010, which directs the petitioner to pay the respondent

total sum of Rs.30,10,15,928/- with interest @10% per annum from 1st March 2001 till payment of Rs.26,67,94,320/- and interest @10% per annum from 21st November, 2005 till payment of Rs.3,42,21,608/- towards reimbursement of the customs duty paid by the respondent to the Customs Department. The petitioner is also directed to pay to the respondent costs of arbitration quantified at Rs.20,00,000/-. The award is a majority award of a panel of three arbitrators with one member dissenting.

2 The petitioner is a Government Company, within the meaning of Section 617 of the Companies Act and is involved in the domestic and international oil & gas exploration and production activities. The respondent is the Company, incorporated under laws of Panama, having it's regional office at Mumbai. The petitioner and the respondent shall be, hereinafter referred to by their names i.e. "ONGC" and "SEDCO" respectively. The claim of SEDCO in the arbitral proceedings arose out of Clause no.15.5 of the Agreement dtd. 23rd August, 1988 between the two for hire of SEDCO's Drilling Unit by name "Rig Trident II". The said clause reads as under:

> "15.5 Customs Duties, Fees on equipment and supplies: The Operator agrees to pay for or reimburse, for any and all customs duties, fees, taxes, licenses or similar charges with respect to any equipment and supplies, which Contractor may require, including the Drilling Unit, in order to carry out the terms of this Agreement provided that the Drilling Unit and the equipment shall be

> exported back from Indian waters immediately after expiry of the Agreement. The Contractor shall provide all assistance to the Operator in claiming and obtaining refunds of such levies wherever possible"

The "Operator" under the contract refers to the ONGC and the "Contractor" referred to is the SEDCO.

3 The brief statement of facts required to be noted and which is mostly undisputed reads as under:

In November, 1987, ONGC invited bids for chartered hire of jack-up Rigs for offshore oil exploration/exploitation. SEDCO responded to the bid on 16th December, 1987. It's offer was accepted and Letter of Intent dtd. 22nd March, 1988 was issued to it for hire of drilling unit Rig Trident-II (the "Rig"). On 22nd April, 1988, SEDCO informed ONGC that the Rig would arrive at a location off-shore Mumbai on 25th April, 1988 and that it would require two tug/anchor handling boats at the location to assist in the unloading and positioning of the Rig. It had also requested for instructions to be issued to the Master of such boats to contact the vessel M.V. Mighty Servant-II on Channel-16 Marine Radio and proceed directly to the Rig. Accordingly, on 25th April, 1988 the Rig was dry towed from Singapore to Mumbai and entered into Indian customs area on the same day. On the next day, i.e. on 26th April, 1988, it was moved out of the Territorial Waters of India to a platform of the ONGC namely R-10-1.

4 During the period 1973 to 1989, several foreign registered Rigs were brought into India by foreign Rig owners for use under Chartered-Hire Contracts with ONGC. Due to the specialised nature of offshore oil exploration, operations undertaken by ONGC in and around the territory of India and the importance of the operation to the national interests, various waivers and exceptions from the normal customs procedure were granted to it by the Government of India through the Customs authorities. Almost all the Rigs were cleared under Import General Manifest (IGM). A Bill of Entry was not filed for importation of the rigs. This was in accordance with the prevailing customs practice. In some cases, Bills of Entry were filed later when the rigs were subsequently purchased by Indian parties. SEDCO accordingly, did not file Bill of Entry. It filed IGM stating that, its vessel, M.V. Mighty Servant-II had towed the Rig. No customs duty was paid on the import of the Rig.

5 On 17th July, 1984, the Customs authorities issued a public notice stating the procedure to be followed for purchase and import of ocean going vessels which were to be locally registered. It stated that alongwith the IGM a regular Bill of Entry should be filed in respect of the vessels at the time of the first entry of the vessels into India. Later on 30th December, 1986, Notification No. 516/86/CU was brought into force which exempted goods imported into India in connection with off-shore exploration/ exploitation from whole of the customs duty on production of :

> (i) a certificate from an officer now below the rank of Deputy Secretary, Minister of Petroleum and Natural Gas, Government of India certifying that the goods were required for offshore oil exploration or exploitation and will be used for such purposes and
>
> (ii) a certificate by duly authorised officer of the Director-General of the technical development that the goods are essentially for the above purposes in respect of which the exemption is claimed are such as, not manufactured in India.

