

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.09.2016

DELIVERED ON : 04.10.2016

Coram

The Honourable **Mr. Justice RAJIV SHAKDHER**

Original Petition No.111 of 2016

M/s.Hardy Exploration & Production (India) Inc.,
5th Floor, Westminster Building
108, Dr.Radhakrishnan Salai,
Mylapore,
Chennai - 600 004.

... Petitioner

Vs.

1. M/s.Samson Maritime Limited,
having its registered office at
201-202, 2nd Floor Raheja Xion,
Dr.Babasaheb Ambedkar Road,
Near DCP office Zone III, Byculia (East)
Mumbai - 400 027.
2. Hon'ble Mr.Justice S.P.Barucha,
Presiding Arbitrator,
Raja Bahadur Mansion,
1st Floor, A.Doshi Marg,
(8 Hamam Street),
Fort Mumbai - 400 001.
3. Hon'ble Mr.Justice Doraiswamy Raju,
Arbitrator,
No.20, Pooran Prakasham Road,
Balaji Nagar, Royapettah,
Chennai - 600 014.
4. Hon'ble Mr.Justice B.N.Srikrishna,
Arbitrator, 109, DBS Heritage,
Prescott Road, Opp. Cathedral Sr. School,

Fort, Mumbai - 400 001.

(R2 to R4 given up)

.. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 25.08.2015 as modified by the impugned additional award dated 25.10.2015.

For Petitioner : Mr.V.Vijay Narayanan, S.C.
for M/s. Vinod Kumar

For Respondents : Mr.AR.L.Sundaresan, S.C. - R1
for Mr.P.Giridharan

ORDER

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 1996 Act), to lay a challenge to the award dated 25.08.2015 and the additional award dated 25.10.2015.

2. I must state at the very outset that the petitioner has assailed the aforementioned awards on just two (2) grounds. First, on the ground of bar of limitation. Second, on the ground that the Arbitral Tribunal has exceeded its jurisdiction, inasmuch as it has held that the petitioner is liable to reimburse the component of service

tax levied on the first respondent, contrary to the plain terms of the contract, obtaining between the parties.

2.1. I have indicated the broad contours of the challenge right at the beginning, as in the petition, there are other grounds raised, which the petitioner's counsel, during the course of arguments, did not touch upon, making it clear, in no uncertain and explicit terms, that the challenge was confined to the grounds adverted to above.

2.2. It would be relevant to note at the outset that I would be referring to the petitioner and first respondent collectively as parties.

3. Before I proceed further, let me, therefore, sketch out the broad facts, in the background of which, challenge has been laid to the aforementioned awards.

Prefatory facts:

4. The petitioner is a Corporation, which is registered in Delaware, USA and engaged in the business of off shore oil and gas exploration and production.

4.1. In furtherance of its business, the petitioner executed a Production Sharing Contract (in short "PSC") dated 30.12.1994 with the Government of India (in short "GOI"). Under the contract, the petitioner was designated as the operator of a particular block in the Cauvery Basin,

in India.

4.2. Evidently, the petitioner, thereafter, executed a Joint Operating Agreement (JOA) dated 05.12.1995 with three (3) entities; these being: Oil and Natural Gas Corporation Limited (ONGC), Hindustan Oil Exploration Co. Ltd. (HOEC), and Tata Petrodyne Limited (TPL).

5. The petitioner, for the purpose of its business, required off shore support/supply vessels. It is, for this purpose, that the petitioner, from time to time, chartered different vessels, owned by the first respondent, from 1997 onwards; resulting, Charter Party Agreements being executed between them.

6. In so far the instant petition is concerned, parties entered into a Charter Party Agreement in respect of two (2) vessels, i.e., M.V. Jade (hereafter referred to as "Jade Charter") and M.V. Ocean Tanzanite (hereafter referred to as "Tanzanite Charter"). The said Charter Party Agreements were executed between 2007 and 2009.