The Notification was later amended on 23rd January, 1987 by substituting Condition- (ii) above with the following:

> (i) To produce a certificate from an officer not below the rank of Deputy Secretary, Ministry of Petroleum and Natural Gas (MoPNG), Government of India, certifying that the goods are required for offshore oil exploration and exploitation and will be used for such purposes.
>
> (ii) To produce a certificate by a duly authorised officer of the Directorate-General of the Technical Development (a Government of India Officer) that the goods are essential for the above purposes.

6 On 22nd July, 1987, Customs Notification No.516 was further modified by substituting the earlier two conditions for a sole condition stating, inter-alia, that the importer was required to produce a Certificate that the goods are essential for offshore oil

exploration/exploitation from the Member Secretary of the Empowered Committee on the Indigenization of the Oil Field Equipment and Services of the MoPNG, Government of India. The certificate to be issued under the Notification is generally described as “Essentiality Certificate”.

7 Though the Rig was brought to India on 25th April, 1988 and started working immediately, the formal contract between the parties was executed on 23rd August, 1988. The Rig worked under the contract which was extended from time to time until 15th February, 1994. Thereafter it was used in another contract with ONGC and later with M/s Enron Oil and Gas India. On 13th November, 1988, the ONGC re-hired the same rig for two years.

8 While the Rig was working for ONGC under the second contract, the Customs Department issued notice dtd. 17th June, 1994 calling upon ONGC and SEDCO to show cause as to why penal action under the Customs Act, be not taken against them for getting the Rig cleared without filing the Bill of Entry. Both the parties replied the notice. Not being satisfied with the reply, the Customs Department seized the Rig in March, 1998 for alleged contravention of the Customs Act, 1962. However, it was permitted to function under the interim orders of this court. Notwithstanding the fact, ONGC rehired the Rig for a period of two years by issuing Letter of Intent and by executing the formal

contract on 21st April, 1999. On 8th July, 1999 another show-cause notice was issued to various parties including SEDCO and ONGC regarding the initial entry of the Rig and its subsequent movements in designated areas on five occasions. The notice proposed confiscation of the Rig and imposition of penalty. SEDCO replied the notice pointing out that, as many as, 27 rigs had been brought into Indian Waters during the period 1973-1989 and sought information as to whether IGMs or Bills of Entry were filed for their import. It claimed that, in the year 1988 the prevailing practice was to file IGMs and not Bills of Entry. Further, the Rig was exempted from Customs duty under Notification No.516/86. The same stand was taken by ONGC also stating that, the customs practice was not to require Bills of Entry to be filed for vessels such as rig. It examined its officers, the GM (Drilling) and the Manager (MM) to support it's stand. On 27th January, 2000, the Commissioner held that, the Rig was liable for confiscation for its initial entry in 1988 and movement to M.V. Platform in 1988. He imposed penalty on SEDCO and other parties but not on ONGC. The reason stated in the order for refraining from taking any action against ONGC reads as under :-

> "54.6 Now, the issue before me is to decide whether the omissions and negligence on the part of the agents of ONGC and concerned officers can be considered as a ground for penalising ONGC, which in fact is a Government owned company, where the President of India, in his official capacity is holding over

> 90% of its capital, and is engaged in an activity of national importance. As an organization ONGC has nothing to gain by abetting or aiding someone to evade or avoid payment of Customs duty. Therefore, it is my considered view that any omission or commission on the part of its agents or any of the employees cannot be held as a valid and sufficient reason to attribute mens rea on ONGC and impose penalty upon them on that ground, I therefore refrain from doing so."

As regards the Rig, he ordered its confiscation by valuing it at Rs.2,10,82,74,000/- and gave option to SECCO to clear the Rig on payment of fine of Rs.15,00,00,000/- alongwith penalty on SEDCO of Rs.50,000,000/- and penalty on SEDCO's District Manager of Rs.10,00,000/-. The penalty and fine was imposed based on the value of the Rig as on 1998.

9 SEDCO appealed to Customs, Excise & Gold Control Appellate Tribunal, Mumbai (CEGAT) from the order of the Commissioner. By the order dtd. 27th March, 2000 CESTAT granted interim stay of the order of the Commissioner on condition that SEDCO furnishes bank guarantee in the sum of Rs.5,00,000,000/- and makes a deposit of Rs.30,000,000/-. SEDCO complied with the conditions imposed. The CESTATE disposed off the Appeal, by the order dtd. 2nd February, 2001 holding that the Rig was liable for confiscation for its import in the year 1988 but no action could be taken against SEDCO on account

of the movement of the Rig in the year 1988. It also held that the Customs Department was fully aware of the entry of the Rig in the year 1988 and its subsequent movement. The Customs Department had, however, allowed a procedure to be developed ad-hoc in response to the immediate need in view of the fact that the import of the goods were made by and at the instance of ONGC, a Government Organisation. There was no clear practice established relating to importing the foreign rigs under IGM only. There was sufficient ambiguity about the procedure. CESTAT observed that, there was no intention on the part of the either SEDCO or ONGC to contravene the law and reduced the redemption fine to Rs.25,00,000/- and penalty to Rs.5,00,000/-. It also held that, the customs duty would be payable at the time of redemption of the Rig on the value of the Rig in the year 1988. SEDCO was held not entitled to exemption from customs duty under exemption Notification No.516/86 since it had not produced "Essentially Certificate" contemplated under the Notification. CESTAT, however, left it open to SEDCO to pursue its claim for the said certificate. This order of CEGAT has subsequently been confirmed on 2nd November, 2004 by the Apex Court and has become final.

10 After the order dated 2nd February, 2001 of CEGAT the respondent made persistent demands for reimbursement of the customs duty by resorting to Clause-15.5 of the contract. ONGC rejected the claim. Thereafter, SEDCO refused to renew the

contract for hire of the Rig. Then, a meeting of the parties was held in which it was agreed that both ONGC and SEDCO would jointly pursue the matter for getting the Essentiality Certificate and in the event of failure to obtain the Certificate, ONGC would reimburse the customs duty.

11 On 6th June, 2001, ONGC applied for the Essentiality Certificate as it was required to do so. It referred in its application to Clause 15.5 of the contract whereunder, it was required to pay customs duty on the Rig and hence sought the Essentiality Certificate. By the letter dtd. 20th December, 2001, the Ministry of Petroleum informed the Director General of Hydro-Carbons that it had no objection to the issuance of the Essentiality Certificate for the import of the Rig. On 21st December, 2001, the Directorate General, Hydro-Carbons issued the Essentiality Certificate. SEDCO submitted that Certificate to the Customs Department and requested for exemption of custom duty under the Notification. By the order dtd. 1st/4th February, 2002, the Additional Commissioner of Customs rejected the claim of SEDCO on the ground that the certificate had not been produced at the time of import of the goods. The appeal referred by SEDCO from the order was rejected by the Commissioner of Appeals and the matter has been further carried to the Tribunal i.e. CESTAT. The Appeal before the CESTAT is still pending.

12 In the meantime, pursuant to the order dtd. 2nd February, 2001, SEDCO exercised the right of redemption of the Rig and requested the Customs Authority that the redemption fine and penalty amount aggregating to Rs.30,00,000/- under the order be appropriated from the deposit of Rs.3.00 crores made under the interim order of the Tribunal. The Customs Department informed SEDCO that the duty payable under the order of CEGAT amounted to Rs.26,67,94,320/-. To that SEDCO responded with a request that the remaining amount of deposit of Rs.2.70 Crores be appropriated towards the duty and the bank guarantee dtd. 20th April, 2010 be encashed to the extent of the balanced duty being Rs.23,97,94,320/-. At the same time, SEDCO also reserved its right to claim refund of the duty so paid after obtaining the Essentiality Certificate.