7. More specifically Jade Charter, it was executed on 26.07.2007. Jade Charter had a fixed tenure, which ended on 31.07.2010. Under the terms of Jade Charter, the tenure was extendable at the petitioner's option for two (2) periods of one year each. Jade Charter, was, as a matter of fact,

extended by the petitioner on two (2) occasions, i.e., 30.06.2010 and 01.07.2011.

7.1. Consequently, the Jade Charter stood extended till 31.07.2012.

8. As against this, Tanzanite Charter was executed on 21.12.2009, with a firm tenure, which expired on 31.12.2012.

8.1. Both Charter Parties, provide for early termination, upon issuance of notice to that effect. Concededly, hire charges were payable for the notice period, which was pegged at 90 days, unless vessels were employed for alternate work.

9. Admittedly, both vessels were made available to the petitioner. M.V. Jade was made available to the petitioner on 07.08.2007, while M.V.Ocean Tanzanite was made available to the petitioner on 13.01.2010.

10. The petitioner, however, brought about, early termination of the aforementioned Charter Parties on 16.03.2012, with the request for waiver of notice period.

11. Pertinently, during the subsistence of the two (2) Charter Parties, on 16.05.2008, Section 65(105) (zzzzj) was inserted in the Finance Act, 1994. The insertion of Section 65(105) (zzzzj) in the Finance Act, 1994 was brought about, via Section 9 of the Finance Act, 2008 (Act 18 of 2008).

11.1. By virtue of this amendment in the Finance Act, 1994, the services rendered by the first respondent became exigible to service tax.

11.2. Consequent thereto, the invoices raised by the first respondent on the petitioner included the component of service tax in respect of the vessel M.V.Jade. The petitioner, in respect of such invoices, took the stand that since, under Clause 34 of the Jade Charter Party, the burden of taxes had to be borne by the first respondent, it was not liable to pay service tax. Consequently, in respect of invoices raised, the petitioner made payments only towards hire charges. It is the petitioner's stand that the first respondent had accepted the payments, (which, obviously, excluded the element of service tax), without demur.

11.3. Concededly, the petitioner failed in making payments of hire charges from September, 2011 onwards, since its three Joint Operating Partners under the JOA, to which I have made a reference above, did not bear the burden of hire charges relatable to the chartered vessels.

12. This situation led to the first respondent issuing a notice dated 05.10.2012 to the petitioner. Via this notice, the first respondent, not only called upon the petitioner to liquidate the unpaid invoices pertaining to

hire charges, which included the component of service tax, but also triggered the arbitration agreement obtaining between them.

12.1. The first respondent, in particular, informed the petitioner of its intention to appoint its nominee Arbitrator in respect of the disputes, which had arisen between them, qua the Jade Charter. The petitioner was, thus, also called upon to nominate its own Arbitrator in terms of Clause 44 of the Jade Charter.

12.2. A similar notice dated 09.10.2012 was issued by the first respondent with respect to Tanzanite Charter.

13. Evidently, since, the constitution of Arbitral Tribunal was not taken forward by the petitioner, the first respondent approached the Supreme Court under Section 11 of the 1996 Act, for appointment of an Arbitrator. In the said petition, the first respondent had not only arrayed the petitioner, as the contesting party, but had also impleaded its three Joint Operating Partners, i.e., ONGC, HOEC and TPL, as parties to the Petition.

14. This Petition came to be numbered as Arbitration Petition No.25 of 2013. The petition came up for hearing, as is the practice, before the designated Judge. Learned Judge, after hearing the parties, on 26.02.2014, passed the

following order:

".....Learned counsel for the petitioner seeks permission to withdraw the arbitration petitions with liberty to serve fresh notice on the appropriate party seeking arbitration. Permission is granted. consequently, the arbitration petitions are dismissed as withdrawn with liberty as aforesaid. However, dismissal of these arbitration petitions will in no manner influence any further proceedings that may be initiated by the petitioner....."

15. The first respondent, thereafter, issued two separate notices dated 10.03.2014 in respect of each of the two (2) vessels. Consequent thereto, since, each party chose to appoint their nominee Arbitrator, the Arbitral Tribunal got constituted, after the two nominee Arbitrators appointed a Presiding Arbitrator.