13 The Customs Department, however, attempted to invoke the bank guarantee for the entire amount of Rs.50.00 Crores compelling SEDCO to file Writ Petition No.48 of 2001 in this Court challenging the invocation of the bank guarantee for the amount in excess to Rs.23,97,94,320/- in which ad-interim orders to that effect were passed. By the order dtd. 22nd March, 2006, the writ petition was finally disposed off with a direction to the Customs Department to assess the duty liability on the Bill of Entry filed by SEDCO pursuant to the order of CEGAT. Keeping in mind, the import of the said Rig in the year 1988 having a value of US$ 13 million, the High Court left it open to SEDCO to claim

the benefit of the Essentiality Certificate and left it open to the Customs Department to consider the same.

14) On 11th February, 2002 SEDCO called upon ONGC to reimburse the amount of Rs.26,67,94,320/- in terms of Clause-15.5 of the contract. ONGC responded by denying its liability to reimburse. Ultimately, by the letter dated 31s March, 2003 SEDCO invoked arbitration and called upon ONGC to appoint its nominee. ONGC failed to appoint the nominee. It contended that, the request was premature since the appeal as regards the Essentiality Certificate was still pending before CESTAT. SEDCO, then approached the Apex Court under Section 11 of the Arbitration and Conciliation Act, ("the Arbitration Act" for short). By the order dated 20th April, 2006 their Application was allowed and the dispute referred to arbitration by a panel of three Arbitrators.

15). By its majority Award, the Tribunal for the reasons stated therein has held that, there was no illegality in the Contract between ONGC and SEDCO for import of the Rig. According to it, all that had happened was that, in the course of execution of the Contract, SEDCO had committed an inadvertent illegality or breach of law by following a procedure which although widely believed to be correct was not correct and which was followed with the full knowledge and consent of ONGC, as well as, to the knowledge of the Customs Authority. In such circumstances, according to the Tribunal, ONGC cannot avoid its liability to reimburse the customs duty which had to be paid on the ground that, SEDCO had committed an illegality. The illegality in not filing the Bill of Entry at the time of import of the Rig was held as an illegality which does not go to the root of the contract to render it void as contemplated under Section 23 of the Contract Act. The Tribunal has further held that, at the relevant time, it was a regular customs practice to allow foreign Rigs to be imported for drilling purposes under IGM and that this aspect has been decided by the CESTAT in its order dated 2nd February, 2001. The evidence before the Tribunal established that, there was a uniform practice of a number of foreign Rigs for offshore duty being imported at the instance of ONGC under the IGMs without payment of duty to the knowledge of ONGC, as well as, the Customs Department. Since the Rig in this qusetion was imported under a Contract with ONGC, the import was permissible only at the instance of ONGC. Therefore, its import under IGM without filing a Bill of Entry and without payment of customs duty was treated as acquiesced by ONGC. The Tribunal also held that, ONGC has acknowledged and admitted its liability to pay customs duty. Besides, the objection as regards the import was raised by the Customs Authority for the first time, six years after the import and since SEDCO had followed the procedure, which was then widely believed to be normal procedure and which had not been objected to by the Customs Authorities, at the relevant time, any breach of the procedure must be held to be not a willful illegality committed by SEDCO.

16). Both sides have made submissions and referred to different decisions as regards the scope of judicial review of an arbitral award under Section 34 of the Arbitration Act. Since the submissions advanced are, established propositions of law, the same need be only stated herein and not be dialated further. Mr. Khambatta, the learned Senior Counsel appearing for the petitioner, submits that, an Award can be set aside under Section 34 of the Arbitration act, if it is contrary to (a) fundamental policy of Indian Law or (b)the interest of India, or © justice or morality, or (d) if it is patently illegal. The arbitral Award also needs to be in accordance with the terms of the contract and the Award which is against the terms of the contract can be set aside. In this connection, he relies upon the decisions of the Apex Court in **Oil & Natural Gas Corporation Ltd Versus. Saw Pipes Ltd., reported in (2003) 5 Supreme Court Cases page 705**. It is his further submission that the patent illegality must be such that goes to the root of the matter. The Award can also be set aside where the reasons are vitiated by perversity in evidence or by internal contradictions. In support of this submission, he relies upon the decision in the case of **McDermott International Inc. V. Burn Standard Co. Ltd reported in (2006) 11 SCC page 181**. On elaboration of the meaning of the expression “fundamental policy of Indian law”, he relies upon two decisions of the Apex Court i.e. in the case of **Oil & Natural Gas**

Corporation Ltd V. Western Geco International Ltd. reported in (2014) 9 SCC page 263, and other in, **Associate Builders V/s. Delhi Development Authority reported in (2015) 3 SCC page 49**. Mr. Rajadhyaksha, the learned Senior Counsel appearing for the respondent, on the other hand, submits that, (i) as far as possible, the approach of the Court should be to uphold the arbitral award, (ii) while deciding applications under Section 34 of the Arbitration Act, the Court does not sit as an Court of Appeal, (iii) Award cannot be interfered with when the view taken by the Arbitrator is a plausible or even a possible one, and (iv) the Award should be read as a whole. In support of these propositions, he relies upon the following decisions amongst others :-

(i) **Bijendranath Srivastava v. Mayank Srivastava, reported in AIR 1994 SC 2562.**

(ii) **P.R. Shah, Shares & Stock Broker (P) Ltd vs. B.H.H. Securities (P) Ltd. reported in AIR 2012 SC 1866.**

(iii) **Oil & Natural Gas Commission v. Oil Country Tubular reported in 2011 (5) Bom. C.R. page 203**.

(iv) **MP Housing v. Progressive Writers reported in (2009) 5 SCC page 678**.

(v) **Vijaypat Singhania v. Hari S. Singhania, reported in 2009 (6) Bom. C.R. page 303**.

17). The challenge to the impugned Award by the petitioner can be broadly placed under five heads i.e. (i) the Award is contrary to public policy, (ii) the Award is contrary to the binding authority of the Supreme Court and CESTAT, (iii) the finding of the Tribunal as to knowledge of ONGC of illegality as ground for awarding reimbursement is patently illegal, (iv) the Tribunal failed to apply the express terms of the Contract, (v) the finding of admission of liability by ONGC, is erroneous and (vi) the Tribunal failed to determine issue of failure to re-export the Rig and consequent lack of liability.

18). Mr. Khambatta, the learned Senior Counsel submits that under Section 30 of the Customs Act, 1962 a person in-charge of a vessel carrying imported goods is required to deliver an import manifest in the prescribed form prior to arrival of the vessel. Under Section 32 of the Customs Act, imported goods cannot be unloaded at a customs station unless they are specified in the import manifest for unloading at that station. Section 46(1) requires, an importer of goods for home consumption to present a Bill of Entry in the prescribed form. Under Section 47 of the Customs Act, the goods are to be cleared for home consumption by a proper officer on being satisfied that the goods are not prohibited goods and that the importer has paid the import duty therefor. The Rig in this case, was drytowed from Singapore to Mumbai and entered the Indian Customs area on/or about 25th April, 1988. As importer of the Rig, SEDCO was required to comply with the provisions of the Customs Act. It was responsible for filing the customs documents. Since admittedly, no Bill of Entry was presented and no customs duty was paid, there was illegality in the import of the Rig. He further submits that, even the IGM filed by SEDCO was not proper and did not disclose import of the Rig. The Cargo Declaration Form in the Coloumn entitled "Description of Goods" was left blank. The IGM merely stated name of the vessel. Since the import of the Rig was illegal, ONGC is not liable for reimbursement under Clause-15.5 of the Contract.