16. The Arbitral Tribunal, so constituted, passed an award dated 25.08.2015, which was corrected upon an application, under Section 33 of the 1996 Act being moved by the first respondent qua typographical errors, which, evidently, had crept in the award. The corrections were made by the Arbitral Tribunal on 25.10.2015, which, as indicated at the outset, is the additional award passed qua the dispute obtaining between the parties.

17. The petitioner, being aggrieved by the awards has preferred the instant petition.

Contentions:

18. The arguments, on behalf of the petitioner, were advanced by Mr.Vijay Narayanan, while submissions, on behalf of the first respondent, were advanced by Mr.AR.L.Sundaresan.

19. As indicated at the outset, Mr.Vijay Narayanan, learned Senior Counsel appearing for the petitioner, restricted his submissions, only to two (2) aspects, first, that a part of the claim was barred by limitation, inasmuch as the first respondent had withdrawn its petition filed under Section 11 of the 1996 Act before the Supreme Court, and thereafter, issued fresh notices dated 10.03.2014. In other words, it was argued that any claim beyond 10.03.2011 was barred by limitation.

19.1. In support of his submission, learned Senior Counsel relied upon the order dated 26.02.2014 passed by the Supreme Court. Based on the said order, it was contended by the learned Senior Counsel that liberty was taken on behalf of the first respondent to serve a fresh notice on the petitioner, which, in the facts of this case, was the only appropriate party.

19.2. Learned Senior Counsel further submitted that observations made in the very same order by the Supreme Court, to the effect that the dismissal of the Arbitration Petition would not, in any manner, "influence any further proceedings", could only be construed to mean, proceedings emanating pursuant to the fresh notices issued by the first respondent. Since, concededly, fresh notices were issued on 10.03.2014, it cannot be said that arbitration was commenced as between the parties, within the meaning of Section 21 of the 1996 Act, prior to 10.03.2014.

19.3. More specifically, qua the issue concerning reimbursement of service tax, Mr. Narayanan laid stress on the language of Clause 34 of the Charter Party. Based on the provisions of Clause 34, it was contended that the Arbitral Tribunal had committed a grave error in holding that the petitioner was liable to reimburse service tax, as it was contrary to the plain language of the said clause.

19.4. It was the contention of the learned Senior Counsel, before me, as well as, before the Arbitral Tribunal, that any other interpretation would result in a jurisdictional error. It was, thus, argued that since, the Arbitral Tribunal had held against the petitioner, it had stepped outside the framework of the contract, obtaining

between the parties.

19.5. In support of his submissions, learned counsel relied upon the following judgments:

a) ***Bhagavatula Panakala Rao V. Kadiyala Venkata Subbayya - 60 L.W. 648***

b) ***Bakhtawar Singh and another V. Sada Kaur and another - (1996) 11 SCC 167***

c) ***Raghubir Saran Charitable Trust V. Puma Sports India Pvt. Ltd. - (2012) 191 DLT 183.***

20. As against this, Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the first respondent, largely, relied upon the award. In support of his contention that the claims made were neither barred by limitation nor could the petitioner be relieved of its liability to pay service tax, stated, that insofar as the notices dated 10.03.2014 were concerned, they would relate back to the earlier notices dated 05.10.2012 and 09.10.2012. In this regard, learned counsel laid emphasis on the fact that the fresh notices, were different to the earlier notices, only to the extent, that they did not bring seek to within their ambit, the three Joint Operating Partners of the petitioner.

20.1. In sum, according to the learned counsel, insofar as the petitioner was concerned, arbitration was triggered, via notices dated 05.10.2012 and 09.10.2012; a fact, which was only reiterated in the two fresh notices dated 10.03.2014 - the only difference being, that the claims made were not pressed against the Joint Operating Partners. Thus, it was contended, that if, notices dated 05.10.2012 and 09.10.2012 were considered as valid and subsisting, the claims made by the first respondent would be within limitation.