19 Mr. Khambhata relies upon decision of the Apex Court in **Chowgule & Co. Pvt. Ltd. and Another vs. Union of India and Others, reported in 1987 (28) E.L.T. page 39 (S.C.)** to support the argument that the submissions of Bill of Entry is an essential requirement and has to be presented by the importer in respect of vessels imported into Indian Territorial Waters. According to him, since there was no option available with SEDCO, for filing the Bill of Entry, the contract of import of the Rig by SEDCO was illegal. His argument is that even if the contract is legal in the beginning, it may be rendered illegal later if it is not performed in a manner that does not comply with statutory requirements. Therefore, where a person fails to perform a contract in the only way legally permissible under the statute, such a person should be placed in the same position as if the contract has been rendered illegal and void ab initio. In support of this

argument, he seeks support from the following citations:-

1 **I.T.C. Limited vs. George Joseph Fernandes and Another, reported in (1989), 2 Supreme Court Cases, page 1**,

2 **Holman Vs. Johnson, reported in 1998 E.R., page 1120**.

3 **Anderson Limited vs. Daniel, reported in (1924) 1 KB, page 138,**

4 **Little Vs. Poole, reported in (1989) 9 B & C, page 192.**

5 **Archbolds (Freightage) Limited Vs. S. Spanglett Limited, reported in (1961) AII. E.R. page 417.**

20 Mr. Rajadhyaksha, the learned Senior Counsel appearing for the SEDCO submits on the other hand that in importing the Rig, SEDCO was simply following the procedure, which was prevalent at the relevant time whereby Rigs which were foreign-registered Rigs were brought into India by foreign rigs owners for use under the Charter-Hire contracts with ONGC by filing an IGM. At those times, the Bill of Entry was not filed for the import of rig until rig was purchased subsequently by the Indian parties. He submits that ONGC was also enjoying special waivers or exemptions from normal customs procedure due to specialised nature of the offshore oil exploration operations undertaken by it which were deemed to be in national interest. Since the entry of the Rig by SEDCO was in accordance with the then prevalent

practice with the special status enjoyed by the ONGC qua the customs authorities, Mr. Rajadhyaksha submits that it cannot be said that import of the rig was illegal. In any case, according to him, at the highest, the act of SEDCO must be treated as an illegality committed in the course of performing a legal contract.

21 Mr. Rajadhyaksha, *per-contra,* relies upon following decisions to contend that performance of an illegal act prohibited by statute in pursuance of a legal contract does not render the contract unenforceable unless the statute intends to prohibit such a contract. Further, since there is a statutory penalty provided for any procedural irregularity or illegality in importing the rig, the role of a common law in determining the consequences of the commission of irregularity or illegality would stand diminished.

1 **St. John Shipping v. Joseph Rank, reported in [1956] 3 All E.R. page 683**,

2 **Gajanan vs. Seth Brindaban, reported in A.I.R., 1970 SC, page 2007**,

3 **Yango Pastoral vs. First Chicago Australia, reported in (1978) 39 CLR, page 410**

4 **Marles v. Philip Trant, reported in [1954] 1 Q.B. page 29.**

5 **Shaw v. Groom, reported in [1970] 2 Q.B., page 504**.

22) The moot question before the Arbitral Tribunal was, whether the contract between the parties was illegal by itself or an account of illegality/irregularity in its performance. In my considered opinion, the findings given by the Arbitral Tribunal on the question of illegality of the contract with reference to Section 23 of the Contract Act is the correct and proper finding. It has held that the contract for import of Rig cannot be said to be a contract, the consideration or object of which, was forbidden by law or was such that it would defeat the provisions of any law or was fraudulent or was for any wrong object as set out under Section 23 of the Contract Act which would render the contract void. It has further observed that, all that happened was that, in the course of execution of the contract, SEDCO had committed, (i)inadvertent illegality or breach of law by following a procedure which although widely believed to be correct was not correct, and (ii)it was followed with the full knowledge and consent of ONGC, as well as, with the knowledge of the Customs authorities. This view of the Arbitral Tribunal is also seen to be supported by the material on record.

23). At the cost of repetition, it is to be noted that pursuant to the acceptance of its bid, SEDCO imported the Rig in India on 25th April, 1988 after advance intimation to ONGC on 22nd April, 1988. The advance intimation was with a request for making arrangements for tug-handling the boats at the location for unloading and positioning of the Rig. Though, the Rig started functioning immediately from the next day, the formal contract between the parties was executed as late as 23rd August, 1988. The contract between the parties was extended from time to time. SEDCO and ONGC had taken a common stand before the Customs Commissioner in the show-cause notice issued to them for evading customs duty by not filing Bill of Entry, that in the year 1988 the prevailing practise was to file IGMs and not Bills of Entry. Further, the Rig was exempted from customs duty under, Notification No.516/86. ONGC had examined two of its officers i.e. General Manager (Drilling) and the Manager, (MM) to support this stand. SEDCO had further contended that during the period 1973 to 1989, as many as 27 Rigs had been brought into Indian waters in a similar way. This was the because at the relevant time a special status was enjoyed by ONGC due to the specialised nature of off-shore oil exploration and operations undertaken by it which was in the national interests.

24). CEGAT, at para-26 of it's order dated 2nd February, 2001 has accepted the claim of the parties on prevailing practices in following terms :-

> “26 We will next deal with the argument regarding the practice, which it is contended existed of filing bills of entry only for ships imported with the intention of placing before the Indian ship Register. For this, the appellant gave example of cases, where bills of entry were filed for the Rigs being purchased by persons or companies located in India. At the

same time, the department gave example for bills of entry that is being filed for Rigs which were not so imported for that purpose. After considering these examples, it is not possible for us to conclude that there was a clear practice of bills of entry being required to be filed by the department only in cases where the Rigs were imported by Indian companies or individuals, and that there was no such practice of not filing bills of entry in cases where the Rig was not on contract for temporary using or around India. The public notice no.129/1 dated 17.7.1984 cited by the appellant notifies "for the information of the Indian Shipping agents (and all other concerned) with the purchase and import of ocean going vessels, boats etc. that at the time of vessels first entry into India, a regular bill of entry under Section 46 should be filed alongwith the manifest." It is not possible for us to conclude that this public notice permits an inference that a bill of entry is not necessary where an ocean going vessel is for purposes other than permanent use in India. We are not able to accept the contention of Mr. Sethna that it refers to ocean going vessel as vessel and not as cargo. If that were the case, the public notice would not have asked for the bill of entry to be filed alognwith the manifest of the vessel. However, in the manner in which it is worded, it is not possible for us to conclude that it would have been clear in the minds of anyone that a bill of entry was not required, where the import did not result in from the purchase of the vessel and thus constituted evidence of a practice not to file the bill of entry."

It has also accepted the argument of ONGC and SEDCO as regards the knowledge of the Customs Officers and their inaction in this regard. The relevant observations at para-27 read as under :-

> "It appears probable that it would not be unreasonable to conclude that, having regard to the fact that the import of such goods was made only by or at the instance of ONGC, a Government organisation, for oil exploration and exploitation, the officers of the Customs department did not really apply their minds in these aspects and procedures were allowed to develop ad hoc on response to immediate needs."
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> ". In this regard, we also have to agree that the fact of the rig having come into the country was known to the department through the manifest, which was filed, and that the department could not have been unaware of the operation of the rig from 1988 till 1999 and there is really no satisfactory explanation as to why there is a delay of 11 years, although the delay in issuing the notice may not be contrary to law."

Further at para 50 of it's order CEGAT, holds that there was no concealment or attempted concealment of the fact of importation of the Rig by SEDCO. It had been declared in substance in the manifest and it's presence in Mumbai and elsewhere was known to the department. There was extensive correspondence engaged between the Customs Department and the SEDCO in connection with the Rig. This order of CEGAT has been upheld by the Apex court and as such the findings therein have attained finality as observed in the impugned award. In the circumstances, there can be no substance in the complaint of ONGC that (i) the award is contrary to public policy, (ii) the finding of the Arbitral Tribunal as to the knowledge of ONGC of illegality as ground for awarding reimbursement is patently illegal and (iii) the finding of admission of liability by ONGC is erroneous. In the circumstance, in my opinion, there is no need to refer to the several citations relied upon by both the sides relating to the three grounds.