20.2. As regards service tax, the learned Senior Counsel submitted that the facts obtaining in the present case would show that service tax was not within the contemplation of parties and, therefore, the reliance placed by the petitioner on Clause 34 of the Jade Charter was misconceived. It was submitted that in the absence of a provision in the contract, the petitioner would have to reimburse the burden of service tax borne by the first respondent under the Finance Act, 1994. In other words, being an indirect tax, it would have to be collected from the service provider, i.e., the first respondent with a

right to claim reimbursement from the ultimate consumers of services, which, in this case, was the petitioner. Thus, the submission simply made was that, though the first respondent was the assessee qua service tax under the Finance Act, 1994, in the absence of a contract to the contrary, the first respondent was entitled to seek reimbursement of service tax from the petitioner, being the user of the services rendered.

20.3. In support of his submissions, learned Senior Counsel relied upon the following judgments:

- a) **Pearey Lal Bhawan Association V. M/s.Satya Developers Pvt. Ltd. - ILR (2011) I Delhi 604**
- b) **M/s.Meattles Pvt. Ltd. V. HDFC Bank Limited - Manu/DE/5248/2012**

Reasons:

21. I have heard the learned senior counsels appearing for the parties and perused the records.

22. Counsel for the parties, during the course of arguments, agreed that the dispute, in sum, in the present petition, pertained to the amounts noticed in paragraph 6 of

the additional award dated 25.10.2015 qua M.V. Jade under heading 'I', which reads as follows:

"...41. Hence, the following Additional Award:

The Respondent shall pay to the Claimant the following sums:

I) In respondent of M.V.Jade

(i) Service tax payable from 30/11/2009
to 06/08/2011 USD 274,
378.70....."

22.1. Therefore, in effect, the grounds of challenge raised before me are directed only qua liability to pay service tax imposed on the petitioner, which is also, as noticed above, confined to the Jade Charter.

23. Mr. Vijay Narayanan, in fact, contended, that if, I were to hold against the petitioner on the issue concerning as to which of the two parties is to finally bear the burden of service tax, then, it may not be necessary for me to rule on the submission advanced by him qua limitation.

24. Before I proceed further, I may only indicate, for the sake of completion of narration, that the first respondent had filed applications under Section 9 of the

1996 Act, for disclosure by the petitioner of the details concerning its fixed assets and bank accounts and, for furnishing security in the sum of USD 3,087,432.36, failing which, to direct attachment of the bank account; the details qua which were given in the application. These applications were allowed by the learned single Judge, vide order dated 23.03.2016. Consequently, the petitioner, was directed not only to furnish a security within a period of eight(8) weeks from the date of receipt of a copy of the order, but was also asked to furnish the details of its fixed assets and bank accounts maintained in India.

25. The petitioner, being aggrieved, had carried the matter in appeal; whereupon, the Division Bench disposed of the appeal by directing the petitioner to comply with, for the present, with the direction issued by the learned single Judge to supply the details of its fixed assets and bank accounts maintained in India.

25.1. Insofar as the other direction was concerned, the Division Bench substituted it, with a direction, that, in the Execution Petition filed by the petitioner in the Delhi High Court against the Government of India, Ministry of Petroleum and Natural Gas, if any monies were received via attachment or otherwise, sums equivalent to the amount

awarded in the instant proceedings, will be kept apart and brought within the sway of the jurisdiction of this Court. Consequent directions qua moneys, if any received, were also issued. In as much it was directed that moneys received would be kept in a fixed deposit, to be renewed from time to time. By the very same order, the Division Bench recorded the submissions of counsel for parties that the scope of objection, vis-a-vis, the award being limited, the roster Judge would consider hearing the main petition on a priority basis.

26. It is in this context, that hearing of the petition was expedited by me, at the behest of the counsel for parties.

27. As regards the merits of the matter, let me first deal with the submission advanced on behalf of the petitioner, that it could not be called upon to reimburse service tax to the first respondent.

27.1. It would be relevant to reiterate that the issue in respect of service tax arises only in Jade Charter. The reason for the same is that Clause 34 of the said Charter Party, which is the bone of contention, was incorporated only in Jade Charter.

28. It would, therefore, be necessary to extract the

relevant sub clauses of Clause 34 before I proceed further in the matter.

"34. Taxes

34.1. The OWNER shall pay all taxes assessed against it by any Governmental Authority, whether in India or otherwise, in connection with the Service provided hereunder (including any withholding taxes in respect of its employees, agents and sub-contractors) and agrees to indemnify the CHARTERER and hold the CHARTERER and its Affiliates safe and harmless from and against any and all claims or liabilities for income tax, excess profits tax, and other taxes assessed or levied including any fines, penalties or taxes assessed or levied or interest thereon, by the country of operations or any political subdivision thereof or by the Government of any country against the OWNER or against the CHARTERER for or on account of any payments made to or earned by the OWNER or its Subcontractors hereunder.

The OWNER further agrees to protect and save the CHARTERER safe and harmless from all taxes assessed or levied against or on account of wages, salaries or other benefits paid to the OWNER's employees or employees of its subcontractors or other parties having an interest in the Vessel and all taxes assessed or

levied against or on account of any property or equipment of the OWNER or its subcontractors or such other parties including customs, excise, occupation and other like taxes or imposts.

34.2.....

34.3.....

34.4 **Change In Law:** In the event of any regulatory or legislative changes occurring after the date of this Contract, affecting OWNER's tax costs including any addition/modification/change to tax rates including surcharges (other than Corporate and Personnel taxes), any resulting change in such OWNER's tax costs shall be to the account of the CHARTERER. In the event of any such change, the OWNER shall notify such change to the CHARTERER promptly (but within 60 days of the effective date of such change) with all supporting details along with the financial impact of such changes. This Clause shall be effective from the date of this Contract."

सत्यमेव जयते

29. A bare perusal of Clause 34.1 would show that the owner, which is the first respondent herein, was required to pay, and that, to my mind would mean, bear the burden, qua all taxes assessed against it by any Governmental Authority, whether in India or otherwise, in connection with the services provided by it.

29.1. Further more, the first respondent, as is evident, has also agreed to indemnify the Charterer, i.e., the petitioner and, to hold both the Charterer, i.e., the petitioner and its affiliates, safe and harmless from and against any such claims or such liabilities towards income tax, excess profits tax and other taxes assessed or levied including fines, penalties, interests etc. made or imposed by the country of operation.

30. As against this, Clause 34.4 contemplates, the change in law, after the execution of the contract and therefore, provides that any such change in law, whether legislative or regulatory in nature, which would impact the owners, i.e, the first respondent's tax, costs including any addition/modification/change in tax rates, such as, surcharges etc., would be to the account of the Charterer, ie., the petitioner. The said clause goes on to say that, if, any such change were to take place, the owner, i.e., the first respondent, was required to notify the change to the Charterer, within 60 days of the effective date of such change along with all supporting details showing the financial impact of the change in law.

30.1. Pertinently, this Clause was made effective from the date of the contract.

30.2. It is, however, interesting to note that this intrinsic piece of evidence was not brought to the notice of the Arbitral Tribunal. However, notwithstanding this, neither the reasoning nor the conclusion of the Arbitral Tribunal can be found fault with.

31. Continuing with my discussion, the facts, which have emerged in the present case, clearly show that, when, the Jade Charter was executed on 26.07.2007, the service tax on the kind of services rendered by the first respondent, had not kicked-in. Service tax was imposed, on the kind of services rendered by the first respondent, only on, 16.05.2008. Therefore, quite clearly, the service tax was not a "tax", which was in contemplation of the parties on the date of execution of the contract. This was, therefore, not a tax, qua which the first respondent was assessed or, could have been assessed on the date when the Jade Charter was executed.

31.1. Therefore, on a plain reading of the language of Clause 34.1, it cannot be held that qua service tax, the first respondent was required to hold the petitioner, safe and harmless and/or even indemnify the petitioner. At best, what could be said in favour of the petitioner is that the contract was silent on who would bear the burden of service tax. Since, service tax is an indirect tax, quite clearly, the ultimate burden qua such tax, like other indirect taxes, i.e., excise duty and sales tax, would have to be borne by the party using the services, as in the case of service tax and similarly, by the consumer of goods, as in the case of excise duty and sales tax.