25 It is contended on behalf of the petitioner that the award is contrary to the binding decisions of the Apex Court and the CESTAT. The argument in this regards relates to the findings as regards statutory requirement to file Bill of Entry and irregularity of filing IGM. There is nothing in the impugned award, which is contrary to these findings of the Apex Court and CESTAT. The question considered by the Arbitral Tribunal is of reimbursement of the duty paid by SEDCO.

26 The next contention of the petitioner is that the Arbitral Tribunal failed to comply the express terms of the contract and also determine the issue of failure to re-export the Rig and consequent lack of liability of ONGC. Mr. Khambhata submitted that under Clause 15.5 the right to reimbursement would have been arisen only if it had been established that the Rig had been re-exported after the expiration of the contract. He submits that issues in respect thereto had been framed by the Arbitral Tribunal at Issues no. 10-12, which have not decided by the Arbitral

Tribunal. According to him from the material on record, it is clear that SEDCO failed to re-export the Rig and continued to use it in and around Indian waters for commercial gain, hiring it out not just to ONGC but also to a third party. Therefore, the pre-condition for reimbursement of customs duty under Clause-15.5 of the 1988 Contract has not been complied with and ONGC cannot be held liable to reimburse SEDCO. The argument of Mr. Khambhata is that had the arbitral Tribunal given a finding in favour of ONGC, it would have precluded SEDCO from claiming reimbursement under the contract. Whereas any decision given in favour of SEDCO without deciding this issue would go against the express terms of the contract. Therefore, it was incumbent upon the Arbitral Tribunal to decide this issue which was material issue. In these circumstances, the impugned Award is alleged to be contrary to the express terms of the contract between the parties and liable to be set aside for failure to determine the issues framed. Relying upon decision of Division Bench of this Court in Jain Shudh Vanspati Limited Vs. S.R. Patankar, Assistant Collector of Customs, reported in 1988 (33) E.L.T. 77 (Bom), Mr. Khambhata also sought to submit that mere physical removal of goods from the territorial waters of India does not amount to export and the goods can be said to have been exported only when the procedure prescribed under the Customs Act has been followed.

27 Mr. Rajadhyaksha points out that the defence of ONGC before the Arbitral Tribunal in fact was not of failure on the part of SEDCO in exporting the Rig after completion of the contract. The contention was taken was of re-importation of the Rigs into the territorial waters of India and this act was alleged to be breaching Clause 15.5 of the Contract. It is his submission that according to the written statement of ONGC before the Arbitral Tribunal, the contract was complete on 15th February, 1994 and the Rig was imported back into designated location on the next day i.e. on 16th February, 1994. The argument of reimport of the Rig on 16th February, 1994 would presuppose export of the Rig. Perusal of the pleading before the Arbitral Tribunal confirms this argument of Mr. Rajadhyaksha although in the written submissions filed subsequently ONGC had taken up the contention of failure of re-export. Mr. Rajadhyaksha also sought to submit that silence of the Arbitral Tribunal upon the subject before it would mean that the Tribunal has negatived such a plea.

28 In my opinion, in the facts and circumstnaces of the case, ONGC cannot be permitted to contend before this court any argument based on re-export of the Rig. It was necessary for it to raise the same in so many words in it's pleadings. In any case, the other material findings as regards the dispute between the parties will dis-entitle ONGC to raise this technical contention before this Court in it's limited jurisdiction under Section 34 of the Arbitration Act. As regards failure to answer the issue, I am

inclined to accept the argument of Mr. Rajadhyaksha on the silence of the Arbitral Tribunal. Hence, the petition is dismissed.

(Smt. R.P. SondurBaldota, J.)