31.2. One could also take a clue from the provisions of Section 64A of the Sale of Goods Act, 1930 to gain statutory wisdom, so to say, to deal with a situation of the kind, one is confronted with, in the instant case. Section 64A of the Sale of Goods Act, if paraphrased, broadly, provides, that if, during the course of the execution of the contract, a new tax is imposed or, rates of tax are increased, the buyer; will bear the burden, and if, per chance the tax is abolished or the rate is reduced, the buyer would get the benefit. The Section, though, gives a

leeway to the parties to provide otherwise.

31.3. Therefore, usually, unless, parties clearly provide in the contract as to who is to bear the burden if such a situation arises, as is the circumstance, in the instant case, the ultimate burden will have to be borne by the consumer, i.e., the petitioner.

31.4. Thus, in my view, the Arbitral Tribunal has correctly held against the petitioner that it would have to bear the burden of service tax.

32. I must refer herein to an argument, which was raised rather fleetingly by Mr. Vijay Narayanan. This was an argument which was predicated on the factum of two extensions being agreed to by the parties qua Jade Charter after imposition of service tax, on the kind of service rendered by the first respondent. It was sought to be contended that because extensions were agreed to mutually after service tax had kicked-in, on the same terms and conditions, as the original contract, parties would be governed by Clause 34.1, contrary to what the Arbitral Tribunal had held.

32.1. According to me, this argument is misconceived for a variety of reasons. First, if the extension is understood as having been agreed on the same terms and conditions, then, it can be said that the first respondent undertook the burden only, vis-a-vis, those taxes, qua, which, it could be assessed on the day the original contract was executed. Second, the first respondent raised invoices, consistent with its stand, that as an ultimate consumer, the petitioner was required to reimburse the service tax wherein, the component of service tax was included. Third and, more importantly, the Arbitral Tribunal has taken a view on an interpretation of the contract that service tax is reimbursable by the petitioner, which is a plausible view, and hence, cannot be interdicted in a Section 34 proceeding.

33. As regards the other issue, which is, as to whether or not the claim of the first respondent ought to be rejected on the ground of limitation, in my view, cannot be sustained in favour of the petitioner.

33.1. The reason, I have reached this conclusion, is

that, the first respondent had triggered the arbitration agreement, insofar as the Jade Charter is concerned, via, notice dated 09.10.2012. The only irregularity in the notice, was that, apart from the petitioner, it also roped in its Joint Operating Partners, i.e., ONGC, HOEC and TPL.

33.2. The fact that a petition was filed by the first respondent in the Supreme Court, which was dismissed as withdrawn with liberty to issue fresh notice to the appropriate party, i.e., the petitioner in this case, in my view, would not, axiomatically lead to a situation, as is sought to be argued on behalf of the petitioner that the invocation of arbitration took place on the date, when, the fresh notice was issued, i.e., 10.03.2014.

33.3. The purpose of Section 21 is to fix the date of commencement of arbitration proceeding. Insofar as the petitioner was concerned, it was put to notice, when, the first notice was issued, i.e., 09.10.2012, that the dispute had to be referred to an Arbitrator. The defect in the notice, if it could be called one, at best, can be termed as an irregularity. The error of roping in the petitioner's Joint Operating Partners did not derogate from the fact that

insofar as the petitioner was concerned, arbitration commenced from the date when, the first notice was issued, i.e., 05.10.2012. If, this date is taken into account, concededly, the claims of the first respondent would be within time and, thus, cannot be held to be barred by limitation.

33.4. Consequently, the submissions of Mr.Vijay Narayanan, to the contrary, being untenable, cannot be accepted.

34. In view of the foregoing discussion, I find no merit in the petition. The petition, is, accordingly, dismissed, leaving the parties to bear their own costs.

sd/.R.S.A.J

04.10.2016

//Certified to be a true copy//

Dated this the day of 2016

S.s/18.11.2016

COURT OFFICER

